PART – A : GENERAL PRINCIPLES OF CRIMINAL LIABILITY

State of Maharashtra v. *Mayer Hans George*

(1965) 1 SCR 123: AIR 1965 SC 722

K. SUBBA RAO, J. - I regret my inability to agree. This appeal raises the question of the scope of the ban imposed by the Central Government and the Central Board of Revenue in exercise of the powers conferred on them under Section 8 of the Foreign Exchange Regulation Act, 1947 against persons transporting prohibited articles through India.

8. In exercise of the powers conferred under Section 8 of the Act the Government of India issued on August 25, 1948 a notification that gold and gold articles, among others, should not be brought into India or sent to India except with the general or special permission of the Reserve Bank of India. On the same date the Reserve Bank of India issued a notification giving a general permission for bringing or sending any such gold provided it was on through transit to a place outside India. On November 24, 1962, the Reserve Bank of India published a notification dated November 8, 1962 in supersession of its earlier notification placing further restrictions on the transit of such gold to a place outside the territory of India, one of them being that such gold should be declared in the "Manifest" for transit in the "same bottom cargo" or "transhipment cargo". The respondent left Zurich by a Swiss aeroplane on November 27, 1962, which touched Santa Cruz Airport at 6.05 a.m. on the next day. The Customs Officers, on the basis of previous information, searched for the respondent and found him sitting in the plane. On a search of the person of the respondent it was found that he had put on a jacket containing 28 compartments and in 19 of them he was carrying gold slabs weighing approximately 34 kilos. It was also found that the respondent was a passenger bound for Manila. The other facts are not necessary for this appeal. Till November 24, 1962 there was a general permission for a person to bring or send gold into India, if it was on through transit to a place outside the territory of India; but from that date it could not be so done except on the condition that it was declared in the "Manifest" for transit as "same bottom cargo" or "transhipment cargo". When the respondent boarded the Swiss plane at Zurich on November 27, 1962, he could not have had knowledge of the fact that the said condition had been imposed on the general permission given by the earlier notification. The gold was carried on the person of the respondent and he was only sitting in the plane after it touched the Santa Cruz Airport. The respondent was prosecuted for importing gold into India under Section 8(1) of the Act, read with Section 23(1-A) thereof, and under Section 167(8)(*i*) of the Sea Customs Act. The learned Presidency Magistrate found the accused "guilty" on the two counts and sentenced him to rigorous imprisonment for one year. On appeal the High Court of Bombay held that the second proviso to the relevant notification issued by the Central Government did not apply to a person carrying gold with him on his body, that even if it applied, the *mens rea* being a necessary ingredient of the offence, the respondent who brought gold into India for transit to Manila, did not know that during the crucial period such a condition had been imposed and, therefore, he did not commit any offence. On those findings, it held that the respondent was not guilty under any of the aforesaid sections. In the

result the conviction made by the Presidency Magistrate was set aside. This appeal has been preferred by special leave against the said order of the High Court.

9. Learned Solicitor-General, appearing for the State of Maharashtra, contends that the Act was enacted to prevent smuggling of gold in the interests of the economic stability of the country and, therefore, in construing the relevant provisions of such an Act there is no scope for applying the presumption of common law that *mens rea* is a necessary ingredient of the offence. The object of the statute and the mandatory terms of the relevant provisions, the argument proceeds, rebut any such presumption and indicate that *mens rea* is not a necessary ingredient of the offence. He further contents that on a reasonable construction of the second proviso of the notification dated November 8, 1962 issued by the Board of Revenue, it should be held that the general permission for bringing gold into India is subject to the condition laid down in the second proviso and that, as in the present case the gold was not disclosed in the Manifest, the respondent contravened the terms thereof and was, therefore liable to be convicted under the aforesaid sections of the Foreign Exchange Act. No argument was advanced before us under Section 168(8)(*i*) of the Sea Customs Act and, therefore, nothing need be said about that section.

10. Learned counsel for the respondent sought to sustain the acquittal of his client practically on the grounds which found favour with the High Court. I shall consider in detail his argument at the appropriate places of the judgment.

11. The first question turns upon the relevant provisions of the Act and the notifications issued thereunder. At the outset it would be convenient to read the relevant parts of the said provisions and the notifications, for the answer to the question raised depends upon them.

> 8. (1) The Central Government may, by notification in the Official Gazette, order that subject to such exemptions, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank and on payment of the fee, if any, prescribed bring or send into India any gold....
> *Explanation*.—The bringing or sending into any port or place in India of any such article as aforesaid intended to be taken out of India without being removed from the ship or conveyance in which it is being carried shall nonetheless be deemed to be bringing, or as the case may be, sending into India of that article for the purpose of this section.

In exercise of the power conferred by the said section on the Central Government, it had issued the following notification dated August 25, 1948 (as amended upto July 31, 1958):

> In exercise of the powers conferred by sub-section (1) of Section 8 of the Foreign Exchange Regulation Act, 1947 and in supersession of the Notification of the Government of India ... the Central Government is pleased to direct that, except with the general or special permission of the Reserve Bank no person shall bring or send into India from any place out of India:-
> (*a*) any gold coin, gold bullion, gold sheets or gold ingot, whether refined or not;....

The Reserve Bank of India issued a notification dated August 25, 1948 giving a general permission in the following terms:

> The Reserve Bank of India is hereby pleased to give general permission to the bringing or sending of any such gold or silver by sea or air into any port in India provided that the

> gold or silver (*a*) is on through transit to a place which is outside both (*i*) the territory of India and (*ii*) the Portuguese Territories which are adjacent to or surrounded by the territory of India and (*b*) is not removed from the carrying ship or aircraft, except for the purpose of transhipment.

On November 8, 1962, in supersession of the said notification the Reserve Bank of India issued the following notification which was published in the Official Gazette on November 24, 1962:

> (T)he Reserve Bank of India gives general permission to the bringing or sending of any of the following articles, namely,
> (*a*) any gold coin, gold bullion, gold sheets or gold ingot, whether refined or not, into any port or place in India when such articles is on through transit to a place which is outside the territory of India. Provided that such article is not removed from the ship or conveyance in which it is being carried except for the purpose of transhipment;
>
> Provided further that it is declared in the manifest for transit as same bottom cargo or transhipment cargo.

The combined effect of the terms of the section and the notifications may be stated thus: No gold can be brought in or sent to India though it is on through transit to a place which is outside India except with the general or special permission of the Reserve Bank of India. Till November 24, 1962, under the general permission given by the Reserve Bank of India such gold could be brought in or sent to India if it was not removed from the ship or aircraft except for the purpose of transhipment. But from that date another condition was imposed thereon, namely, that such gold shall be declared in the manifest transit as "same bottom cargo" or "transhipment cargo."

12. Pausing here, it will be useful to notice the meaning of some of the technical words used in the second proviso to the notification. The object of maintaining a transit manifest for cargo, as explained by the High Court, is twofold, namely, "to keep a record of goods delivered into the custody of the carrier for safe carriage and to enable the Customs Authorities to check and verify the dutiable goods which arrive by a particular fight". "Cargo" is a shipload or the lading of a ship. No statutory or accepted definition of the word "cargo" has been placed before us. While the appellant contends that all the goods carried in a ship or plane is cargo, the respondents counsel argues that nothing is cargo unless it is included in the manifest. But what should be included and what need not be included in the manifest is not made clear. It is said that the expressions "same bottom cargo" and "transit cargo" throw some light on the meaning of the word "cargo". Article 606 of the Chapter on "Shipping and Navigation" in **Halsbury's *Laws of England***, 3rd Edn., Vol. 35, at p. 426, brings out the distinction between the two types of cargo. If the cargo is to be carried to its destination by the same conveyance throughout the voyage or journey it is described as "same bottom cargo." On the other hand, if the cargo is to be transhipped from one conveyance to another during the course of transit, it is called "transhipment cargo." This distinction also does not throw any light on the meaning of the word "cargo". If the expression "cargo" takes in all the goods carried in the plane, whether it is carried under the personal care of the passenger or entrusted to the care of the officer in charge of the cargo, both the categories of cargo can squarely fall under the said two heads. Does the word "manifest" throw any light? Inspector

Darine Bejan Bhappu says in his evidence that manifest for transit discloses only such goods as are unaccompanied baggage but on the same flight and that "accompanied baggage is never manifested as Cargo Manifest". In the absence of any material or evidence to the contrary, this statement must be accepted as a correct representation of the actual practice obtaining in such matters. But that practice does not prevent the imposition of a statutory obligation to include accompanied baggage also as an item in the manifest if a passenger seeks to take advantage of the general permission given thereunder. I cannot see any inherent impossibility implicit in the expression "cargo" compelling me to exclude an accompanied baggage from the said expression.

13. Now let me look at the second proviso of the notification dated November 8, 1962. Under Section 8 of the Act there is ban against bringing or sending into India gold. The notification lifts the ban to some extent. It says that a person can bring into any port or place in India gold when the same is on through transit to a place which is outside the territory of India, provided that it is declared in the manifest for transit as "same bottom cargo or transhipment cargo". It is, therefore, not an absolute permission but one conditioned by the said proviso. If the permission is sought to be availed of, the condition should be complied with. It is a condition precedent for availing of the permission.

14. Learned counsel for the respondent contends that the said construction of the proviso would preclude a person from carrying small articles of gold on his person if such article could not be declared in the manifest for transit as "same bottom cargo" or "transhipment cargo" and that could not have been the intention of the Board of Revenue. On that basis, the argument proceeds, the second proviso should be made to apply only to such cargo to which the said proviso applies and the general permission to bring gold into India would apply to all other gold not covered by the second proviso. This argument, if accepted, would enable a passenger to circumvent the proviso by carrying gold on his body by diverse methods. The present case illustrates how such a construction can defeat the purpose of the Act itself. I cannot accept such a construction unless the terms of the notification compel me to do so. I do not see any such compulsion. The alternative construction for which the appellant contends no doubt prevents a passenger from carrying with him small articles of gold. The learned Solicitor-General relies upon certain rules permitting a passenger to bring into India on his person small articles of gold, but *ex facie* those rules do not appear to apply to a person passing through India to a foreign country. No doubt to have international goodwill the appropriate authority may be well advised to give permission for such small articles of gold or any other article for being carried by a person with him on his way through India to foreign countries. But for one reason or other, the general permission in express terms says that gold shall be declared in the manifest and I do not see, nor any provision of law has been placed before us, why gold carried on a person cannot be declared in the manifest if that person seeks to avail himself of the permission. Though I appreciate the inconvenience and irritation that will be caused to passengers *bonafide* passing through our country to foreign countries for honest purposes, I cannot see my way to interpret the second proviso in such a way as to defeat its purpose. I, therefore, hold that on a fair construction of the notification dated November 8, 1962 that the general permission can be taken advantage of only by a person

passing through India to a foreign country if he declares the gold in his possession in the manifest for transit as "same bottom cargo" or "transhipment cargo".

15. The next argument is that *mens rea* is an essential ingredient of the offence under Section 8 of the Act, read with Section 23(l-A)(*a*) thereof. Under Section 8 no person shall, except with the general or special permission of the Reserve Bank of India, bring or send to India any gold. Under the notification dated November 8, 1962, and published on November 24, 1962, as interpreted by me, such gold to earn the permission shall be declared in the manifest. The section, read with the said notification, prohibits bringing or sending to India gold intended to be taken out of India unless it is declared in the manifest. If any person brings into or sends to India any gold without declaring it in such manifest, he will be doing an act in contravention of Section 8 of the Act read with the notification and, therefore, he will be contravening he provisions of the Act. Under Section 23(l-A)(*a*) of the Act he will be liable to punishment of imprisonment which may extend to two years or with fine or with both. The question is whether the intention of the legislature is to punish persons who break the said law without a guilty mind. The doctrine of *mens rea* in the context of statutory crimes has been the subject-matter of many decisions in England as well as in our country. I shall briefly consider some of the important standard textbooks and decisions cited at the Bar to ascertain its exact scope.

16. In ***Russell on Crime***, 11th Edn., Vol. 1, it is stated at p. 64:

> ... there is a presumption that in any statutory crime the common law mental element, *mens rea*, is an essential ingredient.

On the question how to rebut this presumption, the learned author points out that the policy of the courts is unpredictable. I shall notice some of the decisions which appear to substantiate the author's view. In **Halsbury's *Laws of England***, 3rd Edn., Vol. 10, in para 508, at p. 273, the following passage appears:

> A statutory crime may or may not contain an express definition of the necessary state of mind. A statute may require a specific intention, malice, knowledge, willfulness, or recklessness. On the other hand, it may be silent as to any requirement of *mens rea*, and in such a case in order to determine whether or not *mens rea*, is an essential element of the offence it is necessary to look at the objects and terms of the statute.

This passage also indicates that the absence of any specific mention of a state of mind as an ingredient of an offence in a statute is not decisive of the question whether *mens rea*, is an ingredient of the offence or not: it depends upon the object and the terms of the statute. So too, Archbold in his book on ***Criminal Pleading, Evidence and Practice***, 35th Edn., says much to the same effect at p. 48 thus:

> It has always been a principle of the common law that *mens rea*, is an essential element in the commission of any criminal offence against the common law.... In the case of statutory offences it depends on the effect of the statute.... There is a presumption that *mens rea*, is an essential ingredient in a statutory offence, but this presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals.

The leading case on the subject is ***Sherras* v. *De Rutzen*** [(1895) 1 QB 918, 921]. Section 16(2) of the Licensing Act, 1872, prohibited a licenced victualler from supplying liquor to a police constable while on duty. It was held that that section did not apply where a licenced victualler *bona fide* believed that the police officer was off duty. Wright, J., observed:

> There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.

This sums up the statement of the law that has been practically adopted in later decisions. The Privy Council in ***Jacob Bruhn* v. *King on the Prosecution of the Opium Farmer*** [LR (1909) AC 317, 324] construed Section 73 of the Straits Settlements Opium Ordinance, 1906. Section 73 of the said Ordinance stated that if any ship was used for importation, landing, removal, carriage or conveyance of any opium or chandu contrary to the provisions of the said Ordinance or of the rules made thereunder, the master and owner thereof would be liable to a fine. The section also laid down the rule of evidence that if a particular quantity of opium was found in the ship that was evidence that the ship had been used for importation of opium, unless it was proved to the satisfaction of the court that every reasonable precaution had been taken to prevent such user of such ship and that none of the officers, their servants or the crew or any persons employed on board the ship, were implicated therein. The said provisions are very clear; the offence is defined, the relevant evidence is described and the burden of proof is placed upon the accused. In the context of that section the Judicial Committee observed:

> By this Ordinance every person other than the opium farmer is prohibited from importing or exporting chandu. If any other person does so, he prima facie commits a crime under the provisions of the Ordinance. If it be provided in the Ordinance, as it is, that certain facts, if established, justify or excuse what is prima facie a crime, then the burden of proving those facts obviously rests on the party accused. In truth, this objection is but the objection in another form, that knowledge is a necessary element in crime, and it is answered by the same reasoning.

It would be seen from the aforesaid observation that in that case *mens rea*, was not really excluded but the burden of proof to negative *mens rea*, was placed upon the accused. In ***Pearks' Dairies Ltd.* v. *Tottenham Food Control Committee*** [(1919) 88 LJ KB 623, 626] the Court of Appeal considered the scope of Regulations 3 and 6 of the Margarine (Maximum Prices) Order, 1917. The appellants' assistant, in violation of their instructions, but by an innocent mistake, sold margarine to a customer at the price of 1 sh. per Ib. giving only 14½ozs. by weight instead of 16 ozs. The appellants were prosecuted for selling margarine at a price exceeding the maximum price fixed and one of the contentions raised on behalf of the accused was that *mens rea*, on the part of the appellants was not an essential element of the offence. Lord Coleridge, J., cited with approval the following passage of Channell, J., in ***Pearks, Gunston & Tee, Ltd.* v. *Ward*** [(1902) 71 LJ KB 656]:

> But there are exceptions to this rule in the case of quasi-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment, of a fine; and the reason for this is, that the legislature has thought it so important to prevent

> the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he had any *mens rea*, or not, and whether or not he intended to commit a breach of the law. Where the act is of this character then the master, who, in fact, has done the forbidden thing through his servant, is responsible and is liable to a penalty. There is no reason why he should not be, because the very object of the legislature was to forbid the thing absolutely.

This decision states the same principle in a different form. It also places emphasis on the terms and the object of the statute in the context of the question whether *mens rea*, is excluded or not. The decision in ***Rex* v. *Jacobs*** [(1944) KB 417] arose out of an agreement to sell price-controlled goods at excess price. The defence was that the accused was ignorant of the proper price. The Court of Criminal Appeal held that in the summing up the direction given by the Judge to the jury that it was not necessary that the prosecution should prove that the appellants knew what the permitted price was but that they need only show in fact a sale at an excessive price had taken place, was correct in law. This only illustrates that on a construction of the particular statute, having regard to the object of the statute and its terms, the Court may hold that *mens rea*, is not a necessary ingredient of the offence. In ***Brend* v. *Wood*** [(1946) 62 The Times LR 462, 463] dealing with an emergency legislation relating to fuel rationing, Goddard, C.J., observed:

> There are statutes and regulations in which Parliament has been not to create offences and make people responsible before criminal courts although there is an absence of *mens rea*, but it is certainly not the Court's duty to be acute to find that *mens rea*, is not a constituent part of a crime. It is of the utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea*, as a constituent part of a crime, the Court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.

This caution administered by an eminent and experienced Judge in the matter of construing such statutes cannot easily be ignored. The Judicial Committee in ***Srinivas Mall Bairoloya* v. *King-Emperor*** [(1947) ILR 26 Pat 460, 469 (PC)] was dealing with a case in which one of the appellants was charged with an offence under the rules made by virtue of the Defence of India Act, 1939, of selling salt at prices exceeding those prescribed under the rules, though the sales were made without the appellant's knowledge by one of his servants. Lord Parcq, speaking for the Board, approved the view expressed by Goddard, C.J., in ***Brend* v. *Wood*** and observed:

> Their Lordships agree with the view which was recently expressed by the Lord Chief Justice of England, when he said: 'It is in my opinion the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless the statute, either clearly or by necessary implication, rules out *mens rea*, as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind.'

The acceptance of the principle by the Judicial Committee that *mens rea*, is a constituent part of a crime unless the statute clearly or by necessary implication excludes the same, and the application of the same to a welfare measure is an indication that the Court shall not be

astute in construing a statute to ignore *mens rea,* on a slippery ground of a welfare measure unless the statute compels it to do so. Indeed, in that case the Judicial Committee refused to accept the argument that where there is an absolute prohibition, no question of *mens rea,* arises. The Privy Council again in ***Lim Chin Aik* v. *Queen*** [(1963) AC 160, 174, 175] reviewed the entire law on the question in an illuminating judgment and approached the question, if I may say so, from a correct perspective. By Section 6 of the Immigration Ordinance, 1952, of the State of Singapore, "It shall not be lawful for any person other than a citizen of Singapore to enter the colony from the Federation or having entered the colony from the Federation to remain in the Colony if such person has been prohibited by order made under Section 9 of this Ordinance from entering the colony" and Section 9, in the case of an order directed to a single individual, contained no provision for publishing the order or for otherwise bringing it to the attention of the person named. The Minister made an order prohibiting the appellant from entering the colony and forwarded it to the Immigration officer. There was no evidence that the order had in fact come to the notice or attention of the appellant. He was prosecuted for contravening Section 6(2) of the Ordinance. Lord Evershed, speaking for the Board, reaffirmed the formulations cited from the judgment of Wright, J., and accepted by Lord de Parcq in ***Srinivas Mul Bairoliya*** case. On a review of the case-law on the subject and the principles enunciated therein, the Judicial Committee came to the following conclusion:

> But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim.

The same idea was repeated thus:

> Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, Their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended.

Dealing with the facts of the case before it, the Privy Council proceeded to illustrate the principle thus:

> But Mr. Le Quesne was unable to point to anything that the appellant could possibly have done so as to ensure that he complied with the regulations. It was not, for example, suggested that it would be practicable for him to make continuous inquiry to see whether an order had been made against him. Clearly one of the objects of the Ordinance is the expulsion of prohibited persons from Singapore, but there is nothing that a man can do about it, before the commission of the offence, there is no practical or sensible way in which he can ascertain whether he is a prohibited person or not.

On that reasoning the Judicial Committee held that the accused was not guilty of the offence with which he was charged. This decision adds a new dimension to the rule of construction of a statute in the context of *mens rea,* accepted by earlier decisions. While it accepts the rule that for the purpose of ascertaining whether a statute excludes *mens rea* or not, the object of the statute and its wording must be weighed, it lays down that *mens rea* cannot be excluded unless the person or persons aimed at by the prohibition are in a position to observe the law or to promote the observance of the law. We shall revert to this decision at a later stage in a different context. This Court in ***Rahula Hariparasada Rao* v. *State*** [(1951) SCR 322] speaking through Fazl Ali, J., accepted the observations made by the Lord Chief Justice of England in ***Brend* v. *Wood***. The decision of this Court in ***Indo-China Steam Navigation Co. Ltd.* v. *Jasjit Singh, Additional Collector of Customs, Calcutta*** [Civil Appeal No 770 of 1962 (judgement delivered on 3-2-64)] is strongly relied upon by the appellant in support of the contention that *mens rea,* is out of place in construing statutes similar to that under inquiry now. There, this Court was concerned with the interpretation of Section 52-A of the Sea Customs Act, 1878. The Indo-China Steam Navigation Co. Ltd., which carries on the business of carriage of goods and passengers by sea, owns a fleet of ships, and has been carrying on its business for over 80 years. One of the routes plied by its ships is the Calcutta-Japan-Calcutta route. The vessel *Eastern Saga* arrived at Calcutta on October 29, 1957. On a search it was found that a hole was covered with a piece of wood and over painted and when the hole was opened a large quantity of gold in bars was discovered. After following the prescribed procedure the Customs Authorities made an order confiscating the vessel in addition to imposing other penalties. One of the contentions raised was that Section 52-A of the Sea Customs Act the infringement whereof was the occasion for the confiscation could not be invoked unless *mens rea,* was established. Under that section no vessel constructed, adapted, altered or fitted for the purpose of concealing goods shall enter, or be within, the limits of any port in India, or the Indian customs waters. This Court in construing the scheme and object of the Sea Customs Act came to the conclusion that *mens rea,* was not a necessary ingredient of the offence, as, if that was so, the statute would become a dead-letter. That decision was given on the basis of the clear object of the statute and on a construction of the provisions of that statute which implemented the said object. It does not help us in construing the relevant provisions of the Foreign Exchange Regulation Act.

17. The Indian decisions also pursued the same line. A Division Bench of the Bombay High Court in ***Emperor* v. *Isak Solomon Macmull*** [(1948) 50 Bom LR 190, 194] in the context of the Motor Spirit Rationing Order, 1941, made under the Essential Supplies (Temporary Powers) Act, 1946, held that a master is not vicariously liable, in absence of *mens rea,* for an offence committed by his servant for selling petrol in absence of requisite coupons and at a rate in excess of the controlled rate. Chagla, C.J., speaking for the Division Bench, after considering the relevant English and Indian decisions, observed:

> It is not suggested that even in the class of cases where the offence is not a minor offence or not quasi-criminal that the legislature cannot introduce the principle of vicarious liability and make the master liable for the acts of his servant although the master has no *mens rea,* and was morally innocent. But the Courts must be reluctant to come to such a

conclusion unless the clear words of the statute compel them to do so or they are driven to that conclusion by necessary implication.

So too, a Division Bench of the Mysore High Court in ***State of Coorg* v. *P.K. Assu*** [ILR (1955) Mysore 516] held that a driver and a cleaner of a lorry which carried bags of charcoal and also contained bags of paddy and rice underneath without permit as required by a notification issued under the Essential Supplies (Temporary Powers) Act, 1946, were not guilty of any offence in the absence of their knowledge that the lorry contained food grains. To the same effect a Division Bench of the Allahabad High Court in ***State* v. *Sheo Prasad*** [AIR 1956 All 610] held that a master was not liable for his servant's act in carrying oilseeds in contravention of the order made under the Essential Supplies (Temporary Powers) Act, 1946, on the ground that he had not the guilty mind. In the same manner a Division Bench of the Calcutta High Court in ***C.T. Prim* v. *State*** [AIR 1961 Cal 177] accepted as settled law that unless a statute clearly or by necessary implication rules out *mens rea* as a constituent part of the crime, no one should be found guilty of an offence under the criminal law unless he has got a guilty mind.

18. The law on the subject relevant to the present enquiry may briefly be stated as follows. It is a well settled principle of common law that *mens rea* is an essential ingredient of a criminal offence. Doubtless a statute can exclude that element, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against unless the statute expressly or by necessary implication excluded *mens rea*. To put it differently, there is a presumption that *mens rea,* is an essential ingredient of a statutory offence; but this may be rebutted by the express words of a statute creating the offence or by necessary implication. But the mere fact that the object of a statute is to promote welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. It is also necessary to enquire whether a statute by putting a person under strict liability, helps him to assist the State in the enforcement of the law: can he do anything to promote the observance of the law? A person who does not know that gold cannot be brought into India without a licence or is not bringing into India any gold at all cannot possibly do anything to promote the observance of the law. *Mens rea,* by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law. The nature of *mens rea that* will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof.

19. What is the object of the Act? The object of the Act and the notification issued thereunder is to prevent smuggling of gold and to conserve foreign exchange. Doubtless it is a laudable object. The Act and the notification were conceived and enacted in public interest; but that in itself is not, as I have indicated, decisive of the legislative intention.

20. The terms of the section and those of the relevant notification issued thereunder do not expressly exclude *mens rea*. Can we say that *mens rea,* is excluded by necessary implication? Section 8 does not contain an absolute prohibition against bringing or sending into India any gold. It in effect confers a power on the Reserve Bank of India to regulate the

import by giving general or special permission; nor the notification dated August 25, 1948, issued by the Government embodies any such absolute prohibition. It again, in substance, leaves the regulation of import of gold to the Reserve Bank of India; in its turn the Reserve Bank of India by a notification of the same date permitted persons to transit gold to a place which is outside the territory of India and the Portuguese territories without any permission. Even the impugned notification does not impose an absolute prohibition against bringing into India gold which is on through transit to a place outside India. It permits such import for such through transit, but only subject to conditions. It is, therefore, manifest that the law of India as embodied in the Act under Section 8 and in the notification issued thereunder does not impose an absolute prohibition against bringing into India gold which is on through transit to a place outside India; and indeed it permits such bringing of gold but subject to certain conditions. The legislature, therefore, did not think that public interest would irreparably suffer if such transit was permitted, but it was satisfied that with some regulation such interest could be protected. The law does not become nugatory if element of *mens rea*, was read into it, for there would still be persons who would be bringing into India gold with the knowledge that they would be breaking the law. In such circumstances no question of exclusion of *mens rea*, by necessary implication can arise.

21. If a person was held to have committed an offence in breach of the provision of Section 8 of the Act and the notification issued thereunder without any knowledge on his part that there was any such notification or that he was bringing any gold at all, many innocent persons would become victims of law. An aeroplane in which a person with gold on his body is travelling may have a forced landing in India, or an enemy of a passenger may surreptitiously and maliciously put some gold trinket in his pocket without his knowledge so as to bring him into trouble; a person may be carrying gold without knowledge or even without the possibility of knowing that a law prohibiting taking of gold through India is in existence. All of them, if the interpretation suggested by the learned Solicitor-General be accepted, will have to be convicted and they might be put in jail for a period extending to 2 years. Such an interpretation is neither supported by the provisions of the Act nor is necessary to implement its object. That apart, by imposing such a strict liability as to catch innocent persons in the net of crime, the Act and the notification issued thereunder cannot conceivably enable such a class of persons to assist the implementation of the law: they will be helpless victims of law. Having regard to the object of the Act, I think no person shall be held to be guilty of contravening the provisions of Section 8 of the Act, read with the notification dated November 8, 1962 issued thereunder, unless he has knowingly brought into India gold without complying with the terms of the proviso to the notification.

22. Even so it is contended that the notification dated November 8, 1962, is law and that the maxim “ignorance of law is no defence” applies to the breach of the said law. To state it differently, the argument is that even the mental condition of knowledge on the part of a person is imported into the notification; the said knowledge is imputed to him by the force of the said maxim. Assuming that the notification dated November 8, 1962, is a delegated legislation, I find it difficult to invoke that maxim as the statute empowering the Reserve Bank of India to give the permission, or the rules made thereunder do not prescribe the mode of publication of the notification. Indeed a similar question arose before the Privy Council in

Lim Chin Aik* v. *Queen and a similar argument was advanced before it; but the Board rejected it. I have already dealt with this decision in another context. There the Minister under the powers conferred on him by Section 9 of the Immigration Ordinance, 1952, issued an order prohibiting the appellant therein from entering Singapore. He was prosecuted for disobeying that order. Section 9, in the case of an order directed to a single individual, contained no provision for publishing the order or for otherwise bringing it to the knowledge of the person named. The Crown invoked the precept that ignorance of the law was no excuse. In rejecting the contention of the Crown, Lord Evershed, speaking for the Board observed at p. 171 thus:

> Their Lordships are unable to accept the contention. In their Lordships' opinion, even if the making of the order by the Minister be regarded as an exercise of the legislative as distinct from the executive or administrative function (as they do not concede), the maxim cannot apply to such a case as the present where it appears that there is in the State of Singapore no provision, corresponding, for example, to that contained in Section 3(2) of the English Statutory Instruments Act of 1946, for the publication in any form of an order of the kind made in the present case or any other provision designed to enable a man by appropriate inquiry to find out what 'the law' is.

Here, as there, it is conceded that there is no provision providing for the publication in any form of an order of the kind made by the Reserve Bank of India imposing conditions on the bringing of gold into India. The fact that the Reserve Bank of India published the order in the Official Gazette does not affect the question for it need not have done so under any express provisions of any statute or rules made thereunder. In such cases the maxim cannot be invoked and the prosecution has to bring home to the accused that he had knowledge or could have had knowledge if he was not negligent or had made proper enquiries before he could be found guilty of infringing the law. In this case the said notification was published on November 24, 1962, and the accused left Zurich on November 27, 1962, and it was not seriously contended that the accused had or could have had with diligence the knowledge of the contents of the said notification before he brought gold into India. I, therefore, hold that the respondent was not guilty of the offence under Section 23(1-A) of the Act as it has not been established that he had with knowledge of the contents of the said notification brought gold into India on his way to Manila and, therefore, he had not committed any offence under the said section. I agree with the High Court in its conclusion though for different reasons.

23. Though the facts established in the case stamp the respondent as an experienced smuggler of gold and though I am satisfied that the Customs Authorities *bona fide* and with diligence performed their difficult duties, I have reluctantly come to the conclusion that the accused has not committed any offence under Section 23(1-A) of the Act. In the result, the appeal fails and is dismissed.

N. R. AYYANGAR, J. - This appeal by special leave is directed against the judgment and order of the High Court of Bombay setting aside the conviction of the respondent under Section 8(1) of the Foreign Exchange Regulation Act, 1947 read with a notification of the Reserve Bank of India dated November 8, 1962 and directing his acquittal. The appeal was heard by us at the end of April last and on the 8th May which was the last working day of the Court before it adjourned for the summer vacation, the Court pronounced the following order:

By majority, the appeal is allowed and the conviction of the respondent is restored but the sentence imposed on him is reduced to the period already undergone. The respondent shall forthwith be released and the bail bond, if any, cancelled. Reasons will be given in due course.

25. We now proceed to state our reasons. The material facts of the case are not in controversy. The respondent who is a German national by birth is stated to be a sailor by profession. In the statement that he made to the Customs Authorities, when he was apprehended the respondent stated that some person not named by him met him in Hamburg and engaged him on "certain terms of remuneration, to clandestinely transport gold from Geneva to places in the Far East. His first assignment was stated by him to be to fly to Tokyo wearing a jacket which concealed in its specially designed pockets 34 bars of gold each weighing a kilo. He claimed he had accomplished this assignment and that he handed over the gold he carried to the person who contacted him at Tokyo. From there he returned to Geneva where he was paid his agreed remuneration. He made other trips, subsequently being engaged in like adventures in all of which he stated he had succeeded, each time carrying 34 kilos of gold bars which on every occasion was carried concealed in a jacket which he wore, but we are now concerned with the one which he undertook at the instance of this international gang of gold smugglers carrying, similarly, 34 kilo bars of gold concealed in a jacket which he wore on his person. This trip started at Zurich on November 27, 1962 and according to the respondent his destination was Manila where he was to deliver the gold to a contact there. The plane arrived in Bombay on the morning of the 28th. The Customs Authorities who had evidently advance information of gold being attempted to be smuggled by the respondent travelling by that plane, first examined the manifest of the aircraft to see if any gold had been consigned by any passenger. Not finding any entry there, after ascertaining that the respondent had not come out of the plane as usual to the airport lounge, entered the plane and found him there seated.

They then asked him if he had any gold with him. The answer of the respondent was "what gold" with a shrug indicating that he did not have any. The Customs Inspector thereupon felt the respondent's back and shoulders and found that he had some metal blocks on his person. He was then asked to come out of the plane and his baggage and person were searched. On removing the jacket he wore it was found to have 28 specially made compartments 9 of which were empty and from the remaining 19, 34 bars of gold each weighing approximately one kilo were recovered. The respondent, when questioned, disclaimed ownership of the gold and stated that he had no interest in these goods and gave the story of his several trips which we have narrated earlier. It was common ground that the gold which the respondent carried was not entered in the manifest of the aircraft or other documents carried by it.

26. The respondent was thereafter prosecuted and charged with having committed an offence under Section 8(1) of the Act and also of certain provisions of the Sea Customs Act, in the Court of the Presidency Magistrate, Bombay. The Presidency Magistrate, Bombay took the complaint on file. The facts stated earlier were not in dispute but the point raised by the respondent before the Magistrate was one of law based on his having been ignorant of the law prohibiting the carrying of the gold in the manner that he did. In other words, the plea was

that *mens rea* was an ingredient of the offence with which he was charged and as it was not disputed by the prosecution that he was not actually aware of the notification of the Reserve Bank of India which rendered the carriage of gold in the manner that he did an offence, he could not be held guilty. The learned Magistrate rejected this defence and convicted the respondent and sentenced him to imprisonment for one year. On appeal by the respondent the learned Judges of the High Court have allowed the appeal and acquitted the respondent upholding the legal defence which he raised. It is the correctness of this conclusion that calls for consideration in this appeal.

27. Before considering the arguments advanced by either side before us it would be necessary to set out the legal provisions on the basis of which this appeal has to be decided. The Foreign Exchange Regulation Act, 1947 was enacted in order to conserve foreign exchange, the conservation of which is of the utmost essentiality for the economic survival and advance of every country, and very much more so in the case of a developing country like India. Section 8 of the Act enacts the restrictions on the import and export *inter alia* of bullion. This section enacts, to read only that portion which relates to the import with which this appeal is concerned:

> 8. (1) The Central Government may, by notification in the Official Gazette, order that, subject to such exemptions, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank and on payment of the fee, if any prescribed, bring or send into India any gold or silver or any currency notes or bank notes or coin whether Indian or foreign.
>
> *Explanation*.—The bringing or sending into any port or place in India, of any such article as aforesaid intended to be taken out of India without being removed from the ship or conveyance in which it is being carried shall nonetheless be deemed to be a bringing or as the case may be, sending into India of that article for the purposes of this section.

Section 8 has to be read in conjunction with Section 23 which imposes penalties on persons contravening the provisions of the Act. Sub-section (1) penalises the contravention of the provisions of certain named sections of the Act which do not include Section 8, and this is followed by sub-section (1-A) which is residuary and is directly relevant in the present context and it reads:

> 23. (1-A) whoever contravenes—
>
> (*a*) any of the provisions of this Act or of any rule, direction or order made thereunder, other than those referred to in sub-section (1) of this section and Section 19 shall, upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both;
>
> (*b*) any direction or order made under Section 19 shall, upon conviction by a Court be punishable with fine which may extend to two thousand rupees.

These have to be read in conjunction with the rule as to onus of proof laid down in Section 24(1) which enacts:

> 24. (1) Where any person is prosecuted or proceeded against for contravening any provisions of this Act or of any rule, direction or order made thereunder which prohibits him from doing an act without permission, the burden of proving that he had the requisite permission shall be on him.

28. Very soon after the enactment of the Act the Central Government took action under Section 8(1) and by a notification published in the Official Gazette dated August 25, 1948 the Central Government directed that "except with the general or special permission of the Reserve Bank no person shall bring or send into India from any place out of India any gold bullion", to refer only to the item relevant in the present context. The Reserve Bank by a notification of even date (August 25, 1948) granted a general permission in these terms:

> The Reserve Bank of India is hereby pleased to give general permission to the bringing or sending of any gold or any such silver by sea or air into any port in India:
>
> Provided that the gold or silver
>
> (a) is on through transit to a place which is outside both
>
> (i) the territory of India.
>
> (ii) The Portuguese territories which are adjacent to or surrounded by the territory of India and
>
> (b) is not removed from the carrying ship or aircraft except for the purpose of transhipment.

On November 8, 1962, however, the Reserve Bank of India in supersession of the notification just now read, published a notification (and this is the one which was in force at the date relevant to this case) giving general permission to the bringing or sending of gold, gold-coin etc.into any port or place in India when such article is on through transit to a place which is outside the territory of India:

> Provided that such articles if not removed from the ship or conveyance in which it is being carried except for the purpose of transhipment:
>
> Provided further that it is declared in the manifest for transit as same bottom cargo or transhipment cargo.

This notification was published in the Gazette of India on November 24, 1962.

29. It was not disputed by Mr. Sorabjee — learned counsel for the respondent, subject to an argument based on the construction of the newly added 2nd proviso to which we shall refer later, that if the second notification of the Reserve Bank restricting the range of the exemption applied to the respondent, he was clearly guilty of an offence under Section 8(1) of the Act read with the Explanation to the sub-section. On the other hand, it was not also disputed by the learned Solicitor-General for the appellant-State that if the exemption notification which applied to the present case was that contained in the notification of the Reserve Bank dated August 25, 1948 the respondent had not committed any offence since (*a*) he was a through passenger from Geneva to Manila as shown by the ticket which he had and the manifest of the aircraft, and besides, (*b*) he had not even got down from the plane.

30. Two principal questions have been raised by Mr. Sorabjee in support of the proposition that the notification dated November 8, 1962 restricting the scope of the permission or exemption granted by the Reserve Bank did not apply to the case. The first was that *mens rea* was an essential ingredient of an offence under Section 23(1-A) of the Act and that the prosecution had not established that the respondent knowingly contravened the law in relation to the carriage of the contraband article; (2) The second head of learned counsel's argument was that the notification dated November 8, 1962, being merely subordinate or delegated legislation, could be deemed to be in force not from the date of its issue or

publication in the Gazette but only when it was brought to the notice of persons who would be affected by it and that as the same was published in the Gazette of India only on November 24, 1962 whereas the respondent left Zurich on the 27th November he could not possibly have had any knowledge there of the new restrictions imposed by the Indian authorities and that, in these circumstances, the respondent could not be held guilty of an offence under Section 8(1) or Section 23(1-A) of the Act. He also raised a subsidiary point that the notification of the Reserve Bank could not be attracted to the present case because the second proviso which made provision for a declaration in the manifest "for transit as bottom cargo or transhipment cargo" could only apply to gold handed over to the aircraft for being carried as cargo and was inapplicable to cases where the gold was carried on the person of a passenger.

31. We shall deal with these points in that order. First as to whether *mens rea* is an essential ingredient in respect of an offence under Section 23(1)(*a*) of the Act. The argument under this head was broadly as follows: It is a principle of the Common Law that *mens rea* is an essential element in the commission of any criminal offence against the Common Law. This presumption that *mens rea* is an essential ingredient of an offence equally applies to an offence created by statute, though the presumption is liable to be displaced by the words of the statute creating the offence, or by the subject-matter dealt with by it (Wright, J. in ***Sherras* v. *De Rutzen*** [(1895)1 QB 918)]. But unless the statute clearly or by fair implication rules out *mens rea*, a man should not be convicted unless he has a guilty mind. In other words, absolute liability is not to be presumed, but ought to be established, or the purpose of finding out if the presumption is displaced, reference has to be made to the language of the enactment, the object and subject-matter of the statute and the nature and character of the act sought to be punished. In this connection learned counsel for the respondent strongly relied on a decision of the Judicial Committee in ***Srinivas Mall Bairoliya* v. *King-Emperor***. The Board was, there, dealing with the correctness of a conviction under the Defence of India Rules, 1939 relating to the control of prices. The appellant before the Board was a dealer in wholesale who had employed a servant to whom he had entrusted the duty of allotting salt to retail dealers and nothing on the buyer's licence the quantity which the latter had bought and received all of which were required to be done under the rules. For the contravention by the servant of the Regulations for the sale of salt prescribed by the Defence of India Rules the appellant was prosecuted and convicted as being vicariously liable for the act of his servant in having made illegal exactions contrary to the Rules. The High Court took the view that even if the appellant had not been proved to have known the unlawful acts of his servant, he would still be liable on the ground that "where there is an absolute prohibition and no question of *mens rea* arises, the master is criminally liable for the acts of his servant". On appeal to the Privy Council Lord Du Parcq who delivered the judgment of the Board dissented from this view of the High Court and stated:

> They see no ground for saying that offences against those of the Defence of India Rules here in question are within the limited and exceptional class of offences which can be held to be committed without a guilty mind. See the judgment of Wright, J. in ***Sherras* v. *De Rutzen***. Offences which are within that class are usually of a comparatively minor character, and it would be a surprising result of this delegated legislation if a person who was morally innocent of blame could be held vicariously liable for a servant's crime and so punishable with imprisonment for a term which may extend to three years.

The learned Lord then quoted with approval the view expressed by the Lord Chief Justice in ***Brend* v. *Wood*** [(1946) 110 JP 317]:

> It is ... of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless the statute, either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind.

32. Mr. Sorabjee is justified in referring us to these rules regarding presumption and construction and it may be pointed out that this Court has, in ***Ravula Hariprasada Rao* v. *State*** approved of this passage in the judgment of Lord Du Parcq and the principle of construction underlying it. We therefore agree that absolute liability is not to be lightly presumed but has to be clearly established. Besides, learned counsel for the respondent strongly urged that on this point the exposition by Lord Evershed in ***Lim Chin Aik* v. *Queen*** had clarified the principles applicable in this branch of the law, and that in the light of the criteria there laid down we should hold that on a proper construction of the relevant provisions of the Act, *mens rea* or a guilty mind must be held to be an essential ingredient of the offence and that as it was conceded by the prosecution in the present case that the respondent was not aware of the notification by the Reserve Bank of India dated the 8th November, he could not be held guilty of the offence. We might incidentally state that that decision was also relied on in connection with the second of the submissions made to us as regards the time when delegated legislation could be deemed to come into operation, but to that aspect we shall advert later.

33. In order to appreciate the scope and effect of the decision and of the observations and reasoning to which we shall presently advert it is necessary to explain in some detail the facts involved in it. Section 6(2) of the Immigration Ordinance, 1952, of the State of Singapore enacted:

> 6. (2) It shall not be lawful for any person other than a citizen of Singapore to enter the colony from the Federation ... if such person has been prohibited by order made under Section 9 of this Ordinance from entering the colony.

By sub-section (3) it was provided that:

> Any person who contravenes the provisions of sub-section (2) of this section shall be guilty of an offence against this ordinance.

Section 9 which is referred to in Section 6(2) read to quote the material words of sub-section (1):

> The minister may by order ... (1) prohibit either for a stated period or permanently the entry or re-entry into the colony of any person or class of persons.

Its sub-section (3) provided:

> 34. Every order made under sub-section (1) of this section shall unless it be otherwise provided in such order take effect and come into operation on the date on which it was made.

While provision was made by the succeeding portion of the sub-section for the publication in the Gazette of orders which related to a class of persons, there was no provision in the sub-section for the publication of an order in relation to named individuals or otherwise for bringing it to the attention of such persons. The appellant before the Privy Council had been

charged with and convicted by the courts in Singapore of contravening Section 6(2) of the Ordinance by remaining in Singapore when by an order made by the Minister under Section 9(1) he had been, by name, prohibited from entering the island. At the trial there was no evidence from which it could be inferred that the order had in fact come to the notice or attention of the accused. On the other hand, the facts disclosed that he could not have known of the order. On appeal by the accused, the conviction was set aside by the Privy Council. The judgment of the Judicial Committee insofar as it was in favour of the appellant, was based on two lines of reasoning. The first was that in order to constitute a contravention of Section 6(2) of the Ordinance *mens rea* was essential. The second was that even if the order of the Minister under Section 9 were regarded as an exercise of legislative power, the maxim "ignorance of law is no excuse" could not apply because there was not, in Singapore, any provision for the publication, in any form, of an order of the kind made in the case or any other provision to enable a man, by appropriate enquiry, to find out what the law was.

34. Lord Evershed who delivered the judgment of the Board referred with approval to the formulation of the principle as regards *mens rea*, to be found in the judgment of Wright, J. in ***Sherras* v. *DeRutzen*** already referred to. His Lordship also accepted as correct the enunciation of the rule in ***Srinivas Mall Bairoliya* v. *King-Emperor*** in the passage we have extracted earlier. Referring next to the argument that where the statute was one for the regulation for the public welfare of a particular activity it had frequently been inferred that strict liability was the object sought to be enforced by the legislature, it was pointed out:

> The presumptions that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with: When such a presumption is to be inferred, it displaces the ordinary presumption of mens rea.

Reference was then made to legislation regulating sale of food and drink and he then proceeded to state:

> It is not enough merely to lable the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim.

35. As learned counsel has laid great stress on the above passages, it is necessary to analyse in some detail the provisions in the Singapore Ordinance in relation to which this approach was made and compare them with the case on hand. Let us first consider the frame of Section 6(2) of the Singapore Ordinance the relevant portion of which we have set out earlier. It prohibits the entry of non-citizens into the colony from the Federation, only in the event of that entry being banned by a general or particular order made by the Minister under Section 9. In other words, in the absence of an order made under Section 9, there was freedom of entry or rather absence of any legal prohibition against entry of persons from the

Federation. In the light of this situation, the construction adopted was that persons who normally could lawfully enter the colony, had to be proved to have a guilty mind i.e. actual or constructive knowledge of the existence of the prohibition against their entry before they could be held to have violated the terms of Section 6(2). It is in this context that the reference to "the luckless victim" has to be understood. The position under Sections 8 and 23 of the Act is, if we say so, just the reverse. Apart from the public policy and other matters underlying the legislation before us to which we shall advert later, Section 8(1) of the Act empowers the Central Government to impose a complete ban on the bringing of any gold into India, the act of "bringing" being understood in the sense indicated in the Explanation. When such a ban is imposed, the import or the bringing of gold into India could be effected only subject to the general or special permission of the Reserve Bank. Added to this, and this is of some significance, there is the provision in Section 24(1) of the Act which throws on the accused in a prosecution the burden of proving that he had the requisite permission, emphasising as it were that in the absence of a factual and existent permission to which he can refer, his act would be a violation of the law. In pursuance of the provision in Section 8(1), Central Government published a notification on August 25, 1948 in which the terms of Section 8(1) regarding the necessity of permission of the Reserve Bank to bring gold into India were repeated. On the issue of this notification the position was that everyone who "brought" gold into India, in the sense of the Explanation to Section 8(1), was guilty of an offence, unless he was able to rely for his act on permission granted by the Reserve Bank. We therefore start with this: The bringing of gold into India is unlawful unless permitted by the Reserve Bank, - unlike as under the Singapore Ordinance, where an entry was not unlawful unless it was prohibited by an order made by the Minister. In the circumstances, therefore, *mens rea*, which was held to be an essential ingredient of the offence of a contravention of a Minister's order under the Ordinance, cannot obviously be deduced in the context of the reverse position obtaining under the Act.

36. There was one further circumstance to which it is necessary to advert to appreciate the setting in which the question arose before the Privy Council. The charge against the appellant was that having entered Singapore on or about May 17, 1959 he remained there while being prohibited by an order of the Minister under Section 9 and thereby contravened Section 6(2) of the Immigration Ordinance. At the trial it was proved that the order of the Minister was made on May 28, 1959 i.e. over 10 days after the appellant had entered the colony. It was proved that the Minister's order which prohibited the appellant, who was named in it, from entering Singapore was received by the Deputy Assistant Controller of Immigration on the day on which it was made and it was retained by that official with himself. The question of the materiality of the knowledge of the accused of the order prohibiting him from entering the colony came up for consideration in such a context. The further question as to when the order would, in law, become effective, relates to the second of the submissions made to us by the respondent and will be considered later.

37. Reverting now to the question whether *mens rea* - in the sense of actual knowledge that the act done by the accused was contrary to the law - is requisite in respect of a contravention of Section 8(1), starting with an initial prescription in favour of the need for *mens rea*, we have to ascertain whether the presumption is overborne by the language of the

enactment, read in the light of the objects and purposes of the Act, and particularly whether the enforcement of the law and the attainment of its purpose would not be rendered futile in the event of such an ingredient being considered necessary.

38. We shall therefore first address ourselves to the language of the relevant provisions. Section 23(1-A) of the Act which has already been set out merely refers to contravention of the provisions of the Act or the rule etc. so that it might be termed neutral in the present context, in that it neither refers to the state of the mind of the contravener by the use of the expression such as "wilfully, knowingly" etc., nor does it, in terms, create an absolute liability. Where the statute does not contain the word "knowingly", the first thing to do is to examine the statute to see whether the ordinary presumption that *mens rea* is required applies or not. When one turns to the main provision whose contravention is the subject of the penalty imposed by Section 23(1-A) viz. 8(1) in the present context, one reaches the conclusion that there is no scope for the invocation of the rule of *mens rea*. It lays an absolute embargo upon persons who without the special or general permission of the Reserve Bank and after satisfying the conditions, if any, prescribed by the Bank bring or send into India any gold etc., the absoluteness being emphasised, as we have already pointed out, by the terms of Section 24(1) of the Act. No doubt, the very concept of "bringing" or "sending" would exclude an involuntary bringing or an involuntary sending. Thus, for instance, if without the knowledge of the person a packet of gold was slipped into his pocket it is possible to accept the contention that such a person did not "bring" the gold into India within the meaning of Section 8(1). Similar considerations would apply to a case where the aircraft on a through flight which did not include any landing in India has to make a force landing in India — owing say to engine trouble. But if the bringing into India was a conscious act and was done *with the intention of bringing it into India* the mere "bringing" constitutes the offence and there is no other ingredient that is necessary in order to constitute a contravention of Section 8(1) than that conscious physical act of bringing. If then under Section 8(1) the conscious physical act of "bringing" constitutes the offence, Section 23(1-A) does not import any further condition for the imposition of liability than what is provided for in Section 8(1). On the language, therefore, of Section 8(1) read with Section 24(1) we are clearly of the opinion that there is no scope for the invocation of the rule that besides the mere act of voluntarily bringing gold into India any further mental condition is postulated as necessary to constitute an offence of the contravention referred to in Section 23(1-A).

39. Next we have to have regard to the subject-matter of the legislation. For, as pointed out by Wills, J. in ***R.* v. *Tolson*** [23 QBD 168]:

> Although, prima facie and as a general rule, there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong, or not.

The Act is designed to safeguarding and conserving foreign exchange which is essential to the economic life of a developing country. The provisions have therefore to be stringent and so framed as to prevent unauthorised and unregulated transactions which might upset the scheme underlying the controls; and in a larger context, the penal provisions are aimed at eliminating smuggling which is a concomitant of controls over the free movement of goods or currencies.

In this connection we consider it useful to refer to two decisions - the first a decision of the Privy Council and the other of the Court of Criminal Appeal. The decision of the Privy Council is that reported as ***Bruhn* v. *King*** [1909 AC 317] where the plea of *mens rea*, was raised as a defence to a prosecution for importation of opium in contravention of the Straits Settlements Opium Ordinance, 1960. Lord Atkinson speaking for the Board, referring to the plea as to *mens rea*, observed:

> The other point relied upon on behalf of the appellant was that there should be proof, express or implied, of a mens rea, in the accused person before he could be convicted of a criminal offence. But that depends upon the terms of the statute or ordinance creating the offence. In many cases connected with the revenue certain things are prohibited unless done by certain persons, or under certain conditions. Unless the person who does one of these things can establish that he is one of the privileged class, of that the prescribed conditions have been fulfilled, he will be adjudged guilty of the offence though in fact he knew nothing of the prohibition.

The criteria for the construction of statutes of the type we have before us laid down by the Court of Criminal Appeal in ***Regina* v. *St. Margarets Trust Ltd***. [(1958) 1 WLR 522] is perhaps even nearer to the point. The offence with which the appellants were there charged was a violation of the Hire Purchase and Credit Sale Agreements (Control) Order, 1956 which, having been enacted to effectuate a credit-squeeze, as being necessary for the maintenance of British economy, required by the rules made under it that every Hire Purchase agreement should state the price of the article and fixed the maximum proportion thereof which a hirer might be paid by a Financing Company. The appellant Company advanced to the hirer of a motor car more than the permissible percentage but did so as it was misled by the company which sold the motor car as regards the price it charged to the customer. The plea raised in defence was that the Finance Company was unaware of the true price and that not having guilty knowledge, they could not be convicted of the offence. Donovan, J. who spoke for the Court said:

> The language of Article 1 of the Order expressly prohibits what was done by St. Margarets Trust Ltd., and if that company is to be held to have committed no offence some judicial modification of the actual terms of the article is essential. The appellants contend that the article should be construed so as not to apply where the prohibited act was done innocently. In other words, that mens rea, should be regarded as essential to the commission of the offence. The appellants rely on the presumption that mens rea, is essential for the commission of any statutory offence unless the language of the statute, expressly or by necessary implication, negatives such presumption.

The learned Judge then referred to the various decisions in which the question as to when the Court would hold the liability to be absolute and proceeded:

> The words of the Order themselves are an express and unqualified prohibition of the acts done in this case by St. Margarets Trust Ltd. The object of the Order was to help to defend the currency against the peril of inflation which, if unchecked, would bring disaster upon the country. There is no need to elaborate this. The present generation has witnessed the collapse of the currency in other countries and the consequent chaos, misery and widespread ruin. It would not be at all surprising if Parliament, determined to prevent similar calamities here, enacted measures which it intended to be absolute prohibition of acts which might increase the risk in however small a degree. Indeed, that

would be the natural expectation. There would be little point in enacting that no one should breach the defences against a flood, and at the same time excusing anyone who did it innocently. For these reasons we think that Article 1 of the Order should receive a literal construction, and that the ruling of Diplock, J. was correct.

It is true that Parliament has prescribed imprisonment as one of the punishments that may be inflicted for a breach of the Order, and this circumstance is urged in support of the appellants' argument that Parliament intended to punish only the guilty. We think it is the better view that, having regard to the gravity of the issues, Parliament intended the prohibition to be absolute, leaving the court to use its powers to inflict nominal punishment or none at all in appropriate cases.

40. We consider these observations apposite to the construction of the provision of the Act now before us.

41. This question as to when the presumption as to the necessity for *mens rea* is overborne has received elaborate consideration at the hands of this Court when the question of the construction of Section 52-A of the Sea Customs Act came up for consideration in ***Indo-China Steam Navigation Co. Ltd.*** **v.** ***Jasjit Singh, Addl. Collector of Customs, Calcutta etc.*** Speaking for the Court, Gajendragadkar, C.J. said:

The intention of the legislature in providing for the prohibition prescribed by Section 52-A is, inter alia, to put an end to illegal smuggling which has the effect of disturbing very rudely the national economy of the country. It is well-known, for example, that smuggling of gold has become a serious problem in this country and operations of smuggling are conducted by operators who work on an international basis. The persons who actually carry out the physical part of smuggling gold by one means or another are generally no more than agents and presumably, behind them stands a well-knit organisation which, for motives of profit making, undertakes this activity.

42. This passage, in our opinion, is very apt in the present context and the offences created by Sections 8 and 23(1-A) of the Act. In our opinion, the very object and purpose of the Act and its effectiveness as an instrument for the prevention of smuggling would be entirely frustrated if a condition were to be read into Section 8(1) or Section 23(1-A) of the Act qualifying the plain words of the enactment, that the accused should be proved to have knowledge that he was contravening the law before he could be held to have contravened the provision.

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State of Madhya Pradesh v. *Narayan Singh*

(1989) 3 SCC 596

NATARAJAN, J. — In both the appeals, by special leave, a common question of law is involved and hence they were heard together and are being disposed of by a common judgment. In Criminal Appeal No. 49 of 1978, a lorry driver and two cleaners and in Criminal Appeal No. 24 of 1978 a lorry driver and a coolie were prosecuted for exporting fertilisers without a permit therefor from Madhya Pradesh to Maharashtra in contravention of the Fertilisers (Movement Control) Order, 1973 (for short the "FMC Order") read with Sections 3 and 7 of the Essential Commodities Act, 1955, (for short the "EC Act"). In both the cases, the trial Magistrate held that the prosecution had failed to prove that the accused were attempting to export the fertilisers and he therefore acquitted them. On the State preferring appeals against acquittal under Section 378(3) Criminal Procedure Code, the High Court declined to grant leave. Hence the State has preferred these appeals by special leave.

2. The facts in the two cases are identical. In Criminal Appeal No. 49 of 1978, a truck bearing Registration No. MPP 3668 carrying 200 bags of fertilisers and proceeding from Indore to Maharashtra was intercepted on 12-2-1974 at Sendhwa sales tax barrier situate at a distance of 8 miles from the border of Maharashtra State on the Agra-Bombay Road viz. National Highway No. 3. The lorry driver was in possession of invoices and other records but they did not include a permit issued under the FMC Order. In Criminal Appeal No. 24 of 1978, a lorry bearing Registration No. MPM 4866 proceeding from Indore to Maharashtra was similarly intercepted on 30-10-1973 at Sendhwa sales tax barrier. The truck was carrying 170 bags of fertilisers. The documents seized from the lorry driver contained the invoices and other records but they did not include a permit issued under the FMC Order. Consequently, the lorry driver and the cleaners in the first case and the lorry driver and the coolie in the second case were prosecuted under the FMC Order read with Sections 3 and 7 of the EC Act for exporting fertilisers from Madhya Pradesh to Maharashtra without a valid permit. In both the cases, the accused did not deny the factum of the transport of fertiliser bags in their respective lorries or the interception of the lorries and the seizure of the fertiliser bags or about the fertiliser bags not being covered by a permit issued under the FMC Order. The defence however was that they were not aware of the contents of the documents seized from them and that they were not engaged in exporting the fertiliser bags from Madhya Pradesh to Maharashtra in conscious violation of the provisions of the FMC Order.

3. The trial Magistrate as well as the High Court have taken the view that in the absence of the evidence of an employee of the transport company, there was no material in the cases to hold that the fertiliser bags were being exported to Maharashtra from Madhya Pradesh. The trial Magistrate and the High Court refused to attach any significance or importance to the invoices recovered from the lorry drivers because the drivers had said they had no knowledge of the contents of the documents seized from them. The trial Magistrate and the High Court have further opined that the materials on record would, at best, make out only a case of preparation by the accused to commit the offence and the evidence fell short of establishing that the accused were attempting to export the fertiliser bags from Madhya Pradesh to Maharashtra in contravention of the FMC Order.

4. As we have already stated, the respondents admit that the trucks in question were intercepted at Sendhwa sales tax barrier on 12-2-1974 and 30-10-1973 and they were carrying 200 bags and 170 bags of fertilisers respectively and the consignments were not covered by export permits issued under the FMC Order. In such circumstances what falls for consideration is whether the prosecution must prove *mens rea* on the part of the accused in exporting the fertiliser bags without a valid permit for securing their conviction and secondly whether the evidence on record established only preparation by the accused for effecting export of fertiliser bags from one State to another without a permit therefor and not an attempt to export fertiliser bags. For answering these questions, it is necessary to refer to some of the relevant provisions in the Fertiliser (Movement Control) Order, 1973 framed in exercise of the powers conferred under Section 3 of the EC Act. In the said Order, the relevant provisions to be noticed are clauses 2(*a*) and 3:

2. Definitions. — In this Order unless the context otherwise requires,—

(a) 'Export' means to take or cause to be taken out of any place within a State to any place outside that State;

3. Prohibition of Export of Fertilisers .— No person shall export, or attempt to export, or abet the export of any fertilisers from any State. (emphasis supplied)

5. Section 7 of the Essential Commodities Act, 1955 provides the penalty for contravention of any order made under Section 3 and reads as under :

7. Penalties. — (1) If any person contravenes whether knowingly, intentionally or otherwise any order made under Section 3 —

(a) he shall be punishable—

(i) in the case of an order made with reference to clause (h) or clause (i) of sub-section (2) of that section, with imprisonment for a term which may extend to one year and shall also be liable to fine; and

(ii) in the case of any other order, with imprisonment for a term which may extend to five years and shall also be liable to fine; (emphasis supplied)

6. Taking up the first question for consideration, we may at once state that the trial Magistrate and the High Court have failed to comprehend and construe Section 7(1) of the Act in its full perspective. The words used in Section 7(1) are "if any person contravenes *whether knowingly, intentionally or otherwise* any order made under Section 3". The section is comprehensively worded so that it takes within its fold not only contraventions done knowingly or intentionally but even otherwise i.e. done unintentionally. The element of *mens rea* in export of fertiliser bags without a valid permit is therefore not a necessary ingredient for convicting a person for contravention of an order made under Section 3 if the factum of export or attempt to export is established by the evidence on record.

7. The sweep of Section 7(1) in the light of the changes effected by the legislature has been considered by one of us (Ahmadi, J.) in ***Swastik Oil Industries* v. *State*** [1978 (19) Guj. Law Reporter 117]. In that case, ***Swastik Oil Industries*** a licencee under the Gujarat Groundnut Dealers Licensing Order, 1966 was found to be in possession of 397 tins of groundnut oil in violation of the conditions of the licence and the provisions of the Licensing Order. Consequently, the Collector ordered confiscation of 100 tins of groundnut oil from out

of the 397 tins under Section 6(1) of the Essential Commodities Act. On the firm preferring an appeal, the appellate authority viz. Additional Sessions Judge, Kaira at Nadiad held "that clause (11) of the Licensing Order had been contravened but such contravention was not deliberate as it arose out of a mere *bona fide* misconception regarding the true content of clause (11) of the Licensing Order". The Additional Sessions Judge therefore held that the contravention was merely a technical one and not a wilful or deliberate one and hence the confiscation of 100 tins of groundnut oil was too harsh a punishment and that confiscation of only 25 tins would meet the ends of justice. Against this order, the firm preferred a petition under Article 227 of the Constitution to the High Court. Dealing with the matter, the High Court referred to Section 7 of the Act as it originally stood and the interpretation of the section in ***Nathu Lal* v. *State of Madhya Pradesh*** [AIR 1966 SC 43] wherein it was held that an offence under Section 7 of the Act would be committed only if a person *intentionally contravenes* any order made under Section 3 of the Act as *mens rea* was an essential ingredient of the criminal offence referred to in Section 7. The High Court then referred to the change brought about by the legislature to Section 7 after the decision in ***Nathu Lal*** case was rendered by promulgating Ordinance 6 of 1967 which was later replaced by Act 36 of 1967 and the change effected was that with effect from the date of the Ordinance i.e. 16-9-1967 the words "whether knowingly, intentionally or otherwise" were added between the word "contravenes" and the words and figure "any order made under Section 3". Interpreting the amendment made to the section the High Court held as follows:

> The plain reading of the section after its amendment made it clear that by the amendment, the legislature intended to impose strict liability for contravention of any order made under Section 3 of the Act. In other words, by the use of the express words the element of mens rea as an essential condition of the offence was excluded so that every contravention whether intentional or otherwise was made an offence under Section 7 of the Act. Thus by introducing these words in Section 7 by the aforesaid statutory amendment, the legislature made its intention explicit and nullified the effect of the Supreme Court dicta in ***Nathu Lal*** case.

8. The High Court thereafter proceeded to consider the further amendment effected to Section 7 of the Act pursuant to the recommendation of the Law Commission in its Forty-seventh Report.

9. Though for the purpose of the two appeals on hand, it would be enough if we examine the correctness of the view taken by the High Court in the light of the words contained in Section 7 of the Act as they stood at the relevant time viz. a contravention made of an order made under Section 3 "whether knowingly, intentionally or otherwise", it would not be out of place if we refer to the further change noticed by the High Court, which had been made to Section 7 by Parliament by an Ordinance which was later replaced by Amending Act 30 of 1974. The High Court has dealt with the further amendment made to Section 7(1) in the ***Swastik Oil Industries*** as follows and it is enough if we extract the same:

> But again in the year 1974, pursuant to the recommendations of the Law Commission in their Forty-seventh Report and the experience gained in the working of the Act, by an Ordinance, Section 7 of the Act was amended whereby the words 'whether knowingly, intentionally or otherwise' which were introduced by Amending Act 36 of 1967 were

deleted and the material part of Section 7(1) restored to its original frame and a new provision in Section 10 of the Act was added which reads as under:

10-C(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.— In this section, 'culpable mental state' includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability".

This Ordinance was replaced by Amending Act 30 of 1974. The effect of this subsequent change in the statute is that a presumption of guilty mind on the part of the accused in respect of offences under the Act, including Section 7, would arise and it would be open to the accused to rebut the same. As the law now stands in any prosecution under the Act which requires a culpable mental state on the part of the accused, the same must be presumed unless the accused proves that he had no such mental state with respect to the offence for which he is tried. Now according to the explanation to Section 10-C(1) culpable mental state includes intention, motive, knowledge of a fact and belief in or reason to believe a fact. The degree of proof expected to rebut the presumption has been indicated by sub-section (2) thereof which says that a fact will be said to be proved only if it exists beyond reasonable doubt and it will not be sufficient to prove its existence by preponderance of probability. Thus the burden of proof lies heavily on the accused to rebut the statutory presumption and the degree of proof expected that required for the proof of a fact by the prosecution. There can therefore be no doubt that the aforesaid legislative changes have reversed the thrust of the decision of the Supreme Court in ***Nathu Lal*** case and the same no longer holds the field.

10. Reverting back to Section 7 of the Act as amended by Act 36 of 1967, it is manifestly seen that the crucial words "whether knowingly, intentionally or otherwise" were inserted in Section 7 in order to prevent persons committing offences under the Act escaping punishment on the plea that the offences were not committed deliberately. The amendment was brought about in 1967 in order to achieve the avowed purpose and object of the legislation. To the same end, a further amendment came to be made in 1974, with which we are not now directly concerned but reference to which we have made in order to show the scheme of the Act and the amplitude of Section 7 at different stages.

11. We are in full agreement with the enunciation of law as regards Section 7 of the Act in ***Swastik Oil Industries***. We therefore hold that the trial Magistrate and the High Court were in error in taking the view that the respondents in each of the appeals were not liable for conviction for contravention of the FMC Order read with Sections 3 and 7 of the EC Act since the prosecution had failed to prove *mens rea* on their part in transporting fertiliser bags from Madhya Pradesh to Maharashtra.

12. As regards the second question, we find that the trial Magistrate and the High Court have again committed an error in taking the view that the respondents can at best be said to have only made preparations to export fertiliser bags from Madhya Pradesh to Maharashtra in contravention of the FMC Order and they cannot be found guilty of having attempted to export the fertiliser bags. In the commission of an offence there are four stages viz. intention, preparation, attempt and execution. The first two stages would not attract culpability but the third and fourth stages would certainly attract culpability. The respondents in each case were actually caught in the act of exporting fertiliser bags without a permit therefor from Madhya Pradesh to Maharashtra. The trucks were coming from Indore and were proceeding towards Maharashtra. The interception had taken place at Sendhwa sales tax barrier which is only 8 miles away from the border of Maharashtra State. If the interception had not taken place, the export would have become a completed act and the fertiliser bags would have been successfully taken to Maharashtra State in contravention of the FMC Order. It was not therefore a case of mere preparation viz. the respondents trying to procure fertiliser bags from someone or trying to engage a lorry for taking those bags to Maharashtra. They were cases where the bags had been procured and were being taken in the lorries under cover of sales invoices for being delivered to the consignees and the lorries would have entered the Maharashtra border but for their interception at the Sendhwa sales tax barrier. Surely, no one can say that the respondents were taking the lorries with the fertiliser bags in them for innocuous purposes or for mere thrill or amusement and that they would have stopped well ahead of the border and taken back the lorries and the feriliser bags to the initial place of dispatch or to some other place in Madhya Pradesh State itself. They were therefore clearly cases of attempted unlawful export of the fertiliser bags and not cases of mere preparation alone.

13. We have already seen that clause 3 forbids not only export but also attempt to export and abetment of export of any fertiliser from one State to another without a permit. It would therefore be wrong to view the act of transportation of the fertiliser bags in the trucks in question by the respondents as only a preparation to commit an offence and not an act of attempted commission of the offence. Hence the second question is also answered in favour of the State.

14. In the light of our pronouncement of the two questions of law, it goes without saying that the judgments of the trial Magistrate and the High Court under appeal should be declared erroneous and held unsustainable. The State ought to have been granted leave under Section 378(3) Cr.P.C and the High Court was wrong in declining to grant leave to the State. However, while setting aside the order of acquittal in each case and convicting the respondents for the offence with which they were charged we do not pass any order of punishment on the respondents on account of the fact that more than fifteen years have gone by since they were acquitted by the trial Magistrate. The learned Counsel for the appellant State was more interested in having the correct position of law set out than in securing punishment orders for the respondents in the two appeals for the offence committed by them. Therefore, while allowing the appeals and declaring that the trial Magistrate and the High Court were wrong in the view taken by them of the Fertiliser (Movement Control) Order read with Sections 3 and 7 of the Essential Commodities Act, we are not awarding any punishment to the respondents for the commission of the aforesaid offence.

State of Orissa v. *K. Rajeshwar Rao*

AIR 1992 SC 240

K. RAMASWAMY, J. - The respondent was found to have sold adulterated cumin (*Jira*) on March 13, 1976 punishable under Section 6(1)(a)(i) read with Section 7(1) of the Prevention of Food Adulteration Act, 1954, for short 'the Act'. Both the courts found as a fact that the adulterated cumin was exposed for sale and PW-1, the Food Inspector, purchased the cumin (*Jira*) under the provisions of the Act and on analysis by the Public Analyst it was found that it contained Section 16(1)(a)(i) read with Section 7(1) of the Act. Sub-section (1) of Section 20 of the Act reads thus:

> (1) No prosecution for an offence under this Act shall be instituted except by, or with the written consent of the Central Government or the State Government or a local authority or a person authorised in this behalf, by general or special order, by the Central Government or the State Government or a local authority.

Section 2 of the Act defines 'adulterated' that if the articles sold by a vendor is not of the nature, substance or quality demanded by the purchaser, who is to purchase, the article is adulterated. If the quality or variety of the articles fall below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability, is also adulterated. It would, therefore, be clear that the word 'adulterated' was used widely. If the food or article of food is adulterated, if it is not of the nature, substance or quality demanded by the purchaser and sold by the seller and is to his prejudice, or contains any foreign substance in excess of its prescribed limit, so as to effect injuriously, the nature, substance or quality thereof. In view of the finding of the courts below that cumin (*Jira*) was adulterated it is a sale by the vendor to the purchaser in terms of the provisions of the Act. What Section 20 envisages is that no prosecution for an offence under the Act should be instituted except by or by the written consent of the Central Government or the State Government or a local authority or a person otherwise authorised in this behalf by general or special order by the Central Government or the State Government or a local authority. Therefore, grant of sanction to prosecute for an offence under the Act is a condition precedent. The relevant criteria under Section 20(1) are the competence of the Officer to grant the sanction for the offence. It does not postulate whether the person sold should be the owner or a servant or a person on behalf of the owner (son of the owner). Section 7 prohibits manufacture, sale of certain articles of food. No 'person' shall himself or any person on his behalf manufacture for sale, or store or sell or distribute (i) any adulterated food etc. The phrase "himself or any person on his behalf" obviously included any other person like servant, son, father, or agent irrespective of the relationship legal or jural etc. The person so sold during the course of business either the owner or the person that sold the adulterated food or article of food or both are liable to prosecution.

3. It is not in dispute that the officer that granted the sanction in this case is the competent officer as a delegate on behalf of the local authority. Undoubtedly, a valid sanction is a condition precedent. If no valid sanction was granted by the authority, certainly the accused is entitled to the benefit of statutory infraction, though it is technical and be acquitted of the offence.

4. In ***Sarjoo Prasad* v. *The State of U.P.*** [(AIR 1961 SC 631)] it was contended that a servant who sold food on behalf of his employer was not liable unless it was known that he has done it with knowledge that the food was adulterated. This court held that Section 7 of the Act enjoins everyone whether an employer or a servant not to sell adulterated food and anyone who contravenes this provision is punishable under Section 16 without proof of *mens rea*. This court repelled the argument that the legislature could not have intended, having regard to the fact that large majority of servants in the shops which deal in food are illiterate to penalise servants who are not aware of the true nature of the article sold. The intention of the legislature must be gathered from the words used in the statute and not by any assumption about the capacity of the offenders to appreciate the gravity of the acts done by them. There is also no warrant for the assumption that the servants employed in shops dealing in food stuff are generally illiterate. In the interest of the public health, the Act was enacted prohibiting all persons from selling adulterated food. In the absence of any provision, express or necessarily implied from the context, the courts will not be justified in holding that the prohibition was only to apply to the owner of the shop and not to the agent of the owner who sells adulterated food. This view was reiterated in ***Ibrahim Haji Moideen* v. *Food Inspector*** [(1976) 2 FAC 66(SC)]. This court held that for the purpose of conviction under charge on which A-2 was tried. It was immaterial whether he was an agent or a partner of A-1. Once it is proved that he sold the adulterated articles, he was liable to be convicted under Section 16(1) read with Section 7 of the Act. The contention that it is only the owner of the shop that could be convicted was held to be wholly an unsustainable contention.

5. The Act is a welfare legislation to prevent health hazards by consuming adulterated food. The *mens rea* is not an essential ingredient. It is a social evil and the Act prohibits commission of the offences under the Act. The essential ingredient is sale to the purchaser by the vendor. It is not material to establish the capacity of the person *vis-a-vis* the owner of the shop to prove his authority to sell the adulterated food exposed for sale in the shop. It is enough for the prosecution to establish that the person who sold the adulterated article of food had sold it to the purchaser (including the Food Inspector) and that Food Inspector purchased the same in strict compliance with the provisions of the Act. As stated earlier the sanctioning authority has to consider the material place before it whether the offence of adulteration of food was committed and punishable under the Act. Once that satisfaction is reached and the authority is competent to grant the sanction, the sanction is valid. It is not necessary

for the sanctioning authority to consider that the person sold is the owner, servant, agent or partner or relative of the owner or was duly authorised in this behalf.

6. We have, therefore, no hesitation to hold that the courts below committed manifest error of law causing miscarriage of justice in holding that the sanctioning authority must be apprised of the status of the person that sold the adulterated food article to the Food Inspector or the purchaser. Consequently, the acquittal is set aside and the respondent is held liable to be conviction and accordingly convicted under Section 16(1)(a)(i) read with Section 7(1) of the Act. But what is the sentence to be imposed? The offence had occurred on March 13, 1976 before the Amending Act has come into force. Under the unamended Act it was not mandatory to impose the minimum sentence. For reasons to be recorded the Magistrate may impose the sentence, fine or both for the first offence and it was mandatory to impose minimum sentence for second or subsequent offences. As stated, 15 years have passed by from the date of the offence and at this distance of time the ends of justice may not serve to send the respondent to imprisonment. Suffice that he has undergone, all these years, the agony of the prosecution. But, however, the sentence of fine of a sum of Rs. 500 is imposed upon the respondent and he shall pay the same. In default he shall undergo the imprisonment for a period of one month. The appeal is accordingly allowed.

Appeal allowed.

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State of Orissa v. *Ram Bahadur Thapa*

AIR 1960 Ori. 161

R.L. NARASIMHAM, C.J. - This is an appeal by the State of Orissa against an order of acquittal passed by the Sessions Judge of Mayurbhanj in a case under Sections 302, 324 and 326 I.P.C. instituted against the respondent, a Nepali named Ram Bahadur Thapa.

2. In village Rasgovindpur in Balasore district there is an abandoned aerodrome in which was collected a large quantity of valuable aeroscrap. The Garrison Engineer of the Defence Department kept the aeroscrap in charge of two choukidars named Dibakar (P.W. 22) and Govind (P.W. 23) with a view to prevent pilferage by unauthorized persons. One Jagat Bandhu Chatterjee (P.W. 29) of the firm of Chatterji Brothers, Calcutta, came to Rasgovindpur accompanied by a Nepali servant named Ram Bahadur Thapa (respondent) sometime in April 1958 for the purpose of purchasing the said aeroscrap. He and his Nepali servant stayed in the house of one Krishna Chandra Patro (P.W. 26) who was keeping a tea stall in village Rasgovindpur. All round the aerodrome there are Adivasi villages, inhabited mostly by Santals and Majhis. These persons have strong belief in ghosts and the abandoned aerodrome earned notoriety in that area as being infested with ghosts.

There are several footpaths cutting across the aerodrome, leading from one village to another. But on account of their fear of ghosts the Adivasi would not ordinarily venture out at night alone, along those paths. On the 20th May 1958 one Chandra Majhi (P.W. 11) who is a resident of village Telkundi close by went to the tea-stall of Krishna Chandra Patro (P.W. 26) in village Rasgovindpur at about 9 p.m. and took shelter there for the night because he was afraid of proceeding alone to his village (Telkundi) at the hour of the night for fear of ghosts. But Jugal Bandha Chatterji (P.W. 20) and his Nepali servant (respondent) were anxious to see the ghosts. Hence, at about midnight they persuaded Krishna Chandra Patro (P.W. 26) to accompany them to see the ghosts and they all woke up Chandra Majhi (P.W. 11), escorted him to his village of Telkundi, and then began returning to Rasgovindpur through a foot-path across the aerodrome. While passing through camp No. IV they noticed a flickering light at a distance of about 400 cubits from the path-way. There was a strong wind blowing and the movement of the light in that breeze created in them an impression that it was not ordinary light but 'will-o' the wisp'. They also found some apparitions moving around the flickering light. They though that some ghosts were dancing round the light and they all ran towards that place.

The Nepali servant reached first, and with his 'khukri' he began to attack the ghosts indiscriminately. Krishna Chandra Patro (P.W. 26) arrived there sometime later, but the respondent did not notice him and one of his Khukri blows caused a severe injury to Krishna Chandra Patro, who screamed aloud saying that the Nepali had injured him. In the meantime other injured persons also raised a cry of distress and then the respondent stopped attacking the people. It was subsequently discovered that the persons whom he attacked and injured were some female Majhis of the locality who had collected under a 'Mohua' tree with a hurricane lantern for the purpose of gathering 'Mohua' flowers at that hour of the night. In

consequence of the indiscriminate attack by the respondent with his 'Khukri' one Gelhi Majhiani was killed, and two other females, namely, Ganga Majhiani (P.W. 28) and Saunri Majhiani (P.W. 27) were grievously injured. In addition, Krishna Chandra Patro (P.W. 26) as stated above, was also injured.

3. On the aforesaid facts the respondent was charged under Section 302 I.P.C. for the murder of Gelhi Majhiani, under Section 326 I.P.C. for having caused grievous hurt to P.Ws. 27 and 28 and under Section 324 I.P.C. for having caused hurt to Krishna Chandra Patro (P.W. 26). The learned Sessions Judge held that the respondent committed the said acts, under a *bona fide* mistake of fact, thinking that he was attacking ghosts and not human beings and hence, he acquitted him relying on Section 79 I.P.C.

4. It is not the prosecution case that the respondent had either the necessary criminal intention or knowledge and it was fairly conceded by the learned Standing Counsel that when the respondent attacked his victims he thought he was attacking ghosts and not human beings. But it was urged that the respondent did not act with due care and attention and that consequently he should have been held guilty under Section 304A. I.P.C. for having caused the death of Gelhi Majhiani and under Section 336 I.P.C. for having caused hurt to the other persons.

5. Before discussing the true import of Section 79 I.P.C. and its applicability to the facts of this case it is necessary to come to a clear finding on facts. The circumstances under which the respondent Nepali attacked the aforesaid persons are proved by two witnesses, viz., Krishna Chandra Patro (P.W. 26) and Jagat Bandhu Chatterji (P.W. 20). There are some inconsistencies in their evidence. Krishna Chandra Patro's evidence cannot be given much importance because he has materially contradicted his own previous statement made under Section 164 Cr.P.C. Thus, in his earlier statement under that section he admitted that the "Bengali Babu" (meaning P.W. 20) forced him to go out of his house at mid-night to see witches. In the Court of Session, however, he would not admit that he went with the Bengali Babu to see witches. It is true that P.W. 29 is the master of the respondent and might have some sympathy for him, but his evidence has been consistent and wherever there is any discrepancy between his evidence and that of P.W. 26, I would prefer the former. Chandra Majhi (P.W. 11) whom the party escorted to Telkundi is not also reliable because though he had stated before the Police that on account of fear of ghost he took shelter in the tea stall of P.W. 26 that night and did not venture out until P. Ws. 26 and 28 and the Nepali agreed to escort him to his village, he resiled from that statement while giving evidence in Court of Sessions Judge and tried to make it appear as though he was a brave man who had no fear of ghosts. I would not therefore attach much importance to his testimony.

6. From the evidence of P.W. 20 and those portions of the evidence of P.W. 26 which are not contradicted by his previous statement, or by the evidence of P.W. 29 the following facts clearly emerge. The respondent and his master Jagat Bandhu Chatterji were strangers to the locality having come there only 6 months before the incident. The aerodrome was reputed to be infested with ghosts and it was generally believed that on Tuesdays and Saturdays after night-fall ghosts used to move about in open fields whimpering, singing and playing blind man's buff. At about 9 P.M. on the night of occurrence which was a Tuesday, Chandra Majhi (P.W. 11) of Telkundi took shelter in the tea-stall of P.W. 26 saying that he would not venture

to go to his village on account of fear of ghosts. But P. Ws. 29 and his Nepali servant were anxious to see the ghosts and therefore they induced Krishna Chandra Patro (P.W. 26) and Chandra Majhi (P.W. 11) to accompany them at about midnight.

The whole party was thus obsessed with the idea that there were ghosts in the aerodrome and that they might be seen at that hour. After leaving Chandra Majhi at Telkundi the party returned along the foot-path cutting across the aerodrome. Just then they saw at a distance of 400 cubits away a flickering light which on account of the breeze that was then blowing appeared like "Will-O' the Wisp". There were also some figures moving around that light and P.W. 26 pointed out shouting "Here are the ghosts". Thereupon without thinking even for a moment the respondent rushed towards the alleged ghosts armed with his "Khukri" by the shortest cut and began attacking them indiscriminately. P.W. 26 followed him by a regular path but he also sustained injuries from the Khukri blows. Then he cried aloud and this brought the Nepali to his senses. P.W. 29 further admitted that the respondent Nepali was a firm believer in ghosts and stated that when the latter rushed towards the flickering light he had no doubt in his mind that he was charging ghosts and not human beings.

7. The benefit of Section 79 I.P.C. is available to a person who by reason of mistake of fact in good faith, believes himself to be justified by law in doing an act. In view of the clear evidence of P.W. 29 to the effect that the respondent thought that he was attacking ghosts he would be entitled to the benefit of that section, unless from the facts and circumstances established in the case it can be reasonably held that he did not act in good faith. Good faith required due care and attention (see Section 52 I.P.C.), but there can be no general standard of care and attention applicable to all persons and under all circumstances. As pointed out in ***Emperor* v. *Abdul Wadood Ahmed*** [5 Cr LJ 237]:

> The standard of care and caution must be judged according to the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusion of a calm and philosophical mind may differ very largely from the honest conclusions of a person excited by sectarian zeal and untrained to the habits of reasoning.
>
> The question of good faith must be considered with reference to the position of the accused and the circumstances under which he acts…. The law does not expect the same standard of care and attention from all persons regardless of the position they occupy. [See ***Bhawoo Jiwali* v. *Mulji Dayal*** (ILR 12 Bom. 377)].
>
> What is due care and attention depends on the position in which a man finds himself and varies in different cases.

8. The respondent is a Nepali servant, who was a newcomer to the place. He was a firm believer in ghosts. The aerodrome had acquired notoriety as being haunted by ghosts on Tuesdays and Saturdays and this created in him almost a certainty that ghosts would be there at about midnight on that date. The party also left Rasgovindpur for the purpose of seeing the ghosts. Neither the respondent's master (P.W. 29) nor his landlord (P.W. 26) made any effort to remove this impression from his mind. On the other hand they confirmed that impression by themselves offering to go with him for the purpose of seeing the ghosts. When they noticed the flickering light at a distance of 400 cubits it looked like "will-O' the wisp" with

some apparitions moving round it and P.W. 26 shouted "Hark, here is the ghost". Thereupon, the respondent, who was highly excited, rushed at the light and attacked the figures surrounding it immediately without pausing even for a moment. Considering the status and intellectual attainments of the respondent and the place and time and the circumstances, I do not think it can be said that he acted without due care and attention. When even persons with a higher standard of attainments like P.Ws. 26 and 29 thought that there were ghosts around the flickering light and when neither of them dissuaded the Nepali from going there and when on the other hand P.W. 26 cried out pointing out that it was a ghost it would not be proper to expect that the Nepali should have paused and examined carefully whether the persons moving round the figures were human beings or not.

His immediate reaction to such a situation was to rush at what he believed to be ghosts. It was then urged that from the evidence of P.Ws. 22 and 23 it was clear that the respondent had a torch in his hand and if he had cared to flash the torch at the moving figures around the flickering light he would at once have realised that they were human beings. If there had been any lurking doubt in his mind he would certainly have flashed the torch. But there was no reason for him to entertain any doubt whatsoever about the existence of ghosts and his two companions also not only did not disabuse him of that wrong impression but by their conduct practically confirmed the same.

9. The two leading decisions on the question of criminal liability where a person kills what he considers to be ghosts are ***Waryam Singh* v. *Emperor*** [AIR 1926 Lah 554] and ***Bouda Kui* v. *Emperor*** [AIR 1943 Pat 64]. In these two cases also, if the assailant had taken special care to ascertain who the person assailed was, he would have easily known that he was attacking a human being and not a ghost. Nevertheless the High Court held that the assailant was protected by Section 79 I.P.C. because, from the circumstances under which the apparition appeared before him and his pre-disposition, it would be reasonably inferred that he believed, in good faith, that he was attacking a ghost and not a human being. There may be slight differences on facts between these cases and the instant case. But on the evidence of the prosecution witnesses it is clear that the respondent is protected by Section 79 I.P.C. The mere fact that had he exercised extra care and attention the incident might have been averted is no ground for denying him the protection of that section.

10. The learned Sessions Judge was therefore right in acquitting the appellant. The order of acquittal is confirmed and this appeal is dismissed.

* * * * *

State of Orissa v. *Bhagaban Barik*

(1987) 2 SCC 498

A.P. SEN, J. After hearing learned counsel for the parties, we are satisfied that the judgment of acquittal entered by the High Court was apparently erroneous and has caused manifest miscarriage of justice. We are rather surprised that the High Court should have given credence to the defence plea of mistake of fact under Section 79 of the Indian Penal Code, 1860. The evidence on record shows that the respondent and the deceased had strained relations over grazing of cattle. On the date of incident the deceased had gone to the house of PW 2 for recital of Bhagbat. Some other villagers including the respondent were also present there. At about 10 p.m. recital of Bhagbat was over and the deceased returned to the house. Some time thereafter, a hue and cry was raised from near the house of the respondent. Several villagers including P.Ws 2, 3, 4 and 5 ran to the place. They saw the deceased lying on the ground in a pool of blood with a head injury. The respondent along with his mother and wife were tending the deceased and wiping out blood. The deceased was till then in his senses and on query by the villagers stated that the respondent had assaulted him. On being questioned, the respondent stated that during the daytime his bell-metal utensil had been stolen and he was keeping a watch for the thief. He saw a person coming inside his premises and thinking him to be a thief he dealt a lathi blow but subsequently discovered that it was the deceased. On being taken back to his house the deceased told his wife PW 6 that he had been assaulted by the respondent in the presence of his son and grandson P.Ws 8 and 7. The Doctor PW 9 who performed the post-mortem examination found multiple injuries on the body. On dissection he found a depressed comminuted fracture over the right perietal bone and transverse fracture extending below left parietal prominence. As per the doctor, the head injury could have been caused by a single stroke by means of a lathi if the stroke was dealt with great force. On this evidence, the learned Sessions Judge very rightly and properly held the respondent guilty of culpable homicide not amounting to murder punishable under Section 304 Part II of the Indian Penal Code.

2. According to the High Court, the dying declaration made by the deceased as also the extra-judicial confession made by the respondent showed that the deceased had kept the bell-metal utensil under water in the pond. At the time of occurrence, the deceased had been to the pond to take out the bell-metal utensil. Admittedly, it was a dark night. The defence plea was that the respondent had been apprehensive of further theft of his bell-metal utensils. When he found someone near the pond, he asked who the person was. As there was no response, believing that person to be a thief, he assaulted him but thereafter discovered that it was the deceased. The High Court held that in the circumstances, the respondent had not committed any offence and was protected under section 79 of the Indian Penal Code. It accepted that the onus to establish the facts to sustain the plea of mistake of fact under section 79 lay on the respondent and he had to establish his plea of reasonable probability or, in other words, on preponderance of probability either by adducing evidence or by cross-examining the prosecution witnesses. It referred to some cases where different High Courts under the facts and circumstances of the particular case extended the benefit of section 79 of the Indian Penal Code to the accused where it was proved that the accused had acted under a mistake of fact,

i.e., an honest and reasonable belief in the existence of circumstances which, if proved, would make the act for which the accused is indicted an innocent act.

3. Section 79 of the Indian Penal Code provides that nothing is an offence which is done by any person who is justified by law, or who by reason of mistake of fact and not by reason of mistake of law, in good faith, believes himself to be justified by law, in doing it. Under this section, although an act may not be justified by law, yet if it is done under a mistake of fact, in the belief in good faith that it is justified by law it will not be an offence. Such cases are not uncommon where the Courts in the facts and circumstances of the particular case have exonerated the accused under section 79 on the ground of his having acted in good faith under the belief, owing to a mistake of fact that he was justified in doing the act which constituted an offence. As laid down in section 52 of the Indian Penal Code, nothing is said to be done or believed in "good faith" which is done or believed without due care and attention. The question of good faith must be considered with reference to the position of the accused and the circumstances under which he acted. 'Good faith' requires not logical infallibility but due care and attention.

The question of good faith is always a question of fact to be determined in accordance with the proved facts and circumstances of each case. 'Mistake of fact.' as put succinctly in **Ratanlal and Dhirajlal's** ***Law of Crimes***, 23rd edn. p.199 means:

> 'Mistake' is not mere forgetfulness. It is a slip 'made, not by design, but by mischance'. Mistake, as the term is used in jurisprudence, is an erroneous mental condition, conception or conviction induced by ignorance, misapprehension or misunderstanding of the truth, and resulting in some act or omission done or suffered erroneously by one or both of the parties to a transaction, but without its erroneous character being intended or known at that time.

It may be laid down as a general rule that an alleged offender is deemed to have acted under that state of things which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence. In the classical work, **Russell on *Crime***, vol. 1, p. 76, the concept of mistake of fact is tersely stated thus:

> When a person is ignorant of the existence of relevant facts, or mistaken as to them, his conduct may produce harmful results which he neither intended nor foresaw.

At p. 79, the law is stated in these words:

> Mistake can be admitted as a defence provided (1) that the state of things believed to exist would, if true, have justified the act done, and (2) the mistake must be reasonable, and (3) that the mistake relates to fact and not to law.

4. The cases on which the High Court has relied were cases where the circumstances showed that the accused had acted under a *bona fide* belief that he was legally justified in doing the act owing to ignorance of the existence of relevant facts, or mistake as to them. There is no need to encumber the judgment with many citations. We would only refer to three illustrative cases. In ***Emperor* v. *Jagmohan Thukral*** [AIR 1947 All. 99] the accused while travelling from Saharanpur to Dehradun near the Mohand pass picked up the loaded gun when he saw the eyes of an animal and fired at it which unfortunately hit two military officers. There was nothing to show that the accused knew that there was a military camp or that any

military exercise was going on. The question was whether the accused was liable for having committed an offence punishable under Section 307 of the Indian Penal Code. The Court held that the accused was protected by section 79 observing:

> If he mistook something else as an animal, then section 79 Penal Code comes to his rescue.

That was a case where the accused under a *bonafide* mistake shot at an object thinking him to be an animal and the mistake was held to be one made in good faith. In ***Dhara Singh* v. *Emperor*** [AIR 1947 Lahore 249] it was held that the accused was labouring under a mistake of fact with regard to the identity of the persons who had surrounded his house followed by an exchange of fire, thinking them to be his adversaries and by reason of that mistake of fact, Explanation I to section 99 gave to him a right of private defence. This again was a case where the accused shot and killed another person under a mistaken belief, in good faith, that such person had intruded his house for the purpose of killing him and that he has a reasonable belief that he was entitled to open fire in exercise of his supposed right of private defence. In ***Chirangi* v. *State*** [AIR (1952) Nag. 282] where an accused under a moment of delusion, considered that his own son, to whom he was attached, was a tiger and he accordingly assaulted him with an axe, thinking by reason of mistake of fact that he was justified in destroying the deceased whom he did not regard to be a human being but a dangerous animal. It was held that the accused was protected under Section 79 of the Indian Penal Code. The Court held that the poignant case which resulted in a tragedy was due to delusion of mind, and stated:

> It is abundantly clear that if, Chirangi had for a single moment thought that the object of his attack was his son, he would have desisted forthwith. There was no reason of any kind why he should have attacked him and, as shown, they were mutually devoted. In short, all that happened was that the appellant in a moment of delusion had considered that his target was a tiger and he accordingly assailed it with his axe.

These considerations do not arise in the present case. There was complete absence of good faith on the part of the respondent. It cannot be doubted that the deceased and the respondent were having strained relations and the respondent knew full well that the deceased had come for the recital of Bhagbat at the house of PW 2 which he attended along with others. From the dying declaration as well as the extrajudicial confession it is apparent that the deceased after the recital of Bhagbat had gone near the pond to take the bell-metal utensil. Apparently, the respondent was waiting for an opportunity to settle the account when he struck the deceased with the lathi blow and there was no occasion for him in the circumstances proved to have believed that he was striking at a thief. This is not a case where a person being ignorant of the existence of the relevant facts or mistaken as to them is guilty of conduct which may produce harmful result which he never intended. Even if he was a thief, that fact by itself would not justify the respondent dealing a lathi blow on the head of the deceased. The deceased had not affected an entry into the house nor was he anywhere near it. He had gone to the pond to fetch his bell-metal utensil. It appears that the respondent stealthily followed him and took the opportunity to settle score by dealing him with a lathi with great force on a vulnerable part of the body like the head which resulted in his death. There is no suggestion that he wielded the lathi in the fight of self-defence. The respondent therefore must face the consequences. Although it cannot be said from the circumstances

appearing that the respondent had any intention to kill the deceased, he must in the circumstances be attributed with knowledge when he struck the deceased on the head with a lathi that it was likely to cause his death. The respondent was, therefore, guilty of culpable homicide not amounting to murder under section 304 Part II of the Indian Penal Code.

5. We, accordingly allow the appeal, set aside the judgment and order of the High Court and convict the respondent for having committed an offence punishable under section 304 Part II of the Indian Penal Code. The respondent is sentenced to undergo rigorous imprisonment for a term of three years. The bail bonds of the respondent shall stand cancelled and he shall be taken into custody forthwith to serve out the remaining part of the sentence.

Appeal allowed.

* * * * *

State of U.P. v. *Ram Swarup*

(1974) 4 SCC 764: AIR 1974 SC 1570

Y.V. CHANDRACHUD, J. - On the morning of June 7, 1970 in the sabzi-mandi at Badaun, U. P., a person called Sahib Datta Mal alias Munimji was shot dead. Ganga Ram and his three sons, Ram Swarup, Somi and Subhash were prosecuted in connection with that incident. Ram Swarup was convicted by the learned Sessions Judge, Badaun, under Section 302, Indian Penal Code, and was sentenced to death. Ganga Ram was convicted under Section 302 read with Section 34 and was sentenced to imprisonment for life. They were also convicted under the Arms Act and sentenced to concurrent terms of imprisonment. Somi and Subhash were acquitted of all the charges as also was Ganga Ram of a charge under Section 307 of the Penal Code in regard to an alleged knife-attack on one Nanak Chand.

2. The High Court of Allahabad has acquitted Ganga Ram and Ram Swarup in an appeal filed by them and has dismissed the appeal filed by the State Government challenging the acquittal of Somi and Subhash. In this appeal by special leave we are concerned only with the correctness of the judgment of acquittal in favour of Ganga Ram and Ram Swarup.

3. Except for a solitary year, Ganga Ram held from the Municipal Board of Badaun the contract of *Tehbazari* in the vegetable market from 1954 to 1969. The deceased Munimji out-bid Ganga Ram in the annual auction of 1970-71 which led to the day-light outrage of June 7, 1970.

4. At about 7 a.m. on that day Ganga Ram is alleged to have gone to the market to purchase a basket of melons. The deceased declined to sell it saying that it was already marked for another customer. Hot words followed during which the deceased, asserting his authority, said that he was the *Thekedar* of the market and his word was final. Offended by this show of authority, Ganga Ram is alleged to have left in a huff.

5. An hour later Ganga Ram went back to the market with his three sons, Ram Swarup, Somi and Subhash. Ganga Ram had a knife, Ram Swarup had a gun and the two others carried *lathis.* They threw a challenge saying that they wanted to know whose authority prevailed in the market. They advanced aggressively to the *gaddi* of the deceased who, taken by surprise, attempted to rush in a neighbouring *kothari*. But that was much too late for before he could retreat, Ram Swarup shot him dead at point-blank range.

6. It was at all stages undisputed that Ganga Ram and Ram Swarup went to the market at about 8 a.m. that one of them was armed with a gun and that a shot fired from that gun by Ram Swarup caused the death of Munimji.

7. Though there was no direct evidence of the 7 O'clock incident the learned Sessions Judge accepted the prosecution case that the shooting was preceded by that incident. In coming to that conclusion the learned Judge relied upon the evidence of Sona Ram, Nanak Chand, Shanti Lal, Shariat Ullah and Shiva Dutta Mal (P. Ws. 1 to 5) to whom the deceased had narrated the incident. These witnesses were also examined in order to establish the main incident and their evidence in that regard was also accepted by the learned Judge. Having found that these witnesses were trustworthy and that their evidence established the case of the prosecution the learned Judge proceeded to consider whether, as contended by Ganga Ram

and Ram Swarup, the shot was fired by Ram Swarup in exercise of the right of private defence. Adverting to a variety of circumstances the learned Judge rejected that theory and held that the charges levelled against the two accused were proved beyond a reasonable doubt.

8. The High Court disbelieved the evidence in regard to the 7 O'clock incident. In any case, according to the High Court, that incident was far too trifling to lead to the shooting outrage. The High Court accepted the defence version that a scuffle had taken place between the deceased Munimji and Ganga Ram and that Ganga Ram was assaulted with *lathis* by Shiva Dutta Mal (PW5) and the servants of the deceased. The High Court concluded:

> If Ganga Ram was being given repeated lathi blows by PWShiv Dutta Mal and servants of the deceased, then Ram Swarup had full justification to fire his gun in the right of private defence of the person of his father. It may be that the gun fire injured the deceased, rather than those who were belabouring Ganga Ram with lathis. But once we come to the conclusion that it was not unlikely that Ram Swarup had used his gun in the circumstances narrated above, i.e. in order to save his aged father from the clutches and assaults of his assailants, he cannot be held guilty of murder or for that matter of that of any other offence.

In regard to Ganga Ram, the High Court held that he could not be found guilty under Section 302 read with Section 34:

> as his presence in the *sabzi mandi* was not for the purpose of killing the deceased, as suggested by the prosecution, but he had more probably reached there along with his son Ram Swarup, on way back from their vegetable farm, in order to purchase melons. ....

9. The burden which rests on the prosecution to establish its case beyond a reasonable doubt is neither neutralised nor shifted because the accused pleads the right of private defence. The prosecution must discharge its initial traditional burden to establish the complicity of the accused and not until it does so can the question arise whether the accused has acted in self-defence. This position, though often overlooked, would be easy to understand if it is appreciated that the Civil Law rule of pleadings does not govern the rights of an accused in a criminal trial. Unlike in a civil case, it is open to a criminal court to find in favour of an accused on a plea not taken up by him and by so doing the Court does not invite the charge that it has made out a new case for the accused. The accused may not plead that he acted in self-defence and yet the Court may find from the evidence of the witnesses examined by the prosecution and the circumstances of the case either that what would otherwise be an offence is not one because the accused has acted within the strict confines of his right of private defence, or that the offence is mitigated because the right of private defence has been exceeded. For a moment, therefore, we will keep apart the plea of the accused and examine briefly by applying the well-known standard of proof whether the prosecution, as held by the Sessions Court, has proved its case.

10. The evidence of the five witnesses - Sona Ram, Nanak Chand, Shanti Lal, Shariat Ullah, Shiva Dutta Mal - is consistent and convincing on the broad points of the case. The Sessions Court accepted that evidence after a careful scrutiny and we are inclined to the view that the High Court was unduly suspicious of that evidence in the name of caution. The High

Court thought that the evidence of these witnesses must be viewed with great caution because Sona Ram and Shanti Lal are the first cousins of the deceased, Nanak Chand and Shiva Dutta Mal were co-sharers of the deceased in the *Tehbazari* contract, Shariat Ullah was a constituent of the deceased and because Sona Ram, Nanak Chand and Shiva Dutta Mal being co-sharers in the contract should have been moving about the market rather than remain at the *gaddi* of the deceased where he was shot down. Caution is a safe and unfailing guide in the judicial armoury but a cautious approach does not justify an *a priori* assumption that the case is shrouded in suspicion. This is exemplified by the rejection of the melon incident by the High Court on the grounds, *inter alia*, that there was no entry in the account books of the deceased evidencing the sale of the melon-basket and that the owner of the melons was not called to support the prosecution case. The point in issue was not whether the melon-basket was in truth and reality sold to another customer, in which case the evidence of the owner and the account books of the deceased would have some relevance. The point of the matter was that there was trade rivalry between the deceased and Ganga Ram, their relations were under a deep strain and therefore, the deceased declined to sell the melons to Ganga Ram. The excuse which the deceased trotted out may be true or false. And indeed, greater the falsity of that excuse, greater the affront to Ganga Ram.

11. The melon incident formed a prelude to the main occurrence and was its immediate cause. By disbelieving it or by treating it alternatively as too trifling the High Court was left to wonder why Ganga Ram and Ram Swarup went to the market armed with a gun, which they admittedly did. The case of the prosecution that they went back to the market to retaliate against the high-handedness of the deceased was unacceptable to the High Court because

> ... it does not stand to reason that the appellants and their two other companions (sons of Ganga Ram) would walk into the lion's den in broad day light and be caught and beaten up, and even be done to death by the deceased, his partners and servants, besides hundreds of people who were bound to be present in the *Sabzimandi* at about 8 a.m. Such a large congregation could have easily disarmed the appellants and their two other companions and given them a thorough beating if not mortal injuries.

Evidently, they did go to the market which to their way of thinking was not a lion's den. And they went adequately prepared to meet all eventualities. The large congregation of which the High Court speaks is often notoriously indifferent to situations involving harm or danger to others and it is contrary to common experience that anyone would readily accost a gun-man in order to disarm him.

12. The High Court saw yet another difficulty in accepting the prosecution case:

> Even if the appellants and their companions would have been so very hazardous, they could not have exposed their lives by carrying only one cartridge in the gun, if they had really gone to murder the deceased and make a safe retreat. It might very well have been that the first shot went astray and did not hit the deceased. It was, therefore, necessary to have at least both the barrells loaded with cartridges. In fact one would expect the ready availability of more cartridges with the appellants, because they were bound to fire some rounds of shots to create a scare in the crowded *Sabzimandi*, before making good their escape. For this reason also one would expect them to keep both the barrels loaded with cartridges and also to carry some spare cartridges for the sake of contingency and safety.

Murders like the one before us are not committed by coolly weighing the pros and cons. Ganga Ram and Ram Swarup were wounded by the high and mighty attitude of a trade rival and they went back to the market in a state of turmoil. They could not have paused to bother whether the double-barrelled gun contained one cartridge or two, any more than an assailant poised to stab would bother to take a spare knife. On such occasions when the mind is uncontrollably agitated, the assailants throw security to the winds and being momentarily blinded by passion are indifferent to the consequences of their action. The High Court applied to the mental processes of the respondents a test far too rigid and unrealistic than was justified by the circumstances of the case and concluded:

> It is noteworthy that P.W. 1 Sona Ram clearly admits that Ganga Ram had a farm in village Naushera, which is at a distance of two miles from Badaun. It is very likely that the two appellants must have been going every early morning to have a round of their vegetable farm and returning home therefrom at about 8 a.m. in the sultry month of June. It is not surprising that on such return to Badaun on the morning of June 7, 1970 the appellants went to the Sabzimandi in order to purchase melons, when they were called to the *Gaddi* of the deceased, ultimately resulting in the fatal occurrence, as suggested by the defence.

The High Court assumed without evidence that Ganga Ram used to carry a gun to his vegetable farm and the whole of the conclusion reproduced above would appear to be based on the thin premise that Sona Ram had admitted that Ganga Ram had a village farm situated at a distance of two miles from Badaun. We find it impossible to agree with the reasons given by the High Court as to why ‘Ganga Ram and Ram Swarup went to the market and how they happened to carry a gun with them. It is plain that being slighted by the melon incident, they went to the market to seek retribution.

13. The finding recorded by the High Court that the respondents went to the market for a casual purchase and that they happened to have a gun because it was their wont to carry a gun is the very foundation of its acceptance of the theory of private defence set up by the respondents. According to the High Court a routine visit to the market led to an unexpected quarrel between the deceased and Ganga Ram, the quarrel assumed the form of grappling, the grappling provoked the servants of the deceased to beat Ganga Ram with *lathis* and the beating impelled Ram Swarup to use the gun in defence of his father. Our view of the genesis of the shooting incident must, at the very threshold, deny to the respondents the right of private defence.

14. The right of private defence is a right of defence, not of retribution. It is available in the face of imminent peril to those who act in good faith and in no case can the right be conceded to a person who stage-manages a situation wherein the right can be used as a shield to justify an act of aggression. If a person goes with a gun to kill another, the intended victim is entitled to act in self-defence and if he so acts, there is no right in the former to kill him in order to prevent him from acting in self-defence. While providing for the right of private defence, the Penal Code has surely not devised a mechanism whereby an attack may be provoked as a pretence for killing.

15. Angered by the rebuff given by the deceased while declining to sell the melons, Ganga Ram went home and returned to the market with the young Ram Swarup who, on the finding of the High Court, carried a gun with him. Evidently, they went to the market with a

pre-conceived design to pick up a quarrel. What semblance of a right did they then have to be piqued at the resistance put up by the deceased and his men? They themselves were the lawless authors of the situation in which they found themselves and though the Common Law doctrine of "retreat to the wall" or "retreat to the ditch" as expounded by Blackstone has undergone modification and is not to be applied to cases where a victim, being in a place where he has a right to be, is in face of a grave uninvited danger, yet, at least those in fault must attempt to retreat unless the severity of the attack renders such a course impossible. The exemption from retreat is generally available to the faultless alone.

16. Quite apart from the consideration as to who was initially at fault, the extent of the harm which may lawfully be inflicted in self-defence is limited. It is a necessary incident of the right of private defence that the force used must bear a reasonable proportion to the injury to be averted, that is, the injury inflicted on the assailant must not be greater than is necessary for the protection of the person assaulted. Undoubtedly, a person in fear of his life is not expected to modulate his defence step by step or tier by tier, for as Justice Holmes said in ***Brown* v. *United States*** "detached reflection cannot be demanded in the presence of an uplifted knife". But Section 99 provides in terms clear and categorical that "the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence".

17. Compare for this purpose the injuries received by Ganga Ram with the injuries caused to the deceased in the alleged exercise of the right of private defence. Dr N. A. Farooqi who examined Ganga Ram found that he had four contusions on his person and that the injuries were simple in nature. Assuming that Ganga Ram had received these injuries before Ram Swarup fired the fatal shot, there was clearly no justification on the part of Ram Swarup to fire from his gun at point-blank range. Munimji was shot on the chest and the blackening and tattooing around the wound shows that Ram Swarup fired his shot from a very close range. Under Section 100 of the Penal Code the right of private defence of the body extends to the voluntary causing of death if the offence which occasions the exercise of the right is of such a nature as may, to the extent material, reasonably cause the apprehension that death or grievous hurt will otherwise be the consequence of the assault. Considering the nature of injuries received by Ganga Ram, it is impossible to hold that there could be a reasonable apprehension that he would be done to death or even that grievous hurt would be caused to him.

18. The presence of blood near the door leading to room No. 2 and the pellet marks on the door-frame show that Ram Swarup fired at the deceased when the latter was fleeing in fear of his life. In any event, therefore, there was no justification for killing the deceased selectively. The right of defence ends with the necessity for it. Under Section 102, Penal Code, the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises and it continues as long as such apprehension of danger continues. The High Court refused to attach any significance to the pellet-marks on the door-frame as it thought that "the gun fire which hit the *chaukhat* was not the one which struck the deceased". But this is in direct opposition to its own view that the respondents had loaded only one cartridge in the gun - a premise from which it had concluded that the respondents could not have gone to the market with an evil design. Basically, there was no reason to suppose that the shot which killed the deceased was not the one which hit the door-frame. It is quite clear that the

deceased was shot after he had left his *gaddi* and while he was about to enter room No. 2 in order to save his life.

19. It would be possible to analyse the shooting incident more minutely but it is sufficient to point out that under Section 105 of the Evidence Act, when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Penal Code, is upon him and the Court shall presume the absence of such circumstances. The High Court must, of course, have been cognizant of this provision but the judgment does not reflect its awareness of the provision and this we say not merely because Section 105 as such has not been referred to in its judgment. The importance of the matter under consideration is that Sections 96 to 106 of the Penal Code which confer and define the limits of the right of private defence constitute a general exception to the offences defined in the Code; in fact these sections are a part of Chapter IV headed "General Exceptions". Therefore, the burden of proving the existence of circumstances which would bring the case within the general exception of the right of private defence is upon the respondents and the Court must presume the absence of such circumstances. The burden which rests on the accused to prove that any of the general exceptions is attracted does not absolve the prosecution from discharging its initial burden and truly, the primary burden never shifts save when a statute displaces the presumption of innocence; "indeed, the evidence, though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence". That is to say, an accused may fail to establish affirmatively the existence of circumstances which would bring the case within a general exception and yet, the facts and circumstances proved by him, while discharging the burden under Section 105 of the Evidence Act, may be enough to cast a reasonable doubt on the case of the prosecution, in which event he would be entitled to an acquittal. The burden which rests on the accused to prove the exception is not of the same rigour as the burden on the prosecution to prove the charge beyond a reasonable doubt. It is enough for the accused to show, as in a civil case, that the preponderance of probabilities is in favour of his plea.

20. The judgment of one of us, Beg, J., in ***Rishikesh Singh* v. *State*** [AIR 1970 All 51] explains the true nature and effect of the different types of presumptions arising under Section 105 of the Evidence Act. As stated in that judgment, while the initial presumption regarding the absence of circumstances bringing the case within an exception may be met by showing the existence of appropriate facts, the burden to establish a plea of private defence by a balance of probabilities is a more difficult burden to discharge. The judgment points out that despite this position there may be cases where, though the plea of private defence is not established by an accused on a balance of probabilities, yet the totality of facts and circumstances may still throw a reasonable doubt on the existence of "*mens rea*", which normally is an essential ingredient of every offence. The present is not a case of this latter kind. Indeed realising that a simple plea of private defence may be insufficient to explain the nature of injuries caused to the deceased, Ram Swarup suggested that the shot fired by him at the assailants of his father Ganga Ram accidentally killed the deceased. We have no doubt that the act of Ram Swarup was deliberate and not accidental.

21. The respondents led no evidence to prove their defence but that is not necessary because such proof can be offered by relying on the evidence led by the prosecution, the material elicited by cross-examining the prosecution witnesses and the totality of facts and

circumstances emerging out of the evidence in the case. In view of the considerations mentioned earlier we find it impossible to hold that Ram Swarup fired the shot in defence of his father Ganga Ram. The circumstances of the case negative the existence of such a right.

22. The conclusion of the High Court in regard to Ram Swamp being plainly unsupportable and leading as it does to a manifest failure of justice, we set aside the order acquitting Ram Swarup and restore that of the Sessions Court convicting him under Section 302 of the Penal Code. The possibility of a scuffle, of course not enough to justify the killing of Munimji, but bearing relevance on the sentence cannot, however, be excluded and we would therefore reduce the sentence of death imposed on Ram Swarup by the Sessions Court to that of life imprisonment. We also confirm the order of conviction and sentence under Section 25(1) (*a*) and Section 27 of the Arms Act and direct that all the sentences shall run concurrently.

23. In regard to Ganga Ram, however, though if we were to consider his case independently for ourselves we might have come to a conclusion different from the one to which the High Court has come, the principles governing appeals under Article 136 of the Constitution would require us to restrain our hands. The incident happened within the twinkling of an eye and there is no compelling reason to differ from the concurrent finding of the High Court and the Sessions Court that Ganga Ram never carried the gun and that at all stages it was Ram Swarup who had the gun. The finding of the Sessions Court that "Ram Swarup must have shot at the deceased at the instigation of Ganga Ram" is based on no evidence for none of the five eye-witnesses speaks of any such instigation. On the contrary, Shariat Ullah (PW4) says that "as soon as they came, Ram Swarup opened the gun-fire" and Shiva Dutta Mal (PW5) says that "just after coming forward, Ram Swarup opened the gun-fire". The evidence of the other three witnesses points in the same direction. True, that these witnesses have said that Ganga Ram and Ram Swarup challenged with one voice the authority of the deceased, but in discarding that part of the evidence we do not think that the High Court has committed any palpable error requiring the interference of this Court. Such trite evidence of expostulations on the eve of an attack is often spicy and tends to strain one's credulity. We therefore confirm the order of the High Court acquitting Ganga Ram of the charge under Section 302 read with Section 34 of the Penal Code.

24. The High Court was clearly justified in acquitting Ganga Ram of the charge under Section 307, Penal Code, in regard to the knife-attack on Nanak Chand. Nanak Chand received no injury at all and the story that the knife-blow missed Nanak Chand but caused a cut on his *Kurta* and *Bandi* seems incredible. The High Court examined these clothes but found no cut marks thereon. Tears there were on the *Kurta* and *Bandi* but it is their customary privilege to be torn. With that, the conviction and sentence under the Arms Act for possession of the knife is to fall.

25. There is no substance in the charge against Ganga Ram under Section 29(6) of the Arms Act because he cannot be said to have delivered his licensed gun to Ram Swarup. The better view is that Ram Swarup took it.

26. We, therefore, confirm the order of acquittal in favour of Ganga Ram on all the counts.

* * * * *

Deo Narain v. *State of U.P.*

(1973) 1 SCC 347 : AIR 1973 SC 473

I.D. DUA, J. - This appeal is by special leave and is directed against the conviction of the appellant Deo Narain, by the High Court of Judicature at Allahabad on appeal by the State against the judgment and the order of the Sessions Judge of Ghazipur acquitting five accused persons, including the appellant of various charges including the charge under Section 302 read with Section 149, I. P. C. and in the alternative the charge against the appellant under Section 302, I. P. C.

2. It appears that there was some dispute with respect to the possession of certain plots of land in village Baruara, Police Station Dildarnagar, District Ghazipur. There were several legal proceedings between the rival parties with respect to both title and possession of the said plot. On September 17, 1965 after 12 noon there was a clash between the party of the accused and the party of the complainant. Both sides lodged reports with the police. The appellant Deo Narain, along with Chanderdeo and Lalji, two of the other accused persons acquitted by the trial court, whose acquittal was confirmed by the High Court, went to the Police Station Dildarnagar and made a report against the complainant's party about the occurrence at about 5.45 p.m. on September 17, 1965, but as the Station House Officer had already received information from the *chowkidar* that these accused persons had caused the death of one Chandrama, he took them into custody. Ram Nagina on behalf of the complainant's party lodged the report with the Police Station Kotwali which was adjacent to the District Hospital, Ghazipur and did not go to the Police Station Dildarnagar for making the report because of the long distance. The Sessions Judge, after an exhaustive discussion of the evidence produced both by the prosecution and the defence, came to the conclusion that the possession of the disputed plot of land was undoubtedly with the accused persons. The only further question which required determination by the trial court was, if the complainant's party had gone to the plot in question with an aggressive design to disturb the possession of the accused person by unlawful use of force and, if the accused persons had exceeded the right of private defence in beating and killing Chandrama and causing injuries to the other members of the complainant's party. According to the trial court the complainant's party had actually gone to the plots in question for the purpose of preventing the accused persons from cultivating and ploughing the said land. After considering the evidence on the record the trial court felt great difficulty in agreeing with either of the two rival versions given by the prosecution and the defence witness Mangia Rai about the manner in which the marpeet had taken place. The learned Sessions Judge, however, considered himself to be on firm ground in holding that the injuries suffered by Chanderdeo and Deo Narain rendered it difficult to believe that they had inflicted injuries with their spears on Bansnarain and others. It his opinion, had the accused persons been the aggressors they would not have abstained from causing injury to Raj Narain who was actually ploughing the field. In view of this improbability the learned Sessions Judge did not find it easy to place reliance on the statements of the prosecution witnesses Tin Taus, Raj Narain, Suresh and Bansnarain. Again, after examining the injuries sustained by the members of both parties, the learned Sessions Judge felt that Deo Narain and Chanderdeo must have received injuries on their heads before they inflicted injuries on the members of the

complainant's party. On this view the accused were held entitled to exercise the right of private defence, and to inflict the injuries in question in exercise of that right. On the basis of this conclusion the accused were acquitted.

3. On appeal by the State the High Court upheld the conclusions of the trial court that the accused persons had the right of private defence and that they were justified in exercising that right. But in its opinion that right had been exceeded by the appellant Deo Narain in inflicting the spear injuries on the chest of Chandrama, deceased, Chandrama had received one lacerated wound on the right side of his skull and one incised wound on the left shoulder with a punctured wound 4"deep on the right side of the chest. The last injury was responsible for his death. This injury, according to the High Court, was given by the appellant Deo Narain with his spear. The reasoning of the High Court in convicting the appellant, broadly stated, seems to be that it was only if the complainant's party had actually inflicted a serious injury on the accused that the right of private defence could arise justifying the causing of death. In the present case as only two members of the party of the accused persons, namely, Chanderdeo and Deo Narain, appellant, had received injuries which, though on the head, were not serious, they were not justified in using their spears. On this reasoning the High Court convicted the appellant, of an offence under Section 304, IPC and sentenced him to rigorous imprisonment for five years.

4. Before us the appellant's learned counsel has, after reading the relevant part of the impugned judgment of the High Court, submitted that the High Court has misdirected itself with regard to the essential ingredients and scope of the right of private defence. Our attention has been drawn to a recent decision of this Court in ***G.V. Subramanyan* v. *State of Andhra Pradesh*** [(1970) 3 SCR 473] where the scheme of the right of private defence of person and property has been analysed.

5. In our opinion, the High Court does seem to have erred in law in convicting the appellant on the ground that he had exceeded the right of private defence. What the High Court really seems to have missed is the provision of law embodied in Section 102, I. P. C. According to that section the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed, and such right continues so long as such apprehension of danger to the body continues. The threat, however, must reasonably give rise to present and imminent, and not remote or distant danger. This right rests on the general principle that where a crime is endeavoured to be committed by force, it is lawful to repel that force in self-defence. To say that the appellant could only claim the right to use force after he had sustained a serious injury by an aggressive wrongful assault is a complete misunderstanding of the law embodied in the above section. The right of private defence is available for protection against apprehended unlawful aggression and not for punishing the aggressor for the offence committed by him. It is a preventive and not punitive right. The right to punish for the commission of offences vests in the State (which has a duty to maintain law and order) and not in private individuals. If after sustaining a serious injury there is no apprehension of further danger to the body then obviously the right of private defence would not be available. In our view, therefore, as soon as the appellant reasonably apprehended danger to his body even from a real threat on the part of the party of the complainant to

assault him for the purpose of forcibly taking possession of the plots in dispute or of obstructing their cultivation, he got the right of private defence and to use adequate force against the wrongful aggressor in exercise of that right. There can be little doubt that on the conclusions of the two courts below that the party of the complainant had deliberately come to forcibly prevent or obstruct the possession of the accused persons and that this forcible obstruction and prevention was unlawful, the appellant could reasonably apprehend imminent and present danger to his body and to his companions. The complainants were clearly determined to use maximum force to achieve their end. He was thus fully justified in using force to defend himself and if necessary, also his companions, against the apprehended danger which was manifestly imminent. Again, the approach of the High Court that merely because the complainant's party had used *lathis*, the appellant was not justified in using his spear is no less misconceived and insupportable. During the course of a *marpeet*, like the present, the use of a *lathi* on the head may very well give rise to a reasonable apprehension that death of grievous hurt would result from an injury caused thereby. It cannot be laid down as a general rule that the use of a *lathi* as distinguished from the use of a spear must always be held to result only in a minor injury. Much depends on the nature of the *lathi*, the part of the body aimed at and the force used in giving the blow. Indeed, even a spear is capable of being so used as to cause a very minor injury. The High Court seems in this connection to have overlooked the provision contained in Section 100, IPC. We do not have any evidence about the size or the nature of the *lathi*. The blow, it is known, was aimed at a vulnerable part like the head. A blow by a *lathi* on the head may prove instantaneously fatal and cases are not unknown in which such a blow by a *lathi* has actually proved instantaneously fatal. If, therefore, a blow with a *lathi* is aimed at a vulnerable part like the head we do not think it can be laid down as a sound proposition of law that in such. cases the victim is not justified in using his spear in defending himself. In such moments of excitement or disturbed mental equilibrium it is somewhat difficult to expect parties facing grave aggression to coolly weigh, as if in golden scales, and calmly determine with a composed mind as to what precise kind and severity of blow would be legally sufficient for effectively meeting the unlawful aggression. No doubt, the High Court does seem to be aware of this aspect because the other accused persons were given the benefit of this rule. But while dealing with the appellant's case curiously enough the High Court has denied him the right of private defence on the sole ground that he had given a dangerous blow with considerable force with a spear on the chest of the deceased though he himself had only received a superficial *lathi* blow on his head. This view of the High Court is not only unrealistic and unpractical but also contrary to law and indeed even in conflict with its own observation that in such cases the matter cannot be weighed in scales of gold.

6. Besides, it could not be said on the facts and circumstances of this case that the learned Sessions Judge had taken an erroneous or a wholly unreasonable view on the evidence with regard to the right of private defence when acquitting all the accused persons. No doubt, on appeal against acquittal the High Court is entitled to reappraise the evidence for itself but when the evidence is capable of two reasonable views, then, the view taken by the trial court demands due consideration. It is noteworthy that the High Court considered the learned Sessions Judge to be fully justified in acquitting the other accused persons and it was only in the case of the present appellant that the right of private defence was considered to have been

exceeded on the sole ground that he had used his spear on the chest of the deceased with greater force than was necessary to prevent the deceased from committing unlawful aggression. Apparently the High Court seems to have implied that the appellant should have used the spear as a *lathi* and not the spearhead for defending himself or should have given a less forceful thrust of the spear or on a less vulnerable part of the body and not on the chest, in order to be within the legitimate limits of the right of private defence. This, as already stated, is an erroneous approach because at such moments an average human being cannot be expected to think calmly and control his action by weighing as to how much injury would sufficiently meet the aggressive designs of his opponent. As a result there is clear miscarriage of justice.

7. For the foregoing reasons this appeal succeeds and allowing the same we acquit the appellant.

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Kishan v. *State of M.P.*

(1974) 3 SCC 623: AIR 1974 SC 244

S.N. DWIVEDI, J. - It is an appeal from the judgment of the High Court of Madhya Pradesh convicting the appellant under Section 302, IPC and sentencing him to imprisonment for life. By the same judgment the High Court convicted Ganesh and Damrulal under Section 323, IPC. and imposed a sentence of Rs 50 each. They have not appealed.

2. The aforesaid three persons were tried for the murder of one Bucha by the Additional Sessions Judge, Tikamgarh. The prosecution case was this: On May 4, 1968, Damrulal went to the house of Bucha while he was supervising foundation-digging near his house. Damrulal warned the deceased to abstain from using bricks belonging to him. Bucha replied that he was using his own bricks. Then there was an exchange of hot words between them. Thereafter Damrulal left the place angrily after giving a warning to Bucha that he would soon settle the score. The work came to a stop at about 9 a. m., and the labourers left the place. While the deceased was taking his meal in the verandah of his house, Damrulal, Ganesh and the appellant along with their brother Har Charan arrived there. Ganesh exhorted his brother Har Charan to catch hold of Bucha and kill him. Bucha was dragged out of his house up to a nearby neem tree. There he was given a beating by fists and kicks by the appellant and his three brothers. Bucha contrived to extricate himself from their grip and picked up a *Khutai* lying nearby. He gave three blows on the head of Har Charan with the *Khutai*. Har Charan fell down on the ground and became unconscious. Thereafter the appellant and his remaining two brothers, Ganesh and Damrulal, caught hold of Bucha. The appellant snatched the *Khutai* from the hand of Bucha and gave two or three blows on his head. Bucha fell down on the ground and became unconscious. The appellant, Ganesh and Damrulal carried away Har Charan in a cart and lodged a report with the police. Kanhaiyalal PW6, lodged the F. I. R. about the incident in the Police Station, Prithvipur. Bucha died soon afterwards.

3. The prosecution examined four eye-witnesses of the occurrence. Kanhaiyalal, PW6, Mst. Khumania, PW1, Mst. Tijia, PW2 and Bhagola, PW3. Kanhaiyalal was declared hostile by the prosecution. The Additional Sessions Judge relied on the evidence of Mst. Khumania, Mst. Tijia and Bhagola to the extent that the appellant, Ganesh and Damrulal along with the deceased Har Charan had gone to the house of Bucha and beaten him by fists and kicks. He also found that Bucha extricated himself from their hold and picked up a *khutai*. He gave three blows on the head of Har Charan. Har Charan fell down and became unconscious. The appellant grappled with Bucha and snatched the *khutai* from his hand. He then gave two or three blows on the head of Bucha. Bucha fell down and became unconscious. The Sessions Judge found that Ganesh and Damrulal did not participate in beating Bucha after Har Charan had fallen down on the ground. Accordingly, he held that only the appellant was responsible for causing injuries to Bucha. He was of opinion that after Bucha was in possession of the *khutai* there was a reasonable apprehension of grievous injury in the mind of the appellant. So when the appellant snatched the *khutai* from his hand and struck blows on his head, he was acting in exercise of the right of self-defence. The appellant had no intention to cause grievous hurt to Bucha or to take his life. Bucha was the aggressor. The Sessions Judge considered that the appellant could be held guilty under Section 304 Part II, I. P. C., but as he

has acted in exercise of the right of self-defence, he was not guilty of that offence. The Sessions Judge, therefore, acquitted the appellant as well as his co-accused.

4. The State appealed against the judgment of the Sessions Judge to the High Court. The High Court did not rely on the evidence of Kanhaiyalal. The High Court, however, relied on the evidence of Mst. Khumania, Fijia and Bhagola. Agreeing with the Sessions Judge, the High Court has held that the appellant had inflicted blows on the head of the deceased Bucha by the *khutai*. The High Court has further agreed with the Sessions Judge that Ganesh did not instigate the appellant to kill Bucha. But there the area of agreement between them ends. Disagreeing with the Sessions Judge, the High Court has held that the appellant and his co-accused were the aggressors; Bucha was not an aggressor. So the appellant could not claim to have beaten Bucha in exercise of the right of self-defence. The High Court said:

> The respondents had come prepared to beat the deceased and, as stated above, were the aggressors. The respondents, therefore, could not claim protection under a right to defend against Bucha who, in exercise of the right of private defence, wielded the *khutai* causing serious injuries and even death of one of the attackers.

In the result, the High Court has convicted the appellant of the offence of murder under Section 302, I. P. C.

5. Counsel for the appellant has addressed us on two points. Firstly, he has urged that the appellant has acted in exercise of the right of self-defence. Secondly, he has submitted that the appellant's act of causing injury to Bucha falls not within Section 302, but within Section 304 Part II, I. P. C.

6. We are unable to accept these arguments. The finding of the Courts below is that the appellant along with his three brothers, Ganesh, Damrulal and Har Charan went to the house of Bucha, pulled him out of his house upto the neem tree and there subjected him to punching and kicking. So they were the aggressors. They took the law in their own hands. Bucha contrived to escape from their grip, caught hold of the *khutai* and struck three blows on the head of Har Charan. Bucha was then acting in exercise of the right of self-defence. Therefore, he was not an aggressor. The appellant could not claim to have beaten Bucha in exercise of the right of self-defence.

7. Turning to the second argument, the appellant and his co-accused had gone to the house of Bucha with the intention of causing physical harm to him. They went unarmed to his house. So they did not then have any intention to kill him. Bucha picked up the *khutai* and inflicted deadly blows on the head of Har Charan, a brother of the appellant. Har Charan fell down and became unconscious. (He died soon thereafter.) At that moment the appellant hurled the *khutai* on the head of Bucha. The blow was so severe that there was profuse bleeding inside the brain. One of the skull fractures extended from the right temporal region to the left temporal region and proceeded internally to the base of the skull. Dr S. N. Banerji, who did the autopsy on the dead body of Bucha has deposed: "With these injuries death was inevitable". This medical opinion clearly brings the case of the appellant within the purview of Section 300, third clause. So the High Court is right in convicting him under Section 302, I. P. C. The appeal is accordingly dismissed.

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Mahabir Choudhary v. *State of Bihar*

(1996) 5 SCC 107

THOMAS, J.— Thirteen persons were arraigned in the trial court to face charges for offences including Section 302 read with Section 149 of IPC, out of which the Sessions Court convicted only four of them under Section 304 Part I of IPC and Section 25(1) of the Arms Act, 1959. Others were acquitted. The convicted persons were sentenced to rigorous imprisonment for 5 years each on the first count and rigorous imprisonment for 6 months each on the second count. They filed an appeal before the Patna High Court. The State of Bihar filed another appeal challenging acquittal of 9 accused as well as the order exonerating the convicted persons of the offence under Section 302 IPC. At the appellate stage there was reversal of fortune for all the arraigned persons as the High Court found all of them guilty under Section 302 read with Section 149 IPC. Hence the present appeals by the accused persons by special leave.

2. We are informed that during the pendency of these appeals two of the appellants (Sheonandan Choudhary and Ram Ishwar Choudhary) have expired. It is also reported that appellant Ganesh Choudhary has become insane and has gone out of his house and his whereabouts are not known.

3. The incident which led to the prosecution of all the 13 appellants happened during the morning hours on 15-10-1974, in which three persons [(1) Daroga, (2) Kewal and (3) Hit Narain] died. All the deceased hailed from a village called Malpura which is situated a little north of Kusi village. A water stream starting from another village (Parsar Ahar - situated south of Kusi village) flowed northwards reaching up to Kusi. Appellants are inhabitants of Kusi village. As there was acute drought condition, people of Malpura were in need of water.

4. Prosecution case, in short, is thus: The three deceased visited Kusi village on the eve of the occurrence and cut open a bund which blocked the water flowing further north. This act of the deceased was questioned by some of the appellants, but their protestations were not heeded to by the deceased. On the morning of 15-10-1974, situation further deteriorated with exchange of words between the two factions when those hailing from Malpura forcefully resisted the attempt of the appellants to restore the bund. All the appellants gathered up with guns, lathis, etc. The four appellants who were convicted by the trial court used guns to fire down one or the other of the three deceased and consequently the deceased died of gunshot injuries. The remaining persons who came from Malpura village retreated and fled from the scene.

5. The learned Sessions Judge found that the prosecution succeeded in establishing that the four convicted persons fired guns at the deceased. However, the learned Sessions Judge took the view that the appellants had right of private defence of property as the deceased committed mischief by cutting open the bund to block the water flow. But the trial court further found that the four convicted persons who used firearms had exceeded their right of private defence and hence they were convicted only of the offence under Section 304 Part I of IPC.

6. The High Court, in reversal of the above findings, concluded that all the 13 accused had formed themselves into an unlawful assembly with the common object of murdering the three deceased and that none had the right of private defence at the relevant time.

7. We have no reason to disturb the finding that four appellants had used guns and shot down the three deceased. So the only question for our consideration is whether the High Court was justified in denying initial right of private defence to these appellants.

8. The learned Judges of the High Court have observed:

> Even if mischief had been committed by Malpura people the same was continuing for three days preceding the occurrence, and hence there was no occasion for them to take the law into their own hands for attacking Malpura people.

The High Court further pointed out from the evidence that a cut portion of the bund was filled up by Kusi people and there was some altercation and exchange of abusive words, and when Malpura people came shouting, some of them carrying *lathis*, the four accused took out their guns which they had concealed in the paddy field and started firing indiscriminately. The High Court then proceeded to observe thus:

> In such a situation it is difficult to accept that the accused persons were protected by the right of private defence of person and property. So far as property is concerned mischief was caused to the property but it was not caused under such circumstances as may reasonably cause apprehension in the minds of the accused persons that death or grievous hurt will be the consequence if such right of private defence was not exercised.

The High Court further observed that simply because some persons came shouting from Village Malpura was not enough to give rise to a reasonable apprehension that grievous hurt would be inflicted on the accused.

9. Section 97 IPC recognises the right of a person not only to defend his own or another's body but to defend his own or another's property even against an attempt to inflict any offensive act as against the property. It is now well settled that the rule of retreat which common law courts espoused is not relevant under the Indian Penal Code. If a man's property is in imminent danger of being impaired or attacked he has the right to resort to such measures as would be reasonably necessary to thwart the attempt to protect his property. In ***Jai Dev* v. *State of Punjab*** this Court has observed that in India there is no rule which expects a man to run away when confronted with a situation where he can exercise his right of private defence.

10. No doubt Section 103 IPC, which deals with right of private defence as against an act which might be mischief or theft or criminal trespass, conditions that there should be reasonable apprehension that death or grievous hurt would otherwise be the consequence. But, that provision deals with the farthest extent of the right of private defence as against the above three categories of wrongs against the property. But a man pitted against such wrongs or even against attempts thereof need not wait for exercising his right of private defence until the apprehension of death or grievous hurt is burgeoned in his mind. The Penal Code envisages two measures of right of private defence. One is the first degree which shall not reach up to causing of death of the wrongdoer. The other is the full measure which may go up to causing death. Both measures are, however, subjected to the restrictions enumerated in Section 99.

Section 104 IPC contains the bridle that right of private defence shall not cross the limit of first degree as against acts which would remain as theft, mischief or criminal trespass. But Section 103 recognises extension of the said right up to the full measure, even as against the aforesaid acts but only if such acts or their attempts are capable of inculcating reasonable apprehension in the mind that death or grievous hurt would be the consequence if the right is not exercised in such full measure.

11. The emerging position is, you have the first degree of right of private defence even if the wrong committed or attempted to be committed against you is theft or mischief or criminal trespass *simpliciter*. This right of private defence cannot be used to kill the wrongdoer unless you have reasonable cause to fear that otherwise death or grievous hurt might ensue in which case you have the full measure of right of private defence.

12. When the acts of Malpura people amounted to mischief, the appellants had a right of private defence to thwart the same. In the course of exercise of such right the appellants who gunned down the mischief-makers have obviously acted far in excess of the right of private defence. Nonetheless the first degree of right of private defence cannot be denied to them.

13. We are, therefore, of the view that the High Court was in error in holding that the appellants had no right of private defence at any stage. The trial court was correct in its approach regarding that aspect of the matter. We, therefore, allow these appeals and set aside the judgment of the High Court. The conviction and sentence passed by the Sessions Court will stand.

* * * * *

James Martin v. *State of Kerala*

(2004) 2 SCC 203

ARIJIT PASAYAT, J. Self-preservation is the prime instinct of every human being. The right of private defence is a recognized right in the criminal law. Therefore, Section 96 of Indian Penal Code, 1860 (in short 'the IPC') provides that nothing is an offence which is done in the exercise of the right of private defence. The question is, as happens in many cases, where exercise of such rights is claimed, whether the "*Lakshman Rekha*", applicable to its exercise has been exceeded. Section 99 IPC delineates the extent to which the right may be exercised.

2. The claim was made by the accused in the following background:

Appellant, James Martin, faced trial along with his father Xavier for alleged commission of offences punishable under Sections 302, 307, 326 read with Section 34 and Section 326 read with Section 114 IPC and Section 25(B)(1) of the of the Arms Act, 1959 (in short 'the Act') and Sections 27 and 30 thereof. Learned Sessions Judge, N. Paravur, found the present appellant (A-1) guilty of offences punishable under Section 304 Part I, 326 and 324 IPC, while the other accused was found guilty of the offences punishable under Section 304 Part I read with Section 34, 302 read with Sections 24, 324 IPC. Both the accused persons were sentenced to undergo imprisonment for 7 years and for the second offence, 2 years RI and fine of Rs.20,000/- with default stipulation of 1 year sentence. It was directed that in case fine was realized it was to be paid to PW-3. Each of the accused was also to undergo a sentence of RI for 1 year for the offence punishable under Section 324 IPC and to pay a fine of Rs.5,000/- with default stipulation of 6 months sentence. The fine, if any on realisation, was directed to be paid to PW-7 and PW-8. The fine was directed to be paid to PW-8. The sentences were directed to run concurrently.

5. The matrix of the litigation related to a *Bharat Bandh* on 15.3.1988 sponsored by some political parties. Prosecution version as unfolded during trial is as follows:

Most of the shops and offices were closed and vehicles were off the road. There were isolated instances of defiance to the *bandh* call and some incidents had taken place that, however, did not escalate to uncontrolled dimensions. Cheranelloor, where the concerned incidents took place, is a politically sensitive suburb of Kochi where accused appellant James and his father Xavier had their residence, besides a bread factory and a flour mill in the same compound. It was not anybody's case that they belonged to any political party or had credentials, which were unwholesome. By normal reckoning, their business activities flourished well. They owned a tempo van and other vehicles which were parked inside the compound itself. It was, however, said that their success in business was a matter of envy for Thomas Francis, their neighbour, particularly who filed complaints to the local authorities against the conduct of the mill and the factory and also filed a writ petition to get them closed down, but without success. He was one of the accused in S.C.No.74 of 1991 and according to the accused appellant-James was the kingpin and that the incident was wrought by him out of hatred and deep animosity towards James and Xavier.

6. The incident involved in this case took place at about 2.30 p.m. on 15.3.1988 when five young men, the two deceased in this case, namely, Mohan and Basheer (hereinafter referred to as 'deceased' by their respective name), and PW-1, PW-2 and PW-4, who were activists of the *bandh*, as followers of the political parties which organized that *bandh* on that day, got into the flour mill of the A-2 through the unlocked gate leading access to that mill situate in a property comprising the residential building, a bread factory and other structures belonging to that accused. This group of five men on passing beside the mill of A-2 while they were perambulating the streets of Cheranelloor to have a first hand information as to the observance of the *bandh* on coming to know of the operation of the flour mill by A-2 proceeded to that place and made demands to PW-15, the employee of A-2 who was operating the mill to close down. An altercation took place between them and on hearing the commotion the accused, A-1 and A-2 who were inside their residential building, situate to the west of that mill, rushed to the place and directed the *bandh* activists to go out of the mill. As the activists of the *bandh* persisted in their demands for closing the mill, according to the prosecution, A-2 got out of the mill and on the instruction given by A-2, A-1 locked the gate of the compound from inside. Then both of them rushed back to the house with A-2 directing A-1 to take out the gun and shoot down the *bandh* activists by declaring that all of them should be finished off. On getting into the house and after closing the outer door of that building, both the accused rushed to the southern room of that building which faced the gate with a window opening to that side. The 1st accused on the instigation of the 2nd accused, his father, and having that accused beside him, fired at the *bandh* activists, who by that time had approached near the locked gate, by using an S.B.B.L. Gun through the window. The first shot fired from the gun hit against one of the *bandh* activists, who had got into the compound, namely Basheer, and he fell down beside the gate. The other four *bandh* activists requesting the 1st accused not to open fire rushed towards Basheer and, according to the prosecution, the first accused fired again with the gun indiscriminately causing injuries to all of them. Even when the first shot was fired from the gun, passersby in the road situate in front of that property also sustained injuries. When the firing continued as stated above some of the residents of the area who were standing beside the road also received gun shot injuries. On hearing the gun shots people of the locality rushed to the scene of occurrence and some of them by scaling over the locked gate broke open the lock and removed the injured to the road, from where they were rushed to the hospital in a tempo van along with the other injured who had also sustained gun shot injuries while they were standing beside the road. One among the injured, namely, Mohanan breathed his last while he was transported in the tempo to the hospital and another, namely, Basheer, succumbed to his injuries after being admitted at City Hospital, Ernakulam. All the other injured were admitted in that hospital to provide them treatment for the injuries sustained. After the removal of the injured to the hospital in the tempo as aforesaid, a violent mob which collected at the scene of occurrence set fire to the residential building, flour mill, bread factory, household articles, cycles, a tempo and scooter, parked in front of the residential building of the accused, infuriated by the heinous act of the accused in firing at the *bandh* activists and other innocent people as aforesaid. Soon after the firing both the accused and PW-15 escaped from the scene of occurrence and took shelter in a nearby house.

7. The information as to the occurrence of a skirmish and altercation between *bandh* activists and the accused and of an incident involving firing at Cheranelloor was received by the police at Kalamassery Police Station from the Fire Station at Gandhi Nagar, Ernakulam, which was informed of such an incident over phone by a resident living close to the place of occurrence.

8. The accused on the other hand, took the stand that the firing resulting in the death of two *bandh* activists and sustaining of grievous injuries to several others occurred when their house and other buildings, situated in a common compound bounded with well protected boundary walls, and movable properties kept therein were set on fire by an angry mob of *bandh* activists when the accused failed to heed their unlawful demand to close down the flour mill which was operated on that day.

9. The trial Court discarded the prosecution version that the deceased and P.Ws who had sustained injuries had gone through the gate as claimed. On analysing the evidence it was concluded that they had scaled the walls. Their entry into premises of the accused was not lawful. It was also held that PW-15 was roughed up by the bandh activists, making him run away. A significant conclusion was arrived at that they were prepared and in fact used muscle power to achieve their ends in making the bandh a success. It was categorically held that the bandh activists on getting into the mill threatened, intimidated and assaulted PW-15 so as to compel him to close down the mill. He sustained injuries, and bandh activists indulged in violence before the firing took place at the place of occurrence. Accused asked PW-1, PW-2 and PW-4 to leave the place. It was noticed by the trial Court that the activists were in a foul and violent mood and had beaten up one Jossy, and this indicated their aggressive mood. They were armed with sharp edged weapons. Finally, it was concluded that the right of private defence was exceeded in its exercise.

10. On consideration of the evidence on record as noted above, the conviction was made by the trial Court and sentence was imposed. The trial Court came to hold that though the accused persons claimed alleged exercise of right of private defence the same was exceeded. The view was endorsed by the High Court by the impugned judgment so far as the present appellant is concerned. But benefit of doubt was given to A-2, father of the present appellant.

11. Mr. Sushil Kumar, learned senior counsel for the appellant submitted that the factual scenario clearly shows as to how the appellant was faced with the violent acts of the prosecution witnesses. Admittedly, all of them had forcibly entered into the premises of the appellant. PW-15 one of employees was inflicted severe injuries. In this background, the accused acted in exercise of right of private defence and there was no question of exceeding such right, as held by the trial Court and the High Court.

12. In response, learned counsel for the State submitted that after analyzing the factual position the trial Court and the High Court have rightly held that the accused exceeded the right of private defence and when two persons have lost lives, it cannot be said that the act done by the accused was within the permissible limits. He also pressed for accepting the prayer in the connected SLPs relating to acquittal of A-2 and conviction of the accused-appellant under Section 304 Part I.

13. The only question which needs to be considered is the alleged exercise of right of private defence. Section 96, IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The Section 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. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short 'the Evidence Act'), 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. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. 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. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. [See ***Munshi Ram* v. *Delhi Administration*** (AIR 1968 SC 702), ***State of Gujarat* v. *Bai Fatima*** (AIR 1975 SC 1478), ***State of U.P.* v. *Mohd. Musheer Khan*** (AIR 1977 SC 2226) and ***Mohinder Pal Jolly* v. *State of Punjab*** (AIR 1979 SC 577)]. Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft quoted observation of this Court in ***Salim Zia* v. *State of U.P.*** [AIR 1979 SC 391] runs as follows:

> It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence.

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

14. 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. The defence has to further establish that the injuries so caused on the accused probabilise the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the 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 credit worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. [See ***Lakshmi Singh*** **v.** ***State of Bihar*** (AIR 1976 SC 2263)]. 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. Section 97 deals with the subject matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101, IPC define the limit and extent of right of private defence.

15. Sections 102 and 105, IPC deal with commencement and continuance of the right of private defence of body and property respectively. The right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, or 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 ***Jai Dev*** **v.** ***State of Punjab*** [AIR 1963 SC 612] it was observed that as soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to route, there can be no occasion to exercise the right of private defence.

16. 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. Similar view was expressed by this Court in ***Biran Singh* v. *State of Bihar*** (AIR 1975 SC 87). [See: ***Wassan Singh* v. *State of Punjab,*** (1996) 1 SCC 458, ***Sekar* v. *State,*** (2002) 8 SCC 354].

17. 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 the 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 as is commensurate with the danger apprehended by 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 negatived. 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.

18. The right of self-defence is a very valuable right, serving a social purpose and should not be construed narrowly. [See ***Vidhya Singh*** v. ***State of M.P.*** (AIR 1971 SC 1857)]. Situations have to be judged from the subjective point of view of the accused concerned, in the surrounding excitement and confusion of the moment, confronted with a situation of peril and not by any microscopic and pedantic scrutiny. In adjudging the question as to whether more force than was necessary was used in the prevailing circumstances on the spot it would be inappropriate, as held by this Court, to adopt tests by detached objectivity which would be so natural in a Court room, or that which would seem absolutely necessary to a perfectly cool bystander. 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.

19. In the illuminating words of Russell (**Russell on *Crime***, 11th Edition, Volume I at page 49):

> a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases, he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended and if in a conflict between them he happens to kill his attacker, such killing is justifiable.

20. The right of private defence is essentially a defensive right circumscribed by the governing statute i.e. the IPC, available only when the circumstances clearly justify it. It

should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defense, not of retribution, expected to repel unlawful aggression and not as a retaliatory measure. While providing for exercise of the right, care has been taken in the IPC not to provide and has not devised a mechanism whereby an attack may be a pretence for killing. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived.

21. The background facts as noted by the trial Court and the High Court clearly show that the threat to life and property of the accused was not only imminent but did not cease, and it continued unabated. Not only there were acts of vandalism, but also destruction of property. The High Court noticed that explosive substances were used to destroy the properties of the accused, but did not specifically answer the question as to whether destruction was prior or subsequent to the shooting by the accused. The High Court did not find the prosecution evidence sufficient to decide the question. In such an event the evidence of PW-15 who was also a victim assumes importance. The High Court without indicating any acceptable reason held on mere assumptions that his sympathy lies with the accused. The conclusion was unwarranted, because the testimony was acted upon by the Courts below as a truthful version of the incident. The trial Court found that an unruly situation prevailed in the compound of the accused as a result of the violence perpetrated by the *bandh* activists who got into the place by scaling over the locked gate and that their entry was unlawful too, besides intimidating and assaulting PW-15 and making him flee without shutting down the machines. The circumstances were also found to have necessitated a right of private defence. Even the High Court, candidly found that a tense situation was caused by the deceased and his friends, that PW-15 suffered violence and obviously there was the threat of more violence to the person and properties, that the events taking place generated a sort of frenzy and excitement rendering the situation explosive and beyond compromise. Despite all these to expect the accused to remain calm or to observe greater restraint in the teeth of the further facts found that the accused had only PW-15 who was already manhandled though they were outnumbered by their opponents (the *bandh* activists) and whose attitude was anything but peaceful would be not only too much to be desired but being unreasonably harsh and uncharitable, merely carried away only by considerations of sympathy for the lives lost, on taking a final account of what happened ultimately after everything was over. In the circumstances, the inevitable conclusion is that the acts done by the accused were in the reasonable limits of exercise of his right of private defence and he was entitled to the protection afforded in law under Section 96 IPC.

22. Accordingly we set aside the conviction and sentence imposed. The appeal is allowed. The bail bonds shall stand discharged so far as the present accused is concerned.

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Queen-Empress v. *Kader Nasyer Shah*

(1896) ILR 23 Cal. 604

O. KINEALY AND BANERJEE, JJ. -- The appellant, Kader Pasyer, was tried before the Sessions Court of Rungpur on a charge of murder for causing the death of a boy named Abdul, aged about eight years. His plea was that he "was mad when he strangled the boy". The two assessors were both for acquitting him on the ground of unsoundness of mind, but the learned Sessions Judge disagreeing with them has convicted him of murder and sentenced him under Section 302 of the Indian Penal Code to transportation for life.

Two questions arise for determination in this appeal : First, whether the appellant killed the boy; and, second, whether, if he did so, he is guilty of murder, or is entitled to be acquitted on the ground of unsoundness of mind.

The evidence for the prosecution consists of the depositions of Jalad Mahomed, the father of the boy Abdul, Kakum and Khanullah, two neighbours, and Gopal Chunder Chowdhury, the Police Head Constable, examined before the sessions court, of two depositions of the Civil Surgeon examined in the course of the preliminary inquiry and in the statements of the accused. The two depositions of the cure Surgeon should be left out of consideration, as one of them was taken when the accused as the committing Magistrate remarks go to show was not in a fit state of mind to be able to make his defence or to cross-examine witnesses, and the other was taken by commission and not in the presence of the accused, as required by Section 50 of the Criminal Procedure Code which makes deposition of medical witnesses taken before the committing magistrate admissible at the Sessions trial. Jalad, the father of the boy Abdul accused in morning when he went to his zemindar's *cutchery* on business; that on his return home late in the afternoon he did not find either the boy or the accused; and that on making a search he found the dead body of the boy in a deserted house not far from his own, and the next day he found the accused hiding himself in a jungle at a short distance. The witness Kakum says that on the day of the occurrence he saw the accused carrying a dead body in his arms in the direction of the deserted house, in which the corpse was subsequently discovered. The witnesses, Khanullah and Gopal Chunder, depose to what transpired in the course of the police investigation; and as nothing of importance occurred in the course of that investigation, we need not refer to their evidence in detail.

For the defence three neighbours were examined. Their evidence does not touch the question as to who killed the child, and it is directed only towards showing that the accused had been in an unsound state of mind for some months preceding the occurrence; it being suggested that his unsoundness of mind was the result of the shock received by him from the destruction of his house and property by fire.

The evidence of the witnesses examined before the Sessions Court taken with the two statements of the accused before the committing Magistrate, in one of which he stated that he had a feeling in his head and he killed the child by pressing his throat, and in the other, that he was in a state of insanity and did not know what he did, and taken also with his plea before the Sessions Court, goes clearly to show that the accused caused the death of the boy Abdul; and so the first of the two questions stated above must be answered in the affirmative.

The answer to the second question, however, is not equally easy. It is not doubt clear from the evidence that the accused had been suffering from mental derangement for some months previous to the date of fire; that on one occasion he was seen eating potsherds; and that he often complained of pain in the head. It also appears that when the inquiry preliminary to the commitment taken up, he was found not to be in a fit state of mind to be able to make his defence; and the inquiry was not resumed until/somewhat more than a year after when he was pronounced fit to be able to take his trial. The murder, moreover, was committed without any apparent sane motive. The evidence shows that the accused was fond of the boy, and he had no quarrel with the boy's father. On the other hand, however, it must be borne in mind that the accused observed some secrecy in committing the murder. He tried to conceal the corpse, and he hid himself in a jungle.

Are the circumstances then sufficient to exempt the accused from responsibility for the crime? The act done by him, unless he is shown to be exempted from criminal responsibility, is evidently murder, and it lies upon the accused under section 105 of the Evidence Act to show that he is exempted from criminal responsibility by reason of unsoundness of mind. It must also be borne in mind that it is not every form of unsoundness of mind that would exempt one from criminal responsibility.

The law on the subject is that laid down in section 84 of the Indian Penal Code which enacts that "nothing is an offence which is done by a person who at the time of doing it by reason of unsoundness of mind is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law". This provision of our law, which is in substance the same as that laid down in the answers of the Judges to the questions put to them by the House of Lords in McNaughten's case shows that it is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law. Instances of unsoundness of mind of this description would be such as these : A person strikes another, and in consequence of an insane delusion thinks he is breaking a jar. Here he does not know the nature of the act. Or he may kill a child under an insane delusion that he is saving him from sin and sending him to heaven. Here he is incapable of knowing by reason of insanity that he is doing what is morally wrong. Or he may under insane delusion believe an innocent man whom he kills to be a man that was going to take his life; in which case, by reason of his insane delusion, he is incapable of knowing that he is doing what is contrary to the law of the land.

We learn, however, from medical and legal authorities who have considered the subject of responsibility in mental disease (see **MAUDSLEY'S RESPONSIBILITY IN MENTAL DISEASE**, Ch. III, Bucknill and Tuke's **PSYCHOLOGICAL MEDICINE** (p. 269, and **STEPHEN'S HISTORY OF THE CRIMINAL LAW OF ENGLAND**, Vol. II, ch. XIX) that insanity affects not only the cognitive faculties of the mind which guide our actions, but also our emotions which prompt our actions, and the will by which our actions are performed. It may be that our law, like the law of England, limits non-liability only to those cases in which insanity affects the cognitive faculties; because it is thought that those are the cases to which the exemption rightly applies, and the cases, in which insanity affects only the emotions and the will, subjecting the offender

to impulses, whilst it leaves the cognitive faculties unimpaired, have been left outside the exception, because it has been thought that the object of the criminal law is to make people control their insane as well as their sane impulses, or to use the words of Lord Justice Bramwell in ***Reg.* v. *Humphreys*** (10 Clark & Finnelly, 200) (see **TAYLOR'S MANUAL OF MEDICAL JURISPRUDENCE,** 10th Edition, p. 745) "to guard against mischievous propensities and homicidal impulses". Whether this is the proper view to take of the matter, or whether the exemption ought to be extended as well to the cases in which insanity affects the emotions and will as to those in which it affects the cognitive faculties, is a question which it is not for us here to consider. There are no doubt eminent authorities who are in favour of extending the exemption to those cases, but our duty is to administer the law as we find it. It might be said of our law as it has been said of the law of England by Sir J. Stephen (see his **HISTORY OF THE CRIMINAL LAW OF ENGLAND,** Vol. II, ch. XIX, p. 167) that even as it stands, the law extends the exemption as well to cases where insanity affects the offender's will and emotions as to those where it affects his cognitive faculties, because where the will and emotions are affected by the offender being subjected to insane impulses, it is difficult to say that his cognitive faculties are not affected. In extreme cases that may be true; but we are not prepared to accept the view as generally correct that a person is entitled to exemption from criminal liability under our law in cases in which it is only shown that he is subject to insane impulses, notwithstanding that it may appear clear that his cognitive faculties, so far as we can judge from his acts and words, are left unimpaired. To take such a view as this would be to go against the plain language of section 84 of the Indian Penal Code, and the received interpretation of that section..

Applying then the law as we understand it to the facts of this case, we must say we are unable to hold that it has been shown that the accused, at the time he killed the child, was, by reason of unsoundness of mind, incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law. The circumstances attending the murder go to show that he could not have been devoid of such knowledge, though they go to show that he must at that time have been suffering from mental derangement of some sort. We must therefore dismiss the appeal and confirm the conviction for murder and the sentence of transportation for life which is the only sentence besides the sentence of death which the law prescribes for that offence. But at the same time we think we ought to take the course that the Bombay High Court took in the case just cited, ***Queen-Empress* v. *Lakshman Dagdu***, which was somewhat similar to this; and we accordingly direct that the proceedings be forwarded to His Honour the Lieutenant-Governor with a copy of our judgment and our recommendation that the case may be dealt with by the local Government under section 101 of the Code of Criminal Procedure in such manner as it thinks fit. We make no special recommendation as to how the prisoner should be dealt with; but we deem it right to observe that, though having regard to the language of section 84 of the Indian Penal Code we must hold that the accused is not entitled to be acquitted, we think that the murder was committed without any apparent sane motive; that the accused was at the time suffering from mental derangement of some sort; and that he is therefore entitled to every indulgent consideration.

* * * * *

Lakshmi v. *State*

AIR 1959 All .534

N. BEG, J. - This is an appeal by one Lakshmi who has been convicted under S. 302, I.P.C. and sentenced to imprisonment for life and a fine of Rs. 100/-; in default, to undergo further rigorous imprisonment for one year.

2. The appellant Lakshmi has been found guilty of having murdered his step brother Chhedi Lal on 6-10-1954 at about 8 p.m. in village Baheri, police station Cirwan, district Banda.

3. The prosecution case is that the appellant was addicted to taking ganja and wine. He used to go about making demands for money from his relations. He used to beat his wife and mother. He also used to make similar demands from the deceased Chhedi Lal who was opposed to this habit of life of the appellant, and would not accede to his requests to advance to him monies to enable him to indulge in these vices. It is said that in the month of Jeth preceding the incident he had beaten his mother and wife. At that time the deceased and other persons had intervened and prevented him from doing so. On the appellant's refusal to obey him the deceased had chained him. The appellant had run away after breaking the chains. Five or six days after that, Nichari Ahir of village Baheri had approached Chhedi Lal deceased, and had told him that when Lakshmi was used to taking ganja and bhang why was he not supplying the same to him Chhedi Lal did not accede to his request either. Thereafter it is said that Lakshmi appellant had stopped speaking to Chhedi Lal.

4. The incident itself is said to have taken place on the evening of 6-10-1954. The prosecution story is that at about 8 p.m. In the night, Chhedi Lal had returned to his house after attending, to the call of nature. He was sitting at his door on the chabutra. At that time the appellant took a pharsa and proceeded towards Chhedi Lal. He began to assault Chhedi Lal with the pharsa. Chhedi Lal raised an alarm. A number of persons including Durge, Chhakori and Debi Dayal and son of Chhedi Lal, reached the spot on hearing the alarm. On the arrival of these persons the appellant fled away out side the village taking the pharsa along with him. Chhedi Lal dies within an hour or two.

5. Thereafter Chhedi Lal's son Debi Dayal went to police station Girwan, and lodged a first information report there at 1 O'clock in the night,

6. This first information report was lodged in the presence of S.I. Mohammad Ahmed, station officer, Girwan. He went to the spot and prepared an inquest report. He got the statements of the witnesses recorded under Section 164, Cr.P.C. The reason given by him for taking this step was that the witnesses being relations of the appellant, he was apprehensive that they might be tampered with. He also stated that the witnesses were going about with the pariokar of the appellant, and had colluded with him. He searched for the appellant in the village. The appellant was found absconding and could not be arrested. The appellant surrendered in court on 8-10-1954.

7. The post mortem examination of Chhedi Lal disclosed the following injuries on his body.

1. The Antero-posterior incised wound 3"x¼" bone underneath cut 2½" above left eye brow.
2. Oblique incised wound ¾" 1/6" x bone underneath cut ½" above eye brow.
3. Contused wound 1 ¼" x ¼" x bone deep along the left eye-brow.
4. Transverse incised wound 3 ½" x ½" bone deep left cheek beginning from just above the left corner of the mouth running towards the left ear.
5. Incised wound 5 ½" x 1 ½" bone underneath cut ½" below and parallel to injury No. 4.
6. Transverse incised wound 1 ¼" x ¼ " 1/8" skin deep front of left shoulder".

Death in the opinion of the doctor was due to shock and haemorphage as a result of the injuries sustained by the deceased.

8. The appellant denied the guilt. He denied that he had run away with the pharsa after striking Chhedi Lal. He, however, admitted that he used to smoke ganja and people used to stop him from doing so and that he was tied up for that reason.

9. The main facts relating to the assault made on the deceased by the appellant have not been contested before us by learned counsel for the appellant. The question, however, which has been seriously argued by him is that the act of the appellant in murdering Chhedi Lal fell under the Exception provided by Section 84 in Chap. IV of the Indian Penal Code.

10. Having heard learned counsel, for the appellant at length we find ourselves unable to agree with him. In order to determine this question the prosecution evidence may be divided into three categories enumerated below:

1. Motive.
2. Conduct of the appellant immediately before the incident, at the time of the incident and shortly after the incident.
3. Subsequent conduct of the appellant and his conduct during the trial of the case.

11. After discussion of evidence His Lordship proceeded. To sum up, in the present case there is evidence of motive against the appellant. His conduct prior to the incident as well as at the time of the incident does not support the contention that he was insane at the time when the offence was committed. His conduct subsequent to the incident also does not lend any support to his contention. The conduct history of the appellant in the Court of inquiry as well as in the trial Court also militate against the contention that the appellant was liable to recurring fits of insanity at short intervals.

12. Learned counsel for the appellant has cited two cases to support his contention. The first is ***Ashiruddin Ahmad*** **v.** ***The King*** [AIR 1919 Cal 182]. The facts of this case were that the accused had dreamt that he was commanded by someone in paradise to sacrifice his own son of five years. The next morning the accused took his son to a mosque and killed him by thrusting a knife in his throat. He then went straight to his uncle, but, finding a chaukidar nearby took his uncle to a tank at some distance and slowly told him the story. On these facts it was held by a Bench of the Calcutta High Court that the case of insanity under Section 84, I.P.C. was made out.

It was held in that case that to enable an accused to get the benefit of Section 84 he should be able to establish any one of the following three elements viz.: (1) that the nature of the act

was not known to the accused or (2) that the act was not known by him to be contrary to law or (3) that the act was not known by him to be wrong. On the above facts, the Bench held that the third element was established by the accused, namely, that the accused did not know that the act was wrong. This was obviously on the ground that the accused was labouring under a belief that his dream was a reality. The Bench came to the following conclusion:

> That the accused was clearly of unsound mind and that acting under delusion of his dream, he made this sacrifice believing it to be right.

We find ourselves unable to endorse this view of Section 84, I.P.C., and must therefore, express our respectful disagreement with it. We are further of opinion that once this view is accepted to be correct, it will lead to serious consequences, it will be open to an accused in every case to plead that he had dreamt a dream enjoining him to do a criminal act, and believing that his dream was a command by a higher authority, he was impelled to do the criminal act, and he was, therefore, protected by Section 84. We are of opinion that such a plea would be untenable, and would not fall within the four corners of Section 84. Section 84, I.P.C. provides as follows:

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

The significant word in the above section is "incapable". The fallacy of the above view lies in the fact that it ignores that what Section 84 lays down is not that the accused claiming protection under it should not know an act to be right on wrong, but that the accused should be "incapable" of knowing whether the act done by him is right or wrong. The capacity to know a thing is quite different from what a person knows. The former is a potentiality, the latter is the result of it. If a person possesses the former he cannot be protected in law whatever might be the result of his potentiality. In other words, what is protected is an inherent or organic incapacity, and not a wrong or erroneous belief which might be the result of a perverted potentiality.

A person might believe so many things. His beliefs can never protect him once it is found that he possessed the capacity to distinguish between right and wrong. If his potentialities lead him to a wrong conclusion, he takes the risk and law will hold him responsible for the deed which emanated from him. What the law protects is the case of a man in whom the guiding light that enables a man to distinguish between right and wrong and between legality and illegality is completely extinguished. Where such light is found to be still flickering, a man cannot be heard to plead that he should be protected because he was misled by his own misguided intuition or by any fancied delusion which had been haunting him and which he mistook to be a reality. Our beliefs are primarily the offspring's of the faculty of intuition. On the other hand the content of our knowledge and our realisation of its nature is born out of the faculties of cognition and reason.

If cognition and reason are found to be still alive and gleaming, it will not avail a man to say that at the crucial moment he had been befogged by an overhanging cloud of intuition which had been casting its deep and dark shadows over than. "Legal insanity" is not the same things as "medical insanity" and a case that falls within the latter category need not

necessarily fall within the former. Further, the case where a murderer is struck with an insane delusion is different from the case of a man suffering from organic insanity. In the case cited the plea of the accused would belong to the former class, whereas in the present case the plea of the accused would be long to the latter class. The considerations that arise in the two cases might be different. Mayne quoting from the Draft Code of 1879 has stated the principle applicable to cases of delusions to be as follows:

> A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act.

13. The next case cited by learned counsel for the appellant is ***Anandi* v. Emperor** [AIR 1923 All 327]. This case is easily distinguishable on facts from the present case. This was a case in which a lady named Anandi had murdered a boy. In this case there was in her favour the evidence of two experts, one of whom was a Civil Surgeon and the other also was a doctor. Both of them had found the accused subject to fits of insanity shortly after the murder. There was also evidence of hereditary insanity in the family of the accused. There was also evidence showing that her grandfather had at some time or other been insane. Further, the facts indicated that the murder was committed without any motive. The above case, therefore, stands on a footing quite different from the present case.

In the present case there is evidence of motive and, as already observed by us, the conduct of the appellant at the time of the incident as well as his antecedent and subsequent conduct both negative the plea of insanity under Section 84 of the Indian Penal Code. Further, in the present case, there is no evidence of any hereditary insanity. There is also nothing to indicate that the accused was, at any time, overtaken by any fit of insanity after the crime. Further, there is no evidence of any expert in his favour. Under the circumstances we fail to see how the above case helps the appellant.

14. For the above reasons, we are of opinion that there is no substance in this appeal. We accordingly, dismiss this appeal and maintain the conviction and sentence of the appellant.

* * * * *

Shrikant Anandrao Bhosale v. *State of Maharashtra*

(2002) 7 SCC 748

Y. K. SABHARWAL, J. - Insanity of the appellant, at the time of commission of the offence, is the main plea that has been urged before us for reversing the conviction and sentence in question.

2. The appellant has been found guilty by the Sessions Court of the offence under Section 302 of the Indian Penal Code (IPC) and sentenced to undergo rigorous imprisonment for life. The appeal against conviction and sentence having been dismissed by the High Court, this appeal has been filed on grant of leave.

3. Shortly put, the prosecution case is that the appellant was a police constable. He and Surekha were married in the year 1987. On the date of the incident, they were living in police quarters along with their daughter. On the morning of 24-4-1994, there was a quarrel between husband and wife. While Surekha was washing clothes in the bathroom, the appellant hit her with a grinding stone on her head. The appellant was immediately taken by the police to the quarter guard. Surekha was taken to the hospital. She was found dead. After the usual investigation, the appellant was charged for the offence of murder of his wife.

4. On appreciation of evidence, the appellant was found guilty by the Sessions Court. The evidence was again appreciated by the High Court. The judgment of the Sessions Court was affirmed. We have heard learned counsel and have perused the record. In our opinion also, there is enough cogent evidence to prove that the appellant killed his wife.

5. Now, the only aspect to be considered is the defence of insanity of the appellant. That defence has not found favour with the Sessions Court and the High Court. Dr Shyamla Pappu, learned Senior Counsel appearing as amicus curiae has vehemently and ably argued that the appellant was suffering from insanity at the time of the alleged killing of his wife and was, thus, entitled to benefit of general exception contained in Section 84 IPC. With equal vehemence and ability, Mr. Arun Pednekar argued that the appellant killed his wife not because of insanity but on account of extreme anger, which is different from insanity.

6. Learned counsel for the State, relying upon prosecution witnesses, contended that the appellant, earlier than the date of the incident, used to quarrel with his wife, drink excessive liquor and used to get excited and this evidence proves that he, by nature, was a man of extreme anger. During a fit of extreme anger, he killed his wife.

7. On the other hand, learned counsel for the appellant to establish the plea of unsoundness of mind, drew our attention to the depositions of Dr Arun (DW 2) and Dr Pramod (DW 3). The case history and other proved medical record shows that the appellant was suffering from paranoid schizophrenia. He was an indoor patient at a government hospital from 28-10-1993 to 5-11-1993 for getting treatment for the said ailment. It further stands established that he was suffering from this disease at least from 20-4-1992. He was examined by DW 3 on 20-4-1992 having visited the said doctor with his wife. It also stands established that 25 times he was taken to hospital for treatment of his mental ailment from 27-6-1994 to 5-12-1994. DW 2 deposed that the appellant was examined by him on 27-10-1993. He suffered from suspicious ideas, persecutory delusions, loss of sleep and excitement and was

diagnosed as paranoid schizophrenic. The appellant was intermittently becoming apprehensive and excited. DW 3 deposed that on 20-4-1992, he examined the appellant brought by his wife. There was a history of psychiatric illness in his father at the age of 65 years and in 1989 his father ran away from the house. People used to take advantage of his mental condition and cheat him. After marriage, his mental condition worsened. On examination, he was found suffering from paranoid schizophrenia. The patient had visual hallucinations (seeing images of wife and children). He was brought to hospital 25 times as above. Paranoid schizophrenia is a mental disease. It can recur. When a person is under paranoid delusion, he is not fully aware of his activities and its consequences.

8. Was the commission of offence a result of extreme anger or unsoundness of mind is the question to be decided.

9. From the aforesaid evidence, it has been proved that there was a family history of psychiatric illness. The father of the appellant was suffering from the ailment at the age of 65 and in 1989 his father ran away from the house.

10. What is paranoid schizophrenia, when it starts, what are its characteristics and dangers flowing from this ailment? Paranoid schizophrenia, in the vast majority of cases, starts in the fourth decade and develops insidiously. Suspiciousness is the characteristic symptom of the early stage. Ideas of reference occur, which gradually develop into delusions of persecution. Auditory hallucinations follow, which in the beginning, start as sounds or noises in the ears, but afterwards change into abuses or insults. Delusions are at first indefinite, but gradually they become fixed and definite, to lead the patient to believe that he is persecuted by some unknown person or some superhuman agency. He believes that his food is being poisoned, some noxious gases are blown into his room and people are plotting against him to ruin him. Disturbances of general sensation give rise to hallucinations, which are attributed to the effects of hypnotism, electricity, wireless telegraphy or atomic agencies. The patient gets very irritated and excited owing to these painful and disagreeable hallucinations and delusions. Since so many people are against him and are interested in his ruin, he comes to believe that he must be a very important man. The nature of delusions thus may change from persecutory to the grandiose type. He entertains delusions of grandeur, power and wealth, and generally conducts himself in a haughty and overbearing manner. The patient usually retains his memory and orientation and does not show signs of insanity, until the conversation is directed to the particular type of delusion from which he is suffering. When delusions affect his behaviour, he is often a source of danger to himself and to others. (**MODI'S MEDICAL JURISPRUDENCE AND TOXICOLOGY,** 22nd Edn.)

11. Further, according to Modi, the cause of schizophrenia is still not known but heredity plays a part. The irritation and excitement are effects of illness. On delusion affecting the behaviour of a patient, he is a source of danger to himself and to others.

12. In view of the medical evidence, Mr. Arun Pednekar, learned counsel appearing for the State very rightly submitted that the prosecution cannot question that the appellant was suffering from unsoundness of mind prior to and after the date of the commission of the offence. Even otherwise, it stands proved from the aforesaid evidence of depositions of the government doctors who, it appears, deposed on the basis of the medical record, that the

appellant was suffering from paranoid schizophrenia long before the commission of the offence and the ailment continued thereafter as well. What has, however, been urged by Mr. Pednekar is that the appellant has failed to prove that he was suffering from unsoundness of mind at the time of commission of the offence. The submission is that the fact that the appellant was suffering from the ailment before or after the commission of the offence is of no consequence when the appellant has failed to prove he was suffering from that ailment at the time when the offence was committed.

13. The burden to prove that the appellant was of unsound mind and as a result thereof he was incapable of knowing the consequences of his acts is on the defence. Section 84 IPC is one of the provisions in Chapter IV IPC which deals with "general exceptions". That section provides that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. The burden of proving the existence of circumstances bringing the case within the purview of Section 84 lies upon the accused under Section 105 of the Indian Evidence Act. Under the said section, the court shall presume the absence of such circumstances. Illustration (*a*) to Section 105 is as follows:

> (*a*) *A*, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.
> The burden of proof is on *A*.

14. The question whether the appellant has proved the existence of circumstances bringing his case within the purview of Section 84 will have to be examined from the totality of circumstances. The unsoundness of mind as a result whereof one is incapable of knowing the consequences is a state of mind of a person which ordinarily can be inferred from the circumstances. If, however, an act is committed out of extreme anger and not as a result of unsoundness of mind, the accused would not be entitled to the benefit of exception as contained in Section 84 IPC. In fact, that is the contention of the learned counsel for the State. It was contended that the prosecution evidence has established that the appellant by nature was an angry person and under a fit of extreme anger, he committed the murder of his wife as there was a fight between them that morning and there is nothing to show that at the relevant time the appellant was under an attack of paranoid schizophrenia.

15. At this stage, it is necessary to notice the nature of the burden that is required to be discharged by the accused to get the benefit of Section 84 IPC. [***Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*** (AIR 1964 SC 1563)].

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17. Undoubtedly, the state of mind of the accused at the time of commission of the offence is to be proved so as to get the benefit of the exception.

18. We have already noticed earlier that unsoundness of mind preceding the occurrence and following the occurrence stands proved. It has rightly not been questioned by learned counsel for the State. Regarding the state of mind of the accused at the time of commission of offence, in our opinion, ordinarily that would be an aspect to be inferred from the circumstances. Further, as earlier noticed, the nature of the burden of proof on the accused is no higher than that which rests upon a party to civil proceedings.

19. The circumstances that stand proved in the case in hand are these:

1. The appellant has a family history — his father was suffering from psychiatric illness.

2. Cause of ailment not known — heredity plays a part.

3. The appellant was being treated for unsoundness of mind since 1992 — diagnosed as suffering from paranoid schizophrenia.

4. Within a short span, soon after the incident from 27-6-1994 to 5-12-1994, he had to be taken for treatment of the ailment 25 times to hospital.

5. The appellant was under regular treatment for the mental ailment.

6. The weak motive of killing of the wife — being that she was opposing the idea of the appellant resigning the job of a police constable.

7. Killing in daylight — no attempt to hide or run away.

20. Mr. Arun Pednekar relies upon ***Sheralli Wali Mohammed* v. *State of Maharashtra***, [(1973) 4 SCC 79] to contend that the mere fact that the appellant did not make any attempt to run away or that he committed the crime in daylight and did not try to hide it or that the motive to kill his wife was very weak, would not indicate that at the time of commission of the act the appellant was suffering from unsoundness of mind or he did not have requisite *mens rea* for the commission of the offence. It is correct that these facts itself would not indicate insanity. In the present case, however, it is not only the aforesaid facts but it is the totality of the circumstances seen in the light of the evidence on record to prove that the appellant was suffering from paranoid schizophrenia. The unsoundness of mind before and after the incident is a relevant fact. From the circumstances of the case clearly an inference can be reasonably drawn that the appellant was under a delusion at the relevant time. He was under an attack of the ailment. The anger theory on which reliance has been placed is not ruled out under schizophrenia attack. Having regard to the nature of burden on the appellant, we are of the view that the appellant has proved the existence of circumstances as required by Section 105 of the Evidence Act so as to get the benefit of Section 84 IPC. We are unable to hold that the crime was committed as a result of an extreme fit of anger. There is a reasonable doubt that at the time of commission of the crime, the appellant was incapable of knowing the nature of the act by reason of unsoundness of mind and, thus, he is entitled to the benefit of Section 84 IPC. Hence, the conviction and sentence of the appellant cannot be sustained.

21. Before parting, we wish to place on record our deep appreciation for the able assistance rendered by Dr Shyamla Pappu appearing as amicus curiae for the appellant.

22. For the aforesaid reasons, we set aside the impugned judgment of the High Court and allow the appeal. The appellant shall be set at liberty forthwith, if not required in any other case.

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Basdev v. *State of Pepsu*

1956 SCR 363: AIR 1956 SC 488

N. CHANDRASEKHARA AIYAR, J. - The appellant Basdev of the village of Harigarh is a retired military Jamadar. He is charged with the murder of a young boy named Maghar Singh, aged about 15 or 16. Both of them and others of the same village went to attend a wedding in another village. All of them went to the house of the bride to take the midday meal on 12th March, 1954. Some had settled down in their seats and some had not. The appellant asked Maghar Singh, the young boy to step aside a little so that he may occupy a convenient seat. But Maghar Singh did not move. The appellant whipped out a pistol and shot the boy in the abdomen. The injury proved fatal.

2. The party that had assembled for the marriage at the bride's house seems to have made itself very merry and much drinking was indulged in. The appellant Jamadar boozed quite a lot and he became very drunk and intoxicated. The learned Sessions Judge says "he was excessively drunk" and that "according to the evidence of one witness Wazir Singh Lambardar he was almost in an unconscious condition". This circumstance and the total absence of any motive or premeditation to kill were taken by the Sessions Judge into account and the appellant was awarded the lesser penalty of transportation for life.

3. An appeal to the PEPSU High Court at Patiala proved unsuccessful. Special leave was granted by this Court limited to the question whether the offence committed by the petitioner fell under Section 302 of the Indian Penal Code or Section 304 of the Indian Penal Code having regard to the provisions of Section 86 of the Indian Penal Code. Section 86 which was elaborately considered by the High Court runs in these terms:

> In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

4. It is no doubt true that while the first part of the section speaks of intent or knowledge, the latter part deals only with knowledge and a certain element of doubt in interpretation may possibly be felt by reason of this omission. If in voluntary drunkenness knowledge is to be presumed in the same manner as if there was no drunkenness, what about those cases where *mens rea* is required. Are we at liberty to place intent on the same footing, and if so, why has the section omitted intent in its latter part? This is not the first time that the question comes up for consideration. It has been discussed at length in many decisions and the result may be briefly summarised as follows:

5. So far as knowledge is concerned, we must attribute to the intoxicated man the same knowledge as if he was quite sober. But so far as intent or intention is concerned, we must gather it from the attending general circumstances of the case paying due regard to the degree intoxication. Was the man beside his mind altogether for the time being? If so it would not be possible to fix him with the requisite intention. But if he had not gone so deep in drinking,

and from the facts it could be found that he knew what he was about, we can apply the rule that a man is presumed to intend the natural consequences of his act or acts.

6. Of course, we have to distinguish between motive, intention and knowledge. Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things. Even in some English decisions, the three ideas are used interchangeably and this has led to a certain amount of confusion.

7. In the old English case, ***Rex* v. *Meakin*** [(1836) 173 ER 131] Baron Alderson referred to the nature of the instrument as an element to be taken in presuming the intention in these words:

> However, with regard to the intention, drunkenness may perhaps be adverted to according to the nature of the instrument used. If a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as he would if he had used a different kind of weapon; but where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party.

8. In a charge of murdering a child levelled against a - husband and wife who were both drunk at the time, Patteson J., observed in ***Regina* v. *Cruse and Mary, his wife*** [(1838) 173 ER 610]:

> It appears that both these persons were drunk, and although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence.

9. Slightly different words but somewhat more illuminating were used by Coleridge J., in ***Reg.* v. *Monk House*** [(1849) 4 Cox CC 55]:

> The inquiry as to intent is far less simple than that as to whether an act has been committed, because you cannot look into a man's mind to see what was passing there at any given time. What he intends can only be judged of by what he does or says, and if he says nothing, then his act alone must guide you to your decision. It is a general rule in criminal law, and one founded on common sense, that juries are to presume a man to do what is the natural consequence of his act. The consequence is sometimes so apparent as to leave no doubt of the intention. A man could not put a pistol which he knew to be loaded to another's head, and fire it off, without intending to kill him; but even there the state of mind of the party is most material to be considered. For instance, if such an act were done by a born idiot, the intent to kill could not be inferred from the act. So, if the defendant is proved to have been intoxicated, the question becomes a more subtle one; but it is of the same kind, namely, was he rendered by intoxication entirely incapable of forming the intent charged?
>
> Drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as

> to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention. Such a state of drunkenness may no doubt exist.

10. A great authority on criminal law Stephen J., postulated the proposition in this manner in ***Reg.* v. *Doherty*** [(1887) 16 Cox CC 306]:

> …although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime.

11. We may next notice ***Rex* v. *Meade*** [(1909)1 KB 895] where the question was whether there was any misdirection in his summing up by Lord Coleridge, J. The summing up was in these words:

> In the first place, every one is presumed to know the consequences of his acts. If he be insane, that knowledge is not presumed. Insanity is not pleaded here, but where it is part of the essence of a crime that a motive, a particular motive, shall exist in the mind of the man who does the act, the law declares this — that if the mind at that time is so obscured by drink, if the reason is dethroned and the man is incapable therefore of forming that intent, it justifies the reduction of the charge from murder to manslaughter.

12. Darling, J., delivering the judgment of the Court of Criminal Appeal affirmed the correctness of the summing up but stated the rule in his own words as follows:

> A man is taken to intend the natural consequences of his acts. This presumption may be rebutted (1) in the case of a sober man, in many ways: (2) it may also be rebutted in the case of a man who is drunk, by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous i.e. likely to inflict serious injury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted.

13. Finally, we have to notice the House of Lord's decision in ***Director of Public Prosecutions* v. *Beard*** [(1920) AC 479]. In this case a prisoner ravished a girl of 13 years of age, and in aid of the act of rape he placed his hand upon her mouth to stop her from screaming, at the same time pressing his thumb upon her throat with the result that she died of suffocation. Drunkenness was pleaded as a defence. Bailhache J., directed the jury that the defence of drunkenness could only prevail if the accused by reason of it did not know what he was doing or did not know that he was doing wrong. The jury brought in a verdict of murder and the man was sentenced to death. The Court of Criminal Appeal (Earl of Reading, C.J., Lord Coleridge, J., and Sankey, J.) quashed this conviction on the ground of misdirection following ***Rex* v. *Meade*** which established that the presumption that a man intended the natural consequences of his acts might be rebutted in the case of drunkenness by showing that his mind was so affected by the drink that he had taken that he was incapable of knowing that what he was doing was dangerous. The conviction was, therefore, reduced to manslaughter. The Crown preferred the appeal to the House of Lords and it was heard by a strong Bench consisting of Lord Chancellor, Lord Birkenhead, Earl of Reading, C.J., Viscount Haldane, Lord Dunedin, Lord Atkinson, Lord Sumner, Lord Buckmaster and Lord Phillimore. The

Lord Chancellor delivered the judgment of the court. He examined the earlier authorities in a lengthy judgment and reached the conclusion that ***Rex* v. *Meade*** stated the law rather too broadly, though on the facts there proved the decision was right. The position "that a person charged with a crime of violence may show, in order to rebut the presumption that he intended the natural consequences of his acts, that he was so drunk that he was incapable of knowing what he was doing was dangerous…" which is what is said in *Meade case* was not correct as a general proposition of law and their Lordships laid down three rules:

> (1) That insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged;
>
> (2) That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent;
>
> (3) That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

14. The result of the authorities is summarised neatly and compendiously at p. 63 of **Russell on *Crime***, 10th Edn., in the following words:

> There is a distinction, however, between the defence of insanity in the true sense caused by excessive drunkenness and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention. If actual insanity in fact supervenes as the result of alcoholic excess it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. But in cases falling short of insanity evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent, but evidence of drunkenness which falls short of proving such incapacity and merely establishes that the mind of the accused was so affected by drink that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his act.

15. In the present case the learned Judges have found that although the accused was under the influence of drink, he was not so much under its influence that his mind was so obscured by the drink that there was incapacity in him to form the required intention as stated. They go on to observe:

> All that the evidence shows at the most is that at times he staggered and was incoherent in his talk, but the same evidence shows that he was also capable of moving himself independently and talking coherently as well. At the same time it is proved that he came to the darwaza of Natha Singh PW 12 by himself, that he made a choice for his own seat and that is why he asked the deceased to move away from his place, that after shooting at the deceased he did attempt to get away and was secured at some short distance from the darwaza, and that when secured he realised what he had done and thus requested the witnesses to be forgiven saying that it had happened from him. There is no evidence that when taken to the police station Barnala, he did not talk or go there just as the witnesses and had to be specially supported. All these facts, in my opinion, go to prove that there

was not proved incapacity in the accused to form the intention to cause bodily injury sufficient in the ordinary course of nature to cause death. The accused had, therefore, failed to prove such incapacity as would have been available to him as a defence, and so the law presumes that he intended the natural and probable consequences of his act, in other words, that he intended to inflict bodily injury to the deceased and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death.

16. On this finding the offence is not reduced from murder to culpable homicide not amounting to murder under the second part of Section 304 of the Indian Penal Code. The conviction and sentence are right and the appeal is dismissed.

* * * * *

Mahbub Shah v. *Emperor*

AIR 1945 PC 118

SIR MADHAVAN NAIR- This is an appeal by special leave against judgement of the High Court of Judicature at Lahore, confirming on appeal the conviction of the appellant of the murder of one Allah Dad and the sentence of death passed on him by the Sessions Judge. The main question raised in this appeal is whether the appellant has been rightly convicted of murder upon the true construction of Section 34, Penal Code. Section 34 runs as follows:

> When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

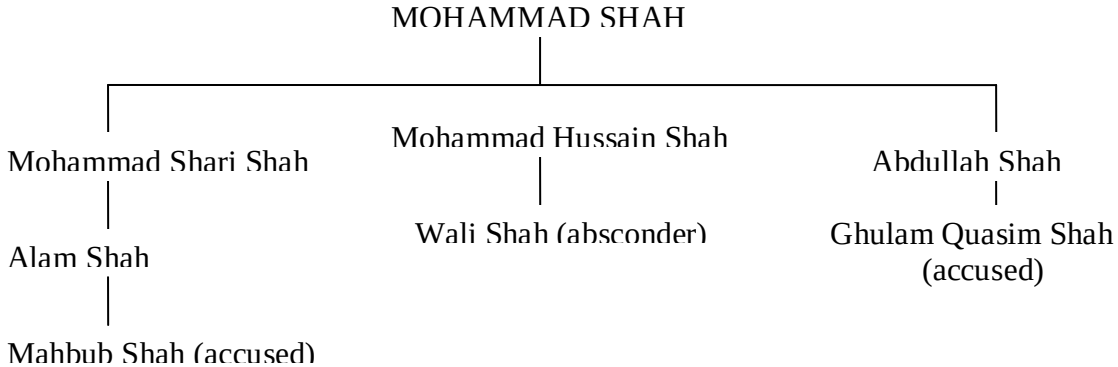
The prosecution case is that on 25th August, 1943, at sunrise, Allah Dad, deceased, with a few others left their village Khanda Kel by boat for cutting reeds growing on the banks of the Indus river. When they had travelled for about a mile downstream, they saw Mohammad Shah, father of Wali Shah (absconder) bathing on the bank of the rive. On being told that they were going to collect reeds, he warned them against collecting reeds from land belonging to him. Ignoring his warning, they collected about 16 bundles of reeds, and then started for the return journey. While the boat was being pulled upstream by means of a rope, Ghulam Quasim Shah, nephew of Mohammad Hussain Shah- acquitted by the High Court-who was standing on the bank of the river asked Allah Dad to give him the reeds that had been collected from his uncle's land. He refused. What happened subsequently was spoken to by boys Nur Hussain P.W. 10 and Nur Mohammad P.W. 11, whose version of the story has been accepted as true by the High Court and summarised as follows:

> Quasim Shah then caught the rope and tried to snatch it away. He then pushed Allah Dad and gave a blow to Allah Dad with a small stick but it was warded off on the rope. Allah Dad then picked up the lari from the boat and struck Quasim Shah. Quasim Shah then shouted out for help and Wali Shah and Mahbub Shah came up. They had guns in their hands. When Allah Dad and Hamidullah tried to run away, Wali Shah and Mahbub Shah came in front of them and Wali Shah fired at Allah Dad who fell down dead and Mahbub Shah fired at Hamidullah, causing injuries to him. [Lari is a bamboo pole for propelling the boat, about ten feet long and six inches thick.]

The appellant Mahbub Shah has been convicted of murder under Section 302, read with Section 34, Penal Code. He was also convicted of the attempted murder of one Hamidullah Khan and sentenced to seven years' rigorous imprisonment: but that conviction has not been brought before the Board.

Along with the appellant, his cousin Ghulam Quasim Shah, was also convicted under S. 302/34, Penal Code, and sentenced to transportation for life. Ghulam was convicted under S. 307/34 also, and was sentence to five years' rigorous imprisonment by the Sessions Judge, but his convictions and sentences have been set aside by the High Court. One Wali Shah, who is said to have fired the shot that killed the deceased, is a fugitive from justice and has not been so far arrested. His father Mohammad Hussain Shah, who was committed to the Sessions Court on a charge of abetment of murder, was acquitted by the Sessions Judge. The

following table given in the judgement of the High Court shows the relationship between the appellant and the other persons who are alleged to have been concerned in this crime.



On the above facts, the learned Judges of the High Court came to the conclusion that Ghulam Quasim was wrongly convicted of murder under Section 302/34, Penal Code, on the following reasoning. Bhandari J., with whom Teja Singh J. concurred, first held that Ghulam Quasim had no common intention of killing any member of the complainant party when he went to the bank of the river in order to demand the bundles of reeds which had been collected from his uncle's lands. Then the learned Judge addressed himself to the question "whether a common intention to commit the crime which was eventually committed by Mahbub Shah and Wali Shah came into being when Ghulam Quasim Shah shouted to his companions to come to his rescue and both of them emerged from behind the bushes and fired their respective guns, and this he answered in the negative, holding that "so far as Quasim Shah was concerned, he did no more than ask his companions to come to his assistance when he was knocked with a pole by the deceased" and that "he could not have been aware of the manner in which assistance was likely to be rendered to him or his friends were likely to shoot at and kill one man or injure another." In the result, he was acquitted of all offences. The learned Judge then proceeded to examine the case of the appellant and Wali Shah. He stated that the case of Mahbub Shah, who was armed with a single barreled gun, and of Wali Shah, who had a double barreled gun, however, stood on a different footing. He distinguished their case on the following ground:

> As soon as they ran to the assistance of Ghulam Quasim Shah, they fired simultaneously in the direction of the complainants killing Allah Dad on the spot and causing injuries on the person of Hamidullah Khan. It is difficult to believe that when they fired the shots they did not have the common intention of killing one or more of the complainant party. If so, both of them are guilty of murder notwithstanding the fact that the fatal shot was fired by only one of them, namely, Wali Shah, absconder.

It will be observed that according to the learned Judge a common intention to commit the crime came into being when appellant and Wali Shah fired the shots. Their Lordships will now proceed to consider whether the above reasoning is correct, and Section 34, Penal Code, has been rightly applied to the facts of the case. Attention has already been drawn to the words of the section. As it originally stood, the section was in the following terms:

> When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone.

In 1870, it was amended by the insertion of the words" in furtherance of the common intention of all" after the word "persons" and before the word "each", so as to make the object of the section clear. Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say "the common intention of all" nor does it say "an intention common to all". Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases, it has to be inferred from his act or conduct or other relevant circumstances of the case.

On careful consideration, it appears to their Lordships that in the present case, there was no evidence and there were no circumstances from which it might be inferred that the appellant must have been acting in concert with Wali Shah in pursuance of a concerted plan when he along with him rushed to the rescue of Ghulam Quasim. The exaggerated circumstances alleged by the prosecution to invoke the aid of Section 34, Penal Code, have been found against by the High Court who have acted solely on the evidence of P.W. 10 and P.W. 11. There was no evidence to indicate that Ghulam Quasim was aware that the complainant party had been cutting reeds from his uncle's lands, or that the appellant and Wali Shah had been kept behind the bush to come and help him when called upon to do so. The evidence shows that Wali Shah "happened to be out shooting game" and when he and the appellant heard Ghulam's shouts for help they came up with their guns; the former shot the deceased, killing him outright and the appellant shot at Hamidullah Khan inflicting injuries on his person. Indeed, the High Court negatived the existence of a "common intention" at the commencement in the sense in which their Lordships have explained the term by stating –in considering the application of Section 34, Penal Code, to the case of Ghulam-what has been already quoted, viz. :

> that the sole point which requires consideration now is whether a common intention to commit the crime came into being when Ghulam shouted to his companions to come to his rescue and both of them emerged from behind the bushes and fired their respective guns.

Having answered the above question in the negative as regards Ghulam Quasim, the learned Judges thought, as Bhandari J. has expressly stated, that with respect to the appellant and Wali Shah, it must be held that the common intention of killing one or more of the members of the complainant party came into being later, when they fired the shots. Their Lordships cannot agree with this view. Their Lordships are prepared to accept that the

appellant and Wali Shah had the same intention, viz., the intention to rescue Quasim if need be by using the guns and that, in carrying out this intention the appellant picked out Hamidullah for dealing with him and Wali Shah, the deceased, but where is the evidence of common intention to commit the criminal act complained against, in furtherance of such intention? Their Lordships find none. Evidence falls far short of showing that the appellant and Wali Shah ever entered into a premeditated concert to bring about the murder of Allah Dad in carrying out their intention of rescuing Quasim Shah. Care must be taken not to confuse same or similar intention with common intention; the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice. In their Lordships' view, the inference of common intention within the meaning of the term in Section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case. That cannot be said about the inference sought to be deduced from the facts relied on by the High Court in distinguishing the case of the appellant from that of Ghulam Quasim.

Mr. MacKenna, the learned counsel for the Crown, besides supporting the judgement of the High Court on the grounds mentioned in it, called their Lordships' attention to the following additional circumstance in further support of it. Reference was made to the concluding portion of the evidence of P.Ws. 10 and 11, where it is stated that "when Allah Dad and Hamidullah tried to run away, Wali Shah and Mahbub Shah came in front of them…" and fired shots. This circumstance is stated more definitely in the evidence of P.W. 6. He stated "… we then tried to run away but Mahbub Shah and Wali Shah coming in front of us and prevented our escape" and fired shots. It was argued that the attempt of the appellant and Wali Shah to prevent the escape of the complainant party shows that they were actuated by a common intention to commit the crime, and from that moment the Court is entitled to infer a common intention to commit the crime even though there was no pre-concerted plan to shoot till then. This additional circumstance does not, in their Lordships' view, advance the prosecution case any further, and moreover, the learned Judges of the High Court do not rely on it. In the circumstances, their Lordships are not satisfied that the appellant was rightly convicted of the offence of murder under Section 302, Penal Code, read with Section 34. His conviction for murder and the sentence of death passed on him should, therefore, be quashed. In this view, the further question raised in the appeal whether, in the vent of his conviction, being confirmed, the sentence of death passed on him should not, having regard to the circumstances of the case and his age, be commuted to one of transportation for life does not arise for consideration. For the reasons indicated above, their Lordships have humbly advised His Majesty that the appellant having succeeded in his appeal, his appeal should be allowed and his conviction for murder and the sentence of death set aside.

* * * * *

Pandurang v. *State of Hyderabad*

(1955) 1 SCR 1083: AIR 1955 SC 216

V. BOSE, J. - Five persons, including the three appellants, were prosecuted for the murder of one Ramchander Shelke. Each was convicted and each was sentenced to death under Section 302 of the Indian Penal Code.

2. The appeals and the confirmation proceedings in the High Court were heard by M.S. Ali Khan and V.R. Deshpande, JJ. They differed. The former considered that the convictions should be maintained but was of opinion that the sentence in each case should be commuted to imprisonment for life. The latter favoured an acquittal in all five cases. The matter was accordingly referred to a third Judge, P.J. Reddy, J. He agreed with the first about the convictions and adjudged all five to be guilty under Section 302. On the question of sentence he considered that the death sentences on the three appellants, Pandurang, Tukia and Bhilia, should be maintained and that those of the other two should be commuted to transportation for life.

3. It seems that the opinion of the third Judge was accepted as the decision of the court and so the sentences suggested by him were maintained as well as the convictions.

4. All five convicts then applied to the High Court for leave to appeal. The petition was heard by Ali Khan and Reddy, JJ. and they made the following order:

> The circumstances of the crime in this case were such that a brutal murder had been committed and sentence of death was the only one legally possible for the Sessions Judge to have passed and it was confirmed by the High Court.

Leave to appeal was refused.

5. Pandurang, Tukia and Bhilia, who were sentenced to death, applied here for special leave to appeal. Their petition was granted. The other two have not appealed.

6. The prosecution case is this. On 7-12-1950, about 3 o'clock in the afternoon Ramchander Shelke (the deceased) went to his field known as "Bhavara" with his wife's sister Rasika Bai (PW 1) and his servant Subhana Rao (PW 7). Rasika Bai started to pick chillies in the field while Ramchander went to another field "Vaniya-che-seth" which is about a furlong away. We gather that this field is near a river called Papana. Anyway, Rasika Bai heard shouts from that direction, so she ran to the river bank with Subhana and they both say that they saw all five accused attacking Ramchander with axes and sticks.

7. Two other persons, Laxman (PW 6) and Elba (PW 5), who were in the neighbourhood, also heard the cries and ran to the spot. They also say they witnessed the assault and name all five accused. The former has a field near by and was working in it; the latter was a passer-by.

8. Rasika Bai shouted out to the assailants not to beat Ramchander but they threatened her and then ran away. Ramehander died on the spot almost immediately.

9. There are four eyewitnesses, and the main question we have to consider is whether they can be believed. Ordinarily, we would not have enquired into questions of fact but as three persons have been sentenced to death on the opinion of the third Judge, despite the opinion of

one that the death sentence should not be imposed and of the other that the appellants are not guilty and so should be acquitted, we have deemed it advisable to examine the evidence.

10. Two of the eye-witnesses were considered unreliable by Reddy, J. in the High Court, so we will omit them from consideration and concentrate on the other two, Rasika Bai (PW 1) and Subhana (PW 7). Both give substantially the same version of what they saw of the assault. They heard Ramchander's cries from the direction of the river bank and rushed there. They say they saw all five accused striking him, the three appellants Pandurang, Tukia and Bhilia with axes, the other two, who have not appealed, with sticks. It is said that there is some discrepancy between Rasika Bai's statement in the Sessions Court and in the Committal Court about the order in which the blows were given and their number. Ali Khan, J. and Reddy, J. considered this unimportant and so do we. The important thing is that both witnesses are agreed on the following points -

(*1*) that Tukia struck Ramchander on his cheek; Rasika Bai adds that he also struck him on the head;
(2) that Pandurang hit him on the head;
(3) that after these blows Ramchander fell down and then Bhilia hit him on the neck.

Subhana does not say that the other two struck any particular blow. Rasika says that one of them, Nilia, hit Ramchander on the thigh with his stick and assigns no particular blow to the other.

11. Rasika Bai's version is that on seeing the assault she called out to the accused not to hit but they "raised their axes and sticks" and threatened her, and then ran away. Subhana merely says that they ran away.

12. After this all the accused absconded. They were arrested on different dates and were committed to trial separately. The dates of arrest and committal respectively in the case of each are as follows:

Bhilia	09-01-1951 and 14-06-1951
Tukia	13-10-1951 and 10-01-1952
Pandurang	31-08-1951 and 10-01-1952
Tukaram	13-04-1951 and 29-09-1951
Nilia	13-10-1951 and 10-01-1952

13. The main attack on this evidence was directed to the fact that neither the accused nor the eye-witnesses are named in the first information report. According to the prosecution, the report was made in the following circumstances.

14. Rasika and Subhana say that after the assault they went back to the village and told Rasika's sister Narsabai, PW 2(the deceased's widow) what they had seen. Narsabai says that they disclosed the names of the assailants at that time.

15. From here we go to the Police Patel who lives in a neighbouring village one mile away. He is Mahadappa (PW 9). He says that he was standing outside his house in his own village when the sun was setting and saw Krishnabai, the mother-in-law of the deceased, crying as she passed by outside his house. He asked her what was wrong and she told him that her son-in-law had been killed. On hearing this he wrote out a report, Ex. 4, and sent it to the

Police Station at Udgir which is about six miles from the scene of the murder. The first information report was recorded on the basis of this report at 10 o'clock the next morning.

16. Now nobody tells us who carried the report to the Police Station. It is written on a printed form and is signed by the Police Patel. Opposite the column headed "Name and address of the complainant or informant" is entered "Tukaram s/o Panda Sheolka". The Sub-Inspector, who wrote out the first information report on the basis of this report, entered the following in it:

> I am to submit that today a report dated 7-12-1950 from the Police Patel, Neemgaon village, has been received stating that (1) Tukaram, s/o Panda Sheolka, r/o Neemgaon village, came and stated that on 7-12-1950 Ramchander, s/o Govind Reddy was murdered, etc.

17. The Police Patel tells us that this Tukaram is a cousin of the deceased. He also says that -

> Tukaram, whose name is entered in column 2, is not the informant but is the complainant in this case. Tukaram had not given any written complaint to me. He had not given oral information to me. When I saw Krishnabai weeping and going, I did not know where Tukaram was. I do not know whether Tukaram was present in the village on that day or not.

This does shroud the matter in mystery but the fact that the report was made is, we think, beyond dispute, also that it was made about 10 o'clock the following morning. It is to be noted that the Sub-Inspector does not say that Tukaram brought the report to him but that Ex. 4(the report received from the Police Patel) states that Tukaram gave the Police Patel the information. In that he is not right (though the mistake is natural enough), because Ex. 4 merely places Tukaram's name opposite the printed column headed "complainant or informant". That leaves the matter equivocal but in view of what the Police Patel tells us, we think that he did mean to convey that Tukaram was the complainant, probably because he did not want to enter a woman's name and so picked on the nearest male relative. We see no reason to doubt his statement. He says he did not know any names at that time; and that is evident from the report. But what the learned counsel for the appellants says is that he saw Narsabai on the evening of the murder and as she did not give him any names it is evident that no one knew who the assailants were and that therefore the accusation made against the accused was a subsequent concoction and that it was for that reason that they waited till the next morning before reporting the matter to the police.

18. The Police Patel Mahadappa admits that he went to the scene of the occurrence the same night and that he stayed there the whole night. He also admits that he saw Narsabai there but says he did not speak to her. We have no doubt that he learned the names of the assailants when he went there but this was after he had sent his report. There is some mystery about the report. It did not reach the Police Station till 10 a.m. the next day though it was written about sunset the evening before, but as we do not know who took it and why he delayed it is idle to speculate. What is certain is that there was no point in sending off a report without names the next morning if the idea of delay was to concoct a story and implicate innocent persons. They would either have hit on the names by then or would have waited a little longer until they

made up their minds about the story they intended to tell. The haphazard way in which the report was written and dispatched indicates rustic simplicity rather than clever and well planned deceit. It has to be remembered that the deceased left no male relatives except this cousin Tukaram, about whom the Police Patel speaks, and his father Pandu, and though cause for enmity between Ramchander and three of the appellants is disclosed, there is nothing to connect this Tukaram or his father Pandu with the quarrel; and no one suggests that anybody else bore them a grudge. We think it unlikely that these three women, Rasikabai, Narsabai and Krishnabai, would have been capable of concocting this elaborate story and of influencing the Police Patel to stay his hand till they had thought of a suitable tale and found likely victims for their plot. Moreover, the whole village probably turned out as soon as the news spread; in any case the witnesses are agreed that there was a large crowd there. We think it would have been easy to find many persons to say that though they asked Rasikabai and Subhana and Narsabai and others present to tell them what had happened, nobody could because no one knew. It would be ridiculous to suppose that the whole village bore the accused a grudge and joined in an elaborate conspiracy against them. In the circumstances, we think Mahadappa told the truth. The absence of the names in the report is therefore not of much consequence in this case especially as the names were disclosed in full at the time of the inquest. All the witnesses who speak about this are agreed on that point.

19. Once that hurdle is surmounted, there is very little else to criticise in the evidence of Rasikabai and Subhana, bar unimportant discrepancies and the fact that they have made a few small and unimportant contradictions between their testimony in court and some of their numerous earlier statements. There were three sets of committal proceedings, and of course the usual questioning by the police and then the proceedings in the Sessions Court, so it is not surprising that these simple rustics should get confused and not remember in minute detail exactly what they had said from stage to stage. But the major part of their story hangs together remarkably well despite the many attempts to trip them in cross-examination in the various courts. As Reddy, J. has dealt with these discrepancies in detail, we need not go over it all again.

20. The injuries shown in the inquest report and the post-mortem report do not tally. It is questionable how far an inquest report is admissible except under Section 145 of the Evidence Act but we do not regard the difference as of value so far as the appellants are concerned; at best it could only have helped Tukaram and Nilia who have not appealed.

21. The inquest report shows eight injuries. The first four are incised wounds and tally with the evidence given by the witnesses. The remaining four are described as “blue and black marks”. The postmortem mentions the first four but not the others. The doctor was recalled by the High Court and he gives some sort of explanation about post-mortem stains on the body which we do not think is satisfactory, but the utmost this shows is that no stick blows were found on the body and that we are prepared to accept.

22. On a careful consideration of the evidence we think Rasika and Subhana are telling the truth and that they can be relied on. We will not rely on the other two witnesses. We are prepared to disregard the evidence of Rasika and Subhana insofar as they say that Tukaram and Nilia also beat Ramchander because the medical evidence does not disclose any injuries which could have been caused by a stick or sticks. As a matter of fact Subhana does not

ascribe any particular blow either to Tukaram or to Nilia though he does describe in detail what the other three did. All he says about Tukaram and Nilia is that—

> The accused present were striking Ramchander; Pandurang, Bhilia and Tukia were holding axes. Tukaram and Nilia had sticks in their hands.

This sort of omnibus accusation is not of much value, and Rasikabai is not much better though she does say that Nilia hit Ramchander on the thigh. Except for this, all she says is that

> "We saw the accused present striking Ramchander Shelke."

23. We think Rasika and Subhana are telling the truth when they say that these two accused were also there but we think that because of that they think they must have joined in the attack and so have added that detail to their story. It is also possible that Nilia did hit out at Ramchander but that the blow did not land on his body. In any case, they only had sticks in their hands which have not even been conceded the dignity of lathis. So the part they played was negligible.

24. We have looked into their cases to this extent so that we can set them on one side in determining who was responsible for the remaining injuries and also because the part they played will be necessary in determining the extent of the common object or intention, if any.

25. The medical evidence shows that the injury that caused death was the one on the neck. All the eyewitnesses are agreed that Bhilia was responsible for that. We refer to the other eye-witnesses here to show that there is no discrepancy on this point, but we only rely on Rasikabai and Subhana for determining the fact. Bhilia was directly charged with the murder and the injury on the throat is ascribed to him in the charge. His conviction cannot therefore be assailed on any of the technical points which arise in the case of the other two. We uphold his conviction under Section 302 of the Indian Penal Code.

26. The injury on the throat having been accounted for, we are left with three. They are —

(1) an incised wound on the scalp above the left ear,
(2) an incised wound on the scalp, central part, and
(3) a lacerated wound on the left side of the face which crushed the upper and lower jaws including the lips and teeth.

27. The doctor says that (*1*) and (*2*) could not have caused death but that the third could. Rasikabai and Subhana are agreed that the only person who struck on the cheek is Tukia. Rasikabai adds that he also hit Ramchander on the head. That means that Tukia and Pandurang caused the two non-fatal injuries on the head, one each, and that Tukia alone caused the fatal one on the cheek. Tukia's conviction under Section 302 of the Indian Penal Code was therefore justified.

28. In Pandurang's case we are left with the difficult question about Section 34 of the Indian Penal Code. But before we deal with that, we will set Section 149 of the Indian Penal Code aside. There is no charge under Section 149 and, as Lord Sumner points out in ***Barendra Kumar Ghosh* v. *King-Emperor*** (52 IA 40 at 52) Section 149, unlike Section 34, creates a specific offence and deals with the punishment of that offence alone. We would accordingly require strong reasons for using Section 149 when it is not charged even if it be

possible to convict under that section in the absence of a specific charge, a point we do not decide here. But that apart, there is, in our opinion, no evidence here which would justify the conclusion of a common object even if one had been charged.

29. There is some vague evidence to the effect that there had once been a dacoity at Ramchander's house and that he suspected "the accused" and reported them to the police who arrested them, but nothing came of it and they were later released. This is put forward as one of the grounds of enmity and to show why all five joined in the attack. But in the absence of anything specific we are not prepared to act on such a vague allegation especially about the persons who are said to have been wrongfully blamed. What, however, is more specific is this: Ramchander bought a field called Hatkerni at Neemgaon from one Shivamma Patelni about a year before the murder. Narsabai tells us that the three accused Nilia, Bhilia and Tukia, all of whom are Lambadas used to live in that field. When Ramchander bought it he turned them out and she says that gave them cause for enmity against him.

30. Now even if it be accepted that this evidence is indicative of prior concert, it only embraces the three Lambadas, Nilia, Bhilia and Tukia. Pandurang, who is a Hatkar, is not included. As this is the only evidence indicating a common purpose, and as we know nothing about what preceded the assault (for the witnesses arrived after it had started), we cannot gather any common object from the fact that Pandurang, though armed with an axe, only inflicted a light blow on the scalp which did not break any of the fragile bones in that region and from the fact that two others who were lightly armed with what have been called "sticks" inflicted no injuries at all. Section 149 is therefore out of the question.

31. Turning now to Section 34, that was not charged in Pandurang case but we need not consider whether such an omission is fatal because even if it had been charged there is no evidence from which a common intention embracing him can legitimately be deduced.

32. As we have just said, the witnesses arrived at a time when the beating was already in progress. They knew nothing about what went before. We are not satisfied that Tukaram is proved to have done anything except be present, and even if it he accepted that Nilia aimed a blow at Ramchander's thigh he was so half hearted about it that it did not even hit him; and in Pandurang case, though armed with a lethal weapon, he did no more than inflict a comparatively light head injury. It is true they all ran away when the eye-witnesses arrived and later absconded, but there is nothing to indicate that they ran away together as a body, or that they met afterwards. Rasikabai says that the "accused" raised their axes and sticks and threatened her when she called out to them, but that again is an all embracing statement which we are not prepared to take literally in the absence of further particulars. People do not ordinarily act in unison like a Greek chorus and, quite apart from dishonesty, this is a favourite device with witnesses who are either not mentally alert or are mentally lazy and are given to loose thinking. They are often apt to say "all" even when they only saw "some" because they are too lazy, mentally, to differentiate. Unless therefore a witness particularises when there are a number of accused it is ordinarily unsafe to accept omnibus inclusions like this at their face value. We are unable to deduce any prior arrangement to murder from these facts.

33. Now in the case of Section 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all: ***Mahbub Shah* v. *King Emperor*** (72 IA 148 at 153). Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: ***Barendra Kumar Ghosh* v. *King Emperor*** and ***Mahbub Shah* v. *King-Emperor***. As Their Lordships say in the latter case, "the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice".

34. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a pre-arranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to have the same intention independently of each other, e.g., the intention to rescue another and, if necessary, to kill those who oppose.

35. In the present case, there is no evidence of any prior meeting. We know nothing of what they said or did before the attack, not even immediately before. Pandurang is not even of the same caste as the others Bhilia, Tukia and Nilia are Lambadas, Pandurang is a Hatkar and Tukaram a Maratha. It is true prior concert and arrangement can, and indeed often must, be determined from subsequent conduct as, for example, by a systematic plan of campaign unfolding itself during the course of the action which could only be referable to prior concert and pre-arrangement, or a running away together in a body or a meeting together subsequently. But, to quote the Privy Council again, "the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case".

But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of cases. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis".

36. The learned counsel for the State relied on ***Mamand* v. *Emperor*** (AIR 1946 PC 45) because in that case the accused all ran away and Their Lordships took that into consideration

to establish a common intention. But there was much more than that. There was evidence of enmity on the part of the accused who only joined in the attack but had no hand in the killing, and none on the part of the two who did the actual murder. There was evidence that all three lived together and that one was a younger brother and the other a tenant of the appellant in question. There was evidence that they all ran away *together;* not simply that they ran away at the same moment of time when discovered, but that they ran away *together.* As we have said, each case must rest on its own facts and the mere similarity of the facts in one case cannot be used to determine a conclusion of fact in another. In the present case, we are of opinion that the facts disclosed do not warrant an inference of common intention in Pandurang case. Therefore, even if that had been charged, no conviction could have followed on that basis. Pandurang is accordingly only liable for what he actually did.

37. In our opinion, his act falls under Section 326 of the Indian Penal Code. A blow on the head with an axe which penetrates half an inch into the head is, in our opinion, likely to endanger life. We therefore set aside his conviction under Section 302 of the Indian Penal Code and convict him instead under Section 326. We are of opinion that in his case a sentence of imprisonment for a term of ten years will suffice. We accordingly set aside the sentence of death and alter it to one of ten years' rigorous imprisonment.

38. That leaves the question of sentence in the case of Bhilia and Tukia. It was argued that no sentence of death can be passed unless two Judges concur because of Section 377 of the Code of Criminal Procedure, and it was argued that Section 378 of the Code does not abrogate or modify that provision. We do not intend to examine that here because we are of opinion that the sentence should be reduced to transportation in these two cases mainly because of the difference of opinion in the High Court, not only on the question of guilt, but also on that of sentence. In saying this we do not intend to fetter the discretion of Judges in this matter, for a question of sentence is, and must always remain, a matter of discretion, unless the law directs otherwise. But when appellate Judges, who agree on the question of guilt, differ on that of sentence, it is usual not to impose the death penalty unless there are compelling reasons. We see no reason to depart from this practice in this case and so reduce the sentences of death in the case of Bhilia and Tukia to transportation for life because of the difference of opinion in the High Court.

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Maina Singh v. *State of Rajasthan*

(1976) 2 SCC 827: AIR 1976 SC 1084

P.N. SHINGHAL, J. - This appeal of Maina Singh arises out of the judgment of the Rajasthan High Court dated April 21, 1971 upholding the trial Court's judgment convicting him of an offence under Section 302 read with Section 34 I.P.C. for causing the death of Amar Singh and of an offence under Section 326 I.P.C. for causing grievous injuries to Amar Singh's son Ajeet Singh (PW 2), and sentencing him to imprisonment for life for the offence of murder and to rigorous imprisonment for three years and a fine of Rs 100 for the other offence.

2. The deceased Amar Singh and accused Maina Singh and his three sons Hardeep Singh, Jeet Singh and Puran Singh used to live in 'chak' No. 77 GB, in Ganganagar district of Rajasthan while Narain Singh used to live in another 'chak'. It was alleged that the relations between Amar Singh and Maina Singh were strained, as Maina Singh suspected that Amar Singh was giving information about his smuggling activities. Amar Singh was having some construction work done in his house and had engaged Isar Ram (PW 3) as a mason. On June 29, 1967, at about sunset, the deceased Amar Singh, his son Ajeet Singh (PW 2) and Isar Ram (PW 3) went to the '*diggi'* in '*murabba'* 35 for bath. Ajeet Singh took his bath, and was changing his clothes and Isar Ram was nearby. Amar Singh was cleaning his 'lota' after attending the call of nature. It is alleged that at that time Maina Singh and his three sons Hardeep Singli, Jeel Singh and Puran Singh came to the '*diggi'* along with Narain Singh. Maina "Singh was armed with a 12 bore gun, Puran Singh with a 'takua' and the other three with 'gandasis'. Maina Singh fired at Amar Singh, but could not hit him. The gunshots however hit Ajeet Singh (PW 2) on his legs and he jumped into a dry watercourse which was nearby to take cover. Maina Singh fired again, but without success. Amar Singh ran towards the sugarcane field crying for help but was chased by the accused. Ajeet Singh thereupon ran towards 'chak' No. 78 GB and ultimately went and lodged a report at police station Anoopgarh at 10 p.m. after covering a distance of about six miles. The five accused however followed Amar Singh. Maina Singh fired his gun at Amar Singh and he fell down. The other accused went near him and gave 'gandasi' blows, and Maina Singh gave a blow or two with. the butt end of his gun which broke and the broken pieces fell down. Amar Singh succumbed to his injuries on the spot, and the accused ran away.

3. On the report of Ajeet Singh about the incident which took place by the time he left for the police station, the police registered a case for an offence under Section 307 read with Section 149 I.P.C. and started investigation. The body of Amar Singh was sent for post-mortem examination. The report Ex. P-9 of Dr Shanker Lal (PW 5) is on the record. The injuries of Ajeet Singh (PW 2) were also examined by Dr Shanker Lal and his report in that connection is Ex. P-10. It was found that there were several gunshot injuries, incised wounds and lacerated wounds on the body of the deceased, and there were as many as 12 gunshot wounds on the person of Ajeet Singh (PW 2). All the five accused were found absconding and could be taken into custody after proceedings were started against them under Sections 87 and 88 Cr. P.C. Maina Singh held a licence for gun Ex. 23 and led to its recovery during the course of the investigation vide memorandum Ex. P-43. At that time, its butt was found to be

missing. Its broken pieces had however been recovered by the investigating officer earlier, along with .the empty cartridges.

4. The prosecution examined Ajeet Singh (PW 2), Isar Ram (PW 3) and Smt. Jangir Kaur (PW 7) the wife of the deceased as eyewitnesses of the incident. The accused denied the allegation of the prosecution altogether, but Maina Singh admitted that the gun belonged to him and he held a licence for it. The Sessions Judge disbelieved the evidence of Smt. Jangir Kaur (PW 7) mainly for the reason that her name had not been mentioned in the first information report. He took the view that the statements of Ajeet Singh (PW 2) and Isar Ram (PW 3) were inconsistent regarding the part played by Hardeep Singh, Jeet Singh, Narain Singh and Puran Singh accused, and although he held that one or more of the accused persons, besides Maina Singh, might be responsible for causing injuries to the deceased, along with Maina Singh, he held further that it could not be ascertained which one of the accused was with him. He also took the view that "someone else might have been with him" and he therefore gave the benefit of doubt to accused Hardeep Singh, Jeet Singh, Puran Singh and Narain Singh and acquitted them. As the statements of Ajeet Singh (PW 2) and Isar Ram (PW 3) were found to be consistent against appellant Maina Singh, and as there was circumstantial evidence in the shape of the recovery of empty cartridges near the dead body and gun (Ex. 23), as well as the medical evidence, and the fact that the accused had absconded, the learned Sessions Judge convicted and sentenced him as aforesaid.

5. An appeal was preferred by the State against the acquittal of the remaining four accused, and Maina Singh also filed an appeal against his conviction. The High Court dismissed both the appeals and maintained the conviction and sentence of Maina Singh as aforesaid.

6. Mr. Harbans Singh appearing on behalf of appellant Maina Singh has not been able to challenge the evidence on which appellant Maina Singh has been convicted, but he has raised the substantial argument that he could not have been convicted of the offence of murder under Section 302 read with Section 34 I.P.C. when the four co-accused had been acquitted and the Sessions Judge had found that it was not possible to record a conviction under Section 302 read with Section 149 I.P.C. or Section 148 I.P.C. It has been argued that when the other four accused were given the benefit of doubt and were acquitted, it could not be held, in law, that they formed an unlawful assembly or that any offence was committed by appellant Maina Singh in prosecution of the common object of that assembly. It has been argued further that, *a fortiori*, it was not permissible for the court of sessions or the High Court to take the view that a criminal act was done by appellant Maina Singh in furtherance of the common intention of the "other accused" when those accused had been named to be no other than Hardeep Singh, Puran Singh, Jeet Singh and Narain Singh who had all been acquitted. It has therefore been argued that all that was permissible for the High Court was to convict appellant Maina Singh of any offence which he might have committed in his individual capacity, without reference to the participation of any other person in. the crime. On the other hand, it has been argued by Mr. S. M. Jain that as the learned Sessions Judge had acquitted the remaining four accused by giving them the benefit of doubt, and had recorded the finding that one or more of the accused persons or some other person might have participated in the crime along with Maina Singh,

the High Court was quite justified in upholding the conviction of the appellant Maina Singh of an offence under Section 302/34 I.P.C.

7. The relevant portion of the judgment of the trial Court, which bears on the controversy and has been extracted with approval in the impugned judgment of the High Court, is as follows:

> The injuries found on the person of the deceased Amar Singh were with firearm, blunt as well as sharp weapon. The firearm injuries and the blunt weapon injuries have been assigned to Maina Singh and so there must have been other person also along with Maina Singh in causing injuries to the deceased. It can be so inferred from the statements of Isar Ram and Ajeet Singh also. These facts could no doubt create a strong suspicion that one or more of the accused persons might be responsible along with Maina Singh in causing injuries to the deceased. In view of the statement of Isar Ram and Ajeet Singh it cannot however be ascertained which one of the accused was with Maina Singh and it was also possible that someone else might have been with him. In such a case the prosecution version against these four accused persons arc not proved beyond doubt. They arc therefore not guilty of the offence with which they have been charged.

It would thus appear that the view which has found favour with *the* High Court is that as there were injuries with firearm and with blunt and sharp-edged weapons, and as the firearm and the blunt weapon injuries had been ascribed to Maina Singh, there must have been one other person with him in causing the injuries to the deceased. At the same time, it has been held further that these facts could only create a strong suspicion "that one or more of the accused persons might be responsible along with Maina Singh in causing the injuries to the deceased", but it could not be ascertained which one of the accused was with him and that it was also possible that "someone else might have been with him". The finding therefore is that the other person might have been one of the other accused or someone else, and not that the other associate in the crime was a person other than the accused. Thus the finding is not categorical and does not exclude the possibility of infliction of the injuries in furtherance of the common intention of one of the acquitted accused and the appellant.

8. Another significant fact which bears on the argument of Mr. Harbans Singh is that while in the original charge-sheet the Sessions Judge specifically named appellant Maina Singh and the other accused Hardeep Singh, Puran Singh, Jeet Singh and Narain Singh as forming an unlawful assembly and for causing the death of Amar Singh in furtherance of the common object of that assembly, he altered that charge but retained, at the same time, the charge that Maina Singh formed an unlawful assembly along with the "other accused" with the common object of murdering Amar Singh and intentionally caused injuries to him along with "the other accused" in prosecution of that common object. In this case therefore Maina Singh and the other four accused were alleged, all along, to have participated in the crime and were named in the chargesheet as the perpetrators of the crime without there being an allegation that some other person (besides the accused) took part in it in any manner whatsoever. It was in fact the case from the very beginning, including the first information report, that the offence was committed by all the five named accused, and even the evidence of the prosecution was confined to them all through and to no other person. The question is

whether the High Court was right in upholding the conviction of the appellant with reference to Section 34 I.P.C. in these circumstances?

9. Such a question came up for consideration in this Court on earlier occasions, and we shall refer to some of those decisions in order to appreciate the argument of Mr. Jain that the decision in ***Dharam Pal* v. *State of U. P.*** [(1975) 2 SCC 596] expresses the latest view of this Court and would justify the appellant's conviction by invoking Section 34 I.P.C.

10. We may start by making a reference to ***King* v. *PIummer*** [(1902) 2 KB 339] which, as we shall show has been cited with approval by this Court in some of its decisions. That was a case where there was a trial of an indictment charging three persons jointly with conspiring together. One of them pleaded guilty, and a judgment was passed against him and the other two were acquitted. It was alleged that the judgment passed against the one who pleaded guilty was bad and could not stand. Lord Justice Wright held that there was much authority to the effect that if there was acquittal of the only alleged co-conspirators, no judgment could have been passed on the appellant, if he had not pleaded guilty, because the verdict must have been regarded as repugnant in finding that there was a criminal agreement between the appellant and the others and none between them and him. In taking that view he made a reference to ***Harrison* v. *Errington*** [(1627) Popham, 202] whereupon an indictment of three for riot two were found not guilty and one guilty, and upon error brought it was held a "void verdict". Bruce, J. who was the other judge in the case made a reference to the following statement in **Chitty's *Criminal Law*** while agreeing with the view taken by Wright, J.:

> And it is holden that if all the defendants mentioned in the indictment, except one, are acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid, and no judgment can be passed upon him.

11. This Court approved ***Plummer's*** case in its decision in ***Topandas* v. *State of Bombay*** [AIR 1956 SC 33]. That was a case where four named individuals were charged with having committed an offence under Section 120-B I.P.C. and three out of those four were acquitted. This Court held that the remaining accused could not be convicted of the offence as his alleged co-participators had been acquitted, for that would be clearly illegal.

12. A similar point came up for consideration in ***Mohan Singh* v. *State of Punjab*** [AIR 1963 SC 174]. There two of the five persons who were tried together were acquitted while two were convicted under Section 302 read with Section 149 and Section 147 I.P.C. In the charge those five accused persons and none others were mentioned as forming the unlawful assembly and the evidence led in the case was confined to them. The proved facts showed that the two appellants and the other convicted person, who inflicted the fatal blow, were actuated by common intention of fatally assaulting the deceased. While examining the question of their liability, it was observed as follows:

> Cases may also arise where in the charge the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the court less than five persons to be tried, then Section 149 cannot be invoked. Even in such cases, it is

> possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial Court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under Section 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under Section 149 because on the evidence the court of facts is liable to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five.

13. The other case to which we may make a reference is ***Krishna Govind Patil* v. *State of Maharashtra*** [AIR 1963 SC 1413]. It noticed and upheld the earlier decision in ***Mohan Singh's*** case and after referring to the portion which we have extracted, it was held as follows:

> It may be that the charge discloses only named persons; it may also be that the prosecution witnesses named only the said accused; but there may be other evidence, such as that given by the court witnesses, defence witnesses or circumstantial pieces of evidence, which may disclose the existence of named or unnamed persons, other than those charged or deposed to by the prosecution witnesses, and the court, on the basis of the said evidence, may come to the conclusion that others, named or unnamed, acted conjointly along with one of the accused charged. But such a conclusion is really based on evidence.

14. It would thus appear that even if, in a given case, the charge discloses only the named persons as co-accused and the prosecution witnesses confine their testimony to them, even then it would be permissible to come to the conclusion that others named or unnamed, besides those mentioned in the charge or the evidence of the prosecution witnesses, acted conjointly with one of the charged accused if there was other evidence to lead to that conclusion, but not otherwise.

15. The decision in ***Krishna Govind Patil's*** case was followed by the decision in ***Ram Bilas Singh* v. *State of Bihar*** [(1964) 1 SCR 775]. After noticing and approving the view taken in ***Plummer's*** case and the decisions in ***Mohan Singh's*** case and ***Krishna Govind Patil's*** case this Court stated the law once again as follows:

> The decisions of this Court quoted above thus make it clear that where the prosecution case as set out in the charge and as supported by the evidence is to the effect that the alleged unlawful assembly consists of five or more named persons and no others, and there is no question of any participation by other persons not identified or identifiable it is not open to the court to hold that there was an unlawful assembly unless it comes to the definite conclusion that five or more of the named persons were members thereof. Where, however, the case of the prosecution and the evidence adduced indicates that a number in excess of five persons participated in the incident and some of them could, not be identified, it would be open to the court to convict less than five of the offence of being members of the unlawful assembly or convict them of the offence committed by the

unlawful assembly with the aid of Section 149 I. P. C. provided it comes to the conclusion that five or more persons participated in the incident.

16. The other decision to which our attention has been invited is ***Yashwant* v. *State of Maharashtra*** [(1972) 3 SCC 639]. The decision in ***Krishna Govind Patil*** was cited there on behalf of the appellant and, while referring to the view expressed there, it was observed that in the case before the court there was evidence that the man who used the axe on Sukal was a man who looked like appellant Brahmanand Tiwari, and could be that accused himself. But, as the Court was not satisfied that the identity of the person who used the axe on Sukal was satisfactorily established, as that of Brahmanand Tiwari, it took the view that the remaining accused could be convicted with the aid of Section 34 for the offences committed by them. This Court did not therefore disagree with the view taken in ***Krishna Govind Patil's*** case, but purported to follow it in its decision and took the aforesaid view in regard to the identity of Brahmanand Tiwari for the purpose of distinguishing it from the case of ***Krishna Govind Patil*** where there was not a single observation in the judgment to indicate that persons other than the named accused participated in the offence and there was no evidence also in that regard.

17. The matter once again came up for consideration in ***Sukh Ram* v. *State of U. P.*** [(1974) 3 SCC 656]. The Court referred to its earlier decisions including those in ***Mohan Singh's*** case and ***Krishna Govind Patil's*** case and. while distinguishing them on facts, it observed that as the prosecution did not put forward a case of the commission of crime by one known person and one or two unknown persons as in ***Sukh Ram's*** case, and there was no evidence to the effect that the named accused had committed the crime with one or more other persons, the acquittal of the other two accused raised no bar to the conviction of the appellant under Section 302 read with Section 34 I.P.C. The decision in ***Sukh Ram's*** case cannot therefore be said to lay down a contrary view for it has upheld the view taken in the earlier decisions of this Court.

18. That leaves the case of ***Dharam Pal* v. *State of U. P.*** for consideration. In that case four accused were tried with fourteen others for rioting. The trial Court gave benefit of doubt to eleven of them, and acquitted them. The remaining seven were convicted for the offence under Section 302/149 1. P. C. and other offences. The High Court gave benefit of doubt to four of them, and held that at least four of the accused participated in the crime because of their admission and the injuries. On appeal this Court found that the attacking party could not conceivably have been of less than five because that was the number of the other party, and it was in that connection that it held that there was no doubt about the number of the participants being not less than five. It was also held that as eighteen accused participated in the crime, and the Court gave the benefit of doubt to be on the side of safety, as a matter of abundant caution, reducing the number to less than five, it may not be difficult to reach the conclusion, having regard to undeniable facts, that the number of the participants could not be less than five. That was therefore a case which was decided on its own facts but even so, it was observed as follows:

> It may be that a definite conclusion that the number of participants was at least five may be very difficult to reach where the allegation of participation is confined to five known persons and there is no doubt about the identity of even one.

It cannot therefore be said that the decision in ***Dharam Pal's*** case is any different from the earlier decisions of this Court, or that it goes to support the view which has been taken by the High Court in the case before us. The view which has prevailed with this Court all along will therefore apply to the case before us.

19. As has been stated, the charge in the present case related to the commission of the offence of unlawful assembly by the appellant along with the other named four co-accused, and with no other person. The trial in fact went on that basis throughout. There was also no direct or circumstantial evidence to show that the offence was committed by the appellant along with any other unnamed person. So when the other four co-accused have been given the benefit of doubt and have been acquitted, it would not be permissible to take the view that there must have been some other person along with the appellant Maina Singh in causing the injuries to the deceased. It was as such not permissible to invoke Section 149 or Section 34 I.P.C. Maina Singh would accordingly be responsible for the offence, if any, which could be shown to have been committed by him without regard to the participation of others.

20. The High Court has held that there could be no room for doubt that the firearm and the blunt weapon injuries which were found on the person of Amar Singh were caused by appellant Maina Singh and that finding has not been challenged before us by Mr. Harbans Singh. Dr Shanker Lal (PW 5) who performed the post-mortem examination stated that while all those injuries were collectively sufficient in the ordinary course of nature to cause death, he could not say whether any of them was individually sufficient to cause death in the ordinary course of nature. It is not therefore possible to hold that the death of Amar Singh was caused by the gunshot or the blunt weapon injuries which were inflicted by appellant Maina Singh. Dr Shanker Lal has stated that the fracture of the frontal bone of the deceased could have been caused by external injuries Nos. 8, 10 and 12, and that he could die of that injury also but of those three injuries injury No. 12 was inflicted by a sharp-edged weapon and could not possibly be imputed to the appellant. The evidence on record therefore does not go to show that he was responsible for any such injury as could have resulted in Amar Singh's death. The evidence however proves that he inflicted gunshot injuries on the deceased, and Dr Shanker Lal has stated that one of those injuries (injury No. 26) was grievous. Maina Singh was therefore guilty of voluntarily causing grievous hurt to the deceased by means of an instrument for shooting, and was guilty of an offence under Section 326 I.P.C. In the circumstances of the case, we think it proper to sentence him to rigorous imprisonment for 10 years for that offence. As has been stated, he has been held guilty of a similar offence for the injuries inflicted on Ajeet Singh (PW 2) and his conviction and sentence for that other offence under Section 326 I. P. C. has not been challenged before us.

21. The appeal is therefore allowed to the extent that the conviction or Maina Singh under Section 302/34 I.P.C. is altered to one under Section 326 I.P.C. and the sentence is reduced to rigorous imprisonment for ten years thereunder. The conviction under Section 326, for causing injuries to Ajeet Singh, and the sentence of rigorous imprisonment for three years and a fine of Rs 100 call for no interference and are confirmed. Both the sentences will run concurrently.

* * * * *

Mizaji v. *State of U.P.*

1959 Supp (1) SCR 940 : AIR 1959 SC 572

J.L. KAPUR, J. - These are two appeals which arise out of the same judgment and order of the High Court at Allahabad and involve a common question of law. Appellants Tej Singh and Mizaji are father and son, Subedar is a nephew of Tej Singh, Machal is Tej Singh's cousin and Maiku was a servant of Tej Singh. They were all convicted under Section 302 read with Section 149 of the Indian Penal Code and except Mizaji who was sentenced to death, they were all sentenced to imprisonment for life. They were also convicted of the offence of rioting and because Tej Singh and Mizaji were armed with a spear and a pistol respectively, they were convicted under Section 148 of the Indian Penal Code and sentenced to three years' rigorous imprisonment and the rest who were armed with *lathis* were convicted under Section 147 of the Indian Penal Code and sentenced to two years' rigorous imprisonment. All the sentences were to run concurrently but Mizaji's term of imprisonment was to come to an end after "he is hanged". Against this order of conviction the appellants took an appeal to the High Court and both their convictions and sentences were confirmed.

2. The offence for which the appellants were convicted was committed on July 27, 1957, at about sunrise and the facts leading to the occurrence were that Field No. 1096 known as Sukhna field was recorded in the revenue papers in the name of Banwari who was recorded as in possession as tenant-in-chief. Sometime in 1949 he mortgaged this plot of land to one Lakhan Singh. In 1952 this field was shown as being under the cultivation of Rameshwar, the deceased and four other persons, Ram Sarup who was the uncle of Rameshwar, Jailal his brother, Sita Ram and Saddon. The record does not show as to the title under which these persons were holding possession. The mortgage was redeemed sometime in 1953. The defence plea was that in the years 1954, 1955, 1956 possession was shown as that of Banwari. But if there were any such entries, they were corrected in 1956 and possession was shown in the revenue papers as that of Rameshwar, and four others above-named. These entries showing cultivating possession of the deceased and four others were continued in 1957. On April 18, 1957, Banwari sold Field No. 1096 to Tej Singh appellant who made an application for mutation in his favour but this was opposed by the deceased and four other persons whose names were shown as being in possession. In the early hours of July 27, 1957 the five appellants came armed as above stated. Mizaji's pistol is stated to have been in the fold (*phent*) of his *dhoti*. A plough and plank known as *patela* and bullocks were also brought. The disputed field had three portions, in one sugarcane crop was growing, in the other Jowar had been sown and the rest had not been cultivated. Maiku started ploughing the Jowar field and overturned the Jowar sown therein while Tej Singh with his spear kept watch. Bateshwar PW 7 seeing what was happening gave information of this to Ramsarup who accompanied by Rameshwar, Jailal and Israel came to the Sukhna field but unarmed. Ram Sarup inquired of Tej Singh as to why he was damaging his field and Tej Singh replied that he had purchased the field and therefore would do "what he was doing" which led to an altercation. Thereupon, the four persons cutting the sugarcane crop i.e. Mizaji, Subedar, Machal and Maiku came to the place where Tej Singh was and upon the instigation of Tej Singh, Mizaji took out the pistol and fired which hit Rameshwar, who fell down and died half an hour later. The

accused, after Rameshwar fell down, fled from the place. Ram Sarup, Jailal and Israel then went to the police station Nawabgunj and Ram Sarup there made the first information report at about 7-30 a.m., in which all the five accused were named. When the police searched for the accused they could not be found and proceedings were taken under Section 87 and 88 of the Code of Criminal Procedure, but before any process was issued Subedar, Tej Singh and Machal and Maiku appeared in court on August 3, 1957 and Mizaji on August 14, 1957, and they were taken into custody.

3. The prosecution relied upon the evidence of the eyewitnesses and also of Bateshwar who carried the information to the party of complainant as to the coming of Tej Singh and others. The defence of the accused was a total denial of having participated in the occurrence and as a matter of fact suggested that Rameshwar was killed in a dacoity which took place at the house of Ram Sarup. The learned Sessions Judge accepted the story of the prosecution and found Ram Sarup to be in possession of the field; he also found that the appellants formed an unlawful assembly "the common object of which was to take forcible possession of the field and to meet every eventuality even to the extent of causing death if they are interfered with in their taking possession of the field" and it was in prosecution of the common object of that assembly that Mizaji had fired the pistol and therefore all were guilty of the offence of rioting and of the offence under Section 302 read with Section 149, Indian Penal Code. The High Court on appeal held that the appellants were members of an unlawful assembly and had gone to the Sukhna field with the object of taking forcible possession and

> There is also no doubt that the accused had gone there fully prepared to meet any eventuality even to commit murder if it was necessary for the accomplishment of their common object of obtaining possession over the field. There is also no doubt that considering the various weapons with which the accused had gone armed they must have known that there was likelihood of a murder being committed in prosecution of their common object.

The High Court also found that all the appellants had gone together to take forcible possession and were armed with different weapons and taking their relationship into consideration it was unlikely that they did not know that Mizaji was armed with a pistol and even if the common object of the assembly was not to commit the murder of Rameshwar or any other member of the party of the complainants "there can be no doubt that the accused fully knew, considering the nature of weapons with which they were armed, namely, pistol and lathis, that murder was likely to be committed in their attempt to take forcible possession over the disputed land". The High Court further found that the accused had gone prepared if necessary to commit the murder in prosecution of their common object of taking forcible possession. They accepted the testimony of Matadin and Hansram who stated that all the accused had asked Ram Sarup and his companions to go away, otherwise they would finish all of them and when they resisted accused Mizaji fired the pistol at them and thus in view of the nature of the weapons with which they had gone to the disputed piece of land, "they knew that murder was likely to be committed in prosecution of their object". Another finding given by the High Court was that the appellants wanted to forcibly dispossess the complainants and with that object in view they went to the disputed field to take forcible possession and that the

complainant's party on coming to know of it went to the field and resisted. Mizaji fired the pistol and thus caused the death of Rameshwar. The High Court also held:

> We are also of the opinion that the act of the accused was premeditated and well-designed and that the accused considering the circumstances of the case and the weapons with which they were armed, knew that murder was likely to be committed in accomplishment of their common object.

For the appellants it was contended that the High Court was not justified in drawing the inference that other members of the party of the appellants had knowledge of the existence of the pistol. There is no doubt that on the evidence the father Tej Singh must have known that the son, Mizaji, had a pistol. And in the circumstances of this case the High Court cannot be said to have erroneously inferred as to the knowledge of the rest as to the possession of pistol by Mizaji.

4. The question for decision is as to what was the common object of the unlawful assembly and whether the offence of murder was committed in prosecution of the common object or was such an offence as the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. It was argued on behalf of the appellants that the common object was to take forcible possession and that murder was committed neither in prosecution of the common object of the unlawful assembly nor was it such as the members of that assembly knew to be likely to be committed. That the common object of the unlawful assembly was to take forcible possession of the Sukhana field cannot be doubted. Can it be said in the circumstances of this case that in prosecution of the common object the members of the unlawful assembly were prepared to go to the extent of committing murder or they knew that it was likely to be committed? One of the members of the assembly Tej Singh was armed with a spear. His son Mizaji was armed with a pistol and others were carrying *lathis*. The extent to which the members of the unlawful assembly were prepared to go is indicated by the weapons carried by the appellants and by their conduct, their collecting where Tej Singh was and also the language they used at the time towards the complainant's party. The High Court has found that the appellants "had gone prepared to commit murder if necessary in the prosecution of their common object of taking forcible possession of the land", which it based on the testimony of Matadin and Hansraj who deposed that when the complainant's party arrived and objected to what the appellants were doing they (the appellants) "collected at once" and asked Ram Sarup and his companions to go away otherwise they would finish all of them and when the latter refused to go away, the pistol was fired. That finding would indicate the extent to which the appellants were prepared to go in the prosecution of their common object which was to take forcible possession of the Sukhana field. The High Court also found that in any event the case fell under the second part of Section 149, Indian Penal Code in view of the weapons with which the members of the unlawful assembly were armed and their conduct which showed the extent to which they were prepared to go to accomplish their common object.

5. Counsel for the appellants relied on ***Queen* v. *Sabid Ali*** [(1873) 20 WR 5 Cr] and argued that Section 149 was inapplicable. There the learned Judges constituting the full bench gave differing opinions as to the interpretation to be put on Section 149, Indian Penal Code. That was a case where the members of an unlawful assembly went to take forcible possession

of a piece of land. The view of the majority of the Judges was that, finding unexpected opposition by one member of the party of the complainants and also finding that they were being overpowered by him, one of the members of the unlawful assembly whose exact time of joining the unlawful assembly was not proved fired a gun killing one of the occupants of the land who were resisting forcible dispossession. It was also held that the act had not been done with a view to accomplish the common object of driving the complainants, out of the land, but it was in consequence of an unexpected counter-attack. Ainslie, J., was of the opinion that the common object of the assembly was not only to forcibly eject the occupants but to do so with show of force and that common object was compounded both of the use of the means and attainment of the end and that it extended to the committing of murder. Phear, J., said that the offence committed must be immediately connected with that common object by virtue of the nature of the object. The members of the unlawful assembly must be prepared and intend to accomplish that object at all costs. The test was, did they intend to attain the common object by means of murder if necessary? If events were of sudden origin, as the majority of the learned Judges held them to be in that case, then the responsibility was entirely personal. In regard to the second part he was of the opinion that for its application it was necessary that members of the assembly must have been aware that it was likely that one of the members of the assembly would do an act which was likely to cause death. Couch, C.J., was of the opinion that firing was not in prosecution of the common object of the assembly and that there was not much difference between the first and the second part of Section 149. He said:

> At first there does not seem to be much difference between the two parts of the section and I think the cases which would be within the first, offences committed in prosecution of the common object, would be, generally, if not always, within the second, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. But I think there may be cases which would come within the second part and not within the first.

Jackson, J., held in the circumstances of that case that assembly did not intend to commit nor knew it likely that murder would be committed. Pontifex, J., interpreted the section to mean that the offence committed must directly flow from the common object or it must so probably flow from the prosecution of the common object that each member might antecedently expect it to happen. In the second part “know” meant to know that some members of the assembly had previous knowledge that murder was likely to be committed.

6. This section has been the subject-matter of interpretation in the various High Courts of India, but every case has to be decided on its own facts. The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a pre-concert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression ‘know’ does not mean a mere

possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of Section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all. There is a great deal to be said for the opinion of Couch, C.J., in ***Sabid Ali*** case that when an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part, but not within the first. The distinction between the two parts of Section 149, Indian Penal Code cannot be ignored or obliterated. In every case it would be an issue to be determined whether the offence committed falls within the first part of Section 149 as explained above or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part.

7. Counsel for the appellants also relied on ***Chikkarange Gowde* v. *State of Mysore*** [AIR 1956 SC 731]. In that case there were special circumstances which were sufficient to dispose of it. The charge was a composite one mixing up common intention and common object under Sections 34 and 149, Indian Penal Code and this Court took the view that it really was one under Section 149 Indian Penal Code. The charge did not specify that three of the members had a separate common intention of killing the deceased, different from that of the other members of the unlawful assembly. The High Court held that the common object was merely to chastise the deceased, and it did not hold that the members of the unlawful assembly knew that the deceased was likely to be killed in prosecution of that common object. The person who was alleged to have caused the fatal injury was acquitted. This Court held that on the findings of the High Court there was no liability under Section 34 and further the charge did not give proper notice, nor a reasonable opportunity, to those accused to meet that charge. On these findings it was held that conviction under Section 302 read with Section 149 was not justified in law, nor a conviction under Section 34.

8. It was next argued that the appellants went to take possession in the absence of the complainants who were in possession and therefore the common object was not to take forcible possession but to quietly take possession of land which the appellants, believed was theirs by right. In the first place there were proceedings in the Revenue Department going on about the land and the complainants were opposing the claim of the appellants and then when people go armed with lethal weapons to take possession of land which is in possession of others, they must have the knowledge that there would be opposition and the extent to which they were prepared to go to accomplish their common object would depend on their conduct as a whole.

9. The finding of the High Court as we have pointed out was that the appellants had gone with the common object of getting forcible possession of the land. They divided themselves into three parties, Maiku appellant was in the field where *jowar* was sown and he was

ploughing it, Mizaji, Subedar and Machal were in the sugar field and cutting the crop. Tej Singh was keeping watch. When the party of the complainants on being told of what the appellants were doing came, they protested to Tej Singh. Thereupon, all the members of Tej Singh's party gathered at the place where Tej Singh was and asked the complainants "to go away otherwise they would be finished", but they refused to go. Thereupon Tej Singh asked Mizaji to fire at them and Mizaji fired the pistol which he was carrying in the fold of his dhoti as a result of which Rameshwar was injured, fell down and died 1/2 hour later. It was argued on behalf of the appellants that in these circumstances it cannot be said that the offence was committed in prosecution of the common object of the assembly which was clear from the fact that the party had divided itself into three parts and only Mizaji used his pistol and the other appellants did not use any weapon and just went away.

10. Both the Courts below have found that the pistol was fired by Mizaji and thus he was responsible for causing the death of Rameshwar which would be murder and also there is no doubt that Tej Singh would be guilty of abetment of that offence. But the question is whether Section 149 is applicable in this case and would cover the case of all the appellants? This has to be concluded from the weapons carried and the conduct of the appellants. Two of them were armed one with a spear and the other with a pistol. The rest were armed with lathis. The evidence is that when the complainants' party objected to what the appellants did, they all collected together and used threats towards the complainants' party telling them to go away otherwise they would be finished and this evidence was accepted by the High Court. From this conduct it appears that members of the unlawful assembly were prepared to take forcible possession at any cost and the murder must be held to be immediately connected with the common object and therefore the case falls under Section 149, Indian Penal Code and they are all guilty of murder. This evidence of Hansram and Matadin which relates to a point of time immediately before the firing of the pistol shows that the members of the assembly at least knew that the offence of murder was likely to be committed to accomplish the common object of forcible possession.

11. It was then contended that Mizaji did not want to fire the pistol and was hesitating to do so till he was asked by his father to fire and therefore penalty of death should not have been imposed on him. Mizaji carried the pistol from his house and was a member of the party which wanted to take forcible possession of the land which was in possession of the other party and about which proceedings were going on before the Revenue Officer. He fully shared the common object of the unlawful assembly and must be taken to have carried the pistol in order to use it in the prosecution of the common object of the assembly and he did use it. Merely because a son uses a pistol and causes the death of another at the instance of his father is no mitigating circumstance which the courts would take into consideration.

12. In our opinion the courts below have rightly imposed the sentence of death on Mizaji. Other appellants being equally guilty under Section 149, Indian Penal Code, have been rightly sentenced to imprisonment for life.

13. The appeals must therefore be dismissed.

* * * * *

Chandra Bihari Gautam v. *State of Bihar*

(2002) 9 SCC 208

R.P. SETHI, J. - Contending that the prosecution had failed to prove the presence of all the appellants and the existence of common object within the meaning of Section 149 of the Indian Penal Code, the learned counsel for the appellants has argued that except appellant Manoj Kumar, no other accused could be convicted or sentenced for the death of the deceased persons. It is submitted that even if the appellants are proved to be present on the spot when the occurrence took place, they cannot be held guilty for the commission of any offence as they were not proved to be sharing any common object but were only bystanders. It has been further argued on behalf of some appellants that the prosecution witnesses being interested were not reliable and the courts below wrongly relied upon their testimony to convict and sentence the appellants.

2. The facts giving rise to the filing of the present appeals are that on 23-7-1994 at about 2.00 a.m. the appellants accompanied by 300-400 persons, armed with deadly weapons like guns attacked the house of Ganesh Singh in Village Amarpur. Bholi Singh was shot dead and Nawlesh Singh, Shiv Narain Singh, Kedar Singh, Sanjay Singh and Ajay Kumar were burnt alive inside the room where they were hiding. According to the first information report, the informant, namely, Ganesh Singh (PW 5) along with other members of the family had slept on the upper floor of his house in the open. At about 1.30 a.m. in the night there was some drizzling whereupon the female members of the family came down to the ground floor of the house and the male members moved inside three separate rooms on the southern side of the upper floor of the house. In the western room facing north Nawlesh Singh, Sanjay Singh, Ajay Kumar, Kedar Singh, Shiv Narain Singh and Bholi Singh went to sleep. The informant (PW 5) himself occupied the middle room and in the room on the eastern side his nephew Dhanju Kumar (PW 1) slept. After about half an hour, the informant heard sounds of firing from the northern side of the roof of his house and he got up. He heard one person saying that Nawlesh should come out and surrender as the person speaking claimed to be the officer in charge of the police station.

He heard Nawlesh saying that if the person seeking surrender was the officer in charge of the police station, he should come to the front door of the house. Ganesh Singh (PW 5) further stated that he saw some fire-like substance and then raised an alarm that the extremists had arrived in khakhi dress. The culprits set the room on fire in which Nawlesh was sleeping along with others. The fire was set with the help of petrol bombs. The occurrence was seen by the informant through a hole in the room where he was sleeping. Out of the mob of 300-400 persons, he identified 19 persons in the light of a torch flashed by fire in the room including the appellants. All the aforesaid persons were named in his statement. In the entire process about 300-400 rounds of firing were made terrifying the whole of the locality. The motive behind the commission of the crime was stated to be enmity of Manoj Kumar with the family of the informant.

3. After completion of the investigation the prosecution filed the charge-sheet in the trial court against 16 persons including the appellants. To prove its case the prosecution examined 8 witnesses. During the pendency of the trial, one of the accused, namely, Mani Singh (A-16)

died. Out of the remaining 15 accused persons, Ram Binay Singh (A-4), Bageshwari Sharma (A-7) and Divya Kumar Madhu (A-15) were acquitted by the trial court. A-2, namely, Hirdaya Singh @ Dhirendra Singh and Manoj Kumar Gautam (A-11) were convicted under Section 302 of the Indian Penal Code and sentenced to death by the trial court. The other accused were convicted for the commission of offences under Section 302 read with Section 149 IPC and sentenced to life imprisonment. The accused were also convicted for the commission of offences under Sections 148, 436 and 120-B of the Indian Penal Code and Section 27 of the Arms Act but no separate sentences were awarded to them. Not satisfied with their conviction and sentences, the accused persons filed Criminal Appeals Nos. 464, 517 and 528 of 1997 and 24 of 1998. All the appeals, along with Death Reference No. 6 of 1997 were disposed of by the common judgment impugned in these appeals. The conviction of the appellants was upheld but the sentence awarded to Hirdaya Singh @ Dhirendra Singh (A-2) and Manoj Kumar Gautam (A-11) was commuted from death sentence to imprisonment for life. Not satisfied even with the judgment of the High Court, the present appeals have been filed by the convicted accused persons.

4. During the pendency of Criminal Appeal No. 1161 of 1999, one of the appellants, namely, Nawal Kishore Gautam (A-3) has died. So far as the appeal regarding Nawal Kishore Gautam is concerned, the same has thus abated.

5. We are not inclined to re-examine the whole of the prosecution case for finding out as to whether the occurrence had taken place in which six people were killed by the appellants in the manner alleged by the prosecution. We find no reason to disbelieve any of the eyewitnesses, namely, Dhananjay Kumar (PW 1), Neelam Devi (PW 2), Narendra Singh (PW 3), Balwanti Devi (PW 4) and Ganesh Singh (PW 5). The trial court as well as the High Court have, after critical examination of their statements, rightly concluded that they were truthful witnesses and that all the appellants in these appeals were present at the time of occurrence. Merely because the witnesses happened to be the relations of the deceased is not a ground to reject their testimony. Under the circumstances of the case, the aforesaid witnesses appear to be natural witnesses who were supposed to be at the house of Ganesh Singh (PW 5) when the occurrence took place. The mere possibility of the occurrence having taken place in the manner suggested by the defence counsel is no ground for interference in the appeals filed by special leave under Article 136 of the Constitution. Time and again it has been held by this Court that no interference would be made with the concurrent finding of fact based on pure appreciation of evidence even if this Court was to take a different view on the evidence. The Court will normally not enter into reappraisal or the review of evidence, unless the trial court or the High Court is shown to have committed an error of law or procedure, and the conclusions arrived at are perverse. This Court cannot enter into the credibility of the evidence with a view to substitute its opinion for that of the High Court. This Court may interfere where on proved facts wrong inferences of law are shown to have been drawn. It needs to be emphasised that this Court is not a regular court of appeal to which every judgment of the High Court in a criminal case may be brought up for scrutinising its correctness. It is only in a rare or exceptional case where there is some manifest illegality or grave or serious irregularity that the Court would interfere with such findings of fact. In this regard reference may be made to the judgments of this Court in ***Duli Chand* v. *Delhi Admn.***

[(1975) 4 SCC 649]; ***Ramaniklal Gokaldas* v. *State of Gujarat*** [(1976) 1 SCC 6]; ***Dalbir Kaur* v. *State of Punjab*** [(1976) 4 SCC 158] and ***Ramanbhai Naranbhai Patel* v. *State of Gujarat*** [(2000) 1 SCC 358] etc.

6. It has been argued alternatively that even if the occurrence is held to have taken place in the manner alleged by the prosecution and the accused persons were seen on the spot, they cannot be convicted and sentenced as the prosecution allegedly failed to establish the existence of a common object amongst the accused persons. Section 149 is an exception to the criminal law where under a person can be convicted and sentenced for his vicarious liability only on proof of his being a member of the unlawful assembly, sharing the common object, notwithstanding as to whether he had actually participated in the commission of the crime or not. Common object does not require prior concert and a common meeting of minds before the attack. An unlawful object can develop after the accused assembled. The existence of the common object of the unlawful assembly has to be ascertained in the facts and circumstances of each case. It is true that the mere presence of the accused is not sufficient to hold them guilty for the sharing of common object as the prosecution has to further establish that they were not mere bystanders but in fact were sharing the common object. When a concerted attack is made by a large number of persons, it is often difficult to determine the actual part played by each of the accused but on that account for an offence committed by a member of the unlawful assembly in the prosecution of the common object or for an offence which was known to be likely to be committed in prosecution of the common object, persons proved to be members cannot escape the consequences arising from the doing of that act which amounts to an offence. There may not be a common object in a sudden fight but in a planned attack on the victim, the presence of the common object amongst the persons forming the unlawful assembly can be inferred.

7. It is submitted by the learned counsel for the appellants that as the prosecution had failed to allege and prove a specified object, their clients cannot be held to be guilty for the commission of the offence with the aid of Section 149 of the Indian Penal Code. Such a submission cannot be accepted in view of the settled position of law. Every member of the unlawful assembly is guilty of the offence committed in prosecution of the common object. Unlawful assembly has been defined under Section 141 of the Indian Penal Code.

8. Section 149 has two parts. First part deals with the commission of an offence by a member of an unlawful assembly in prosecution of the common object of that assembly and the second part deals with the liability of the members of the unlawful assembly who knew that an offence was likely to be committed in prosecution of the object for which they had assembled. Even if the common object of the unlawful assembly is stated to be apprehending Nawlesh Singh only, the fact that the accused persons had attacked the house of the complainant at the dead of night and were armed with deadly weapons including the guns, and used petrol bombs, proves beyond doubt that they knew that in prosecution of the alleged initial common object, murders were likely to be committed. The knowledge of the consequential action in furtherance of the initial common object is sufficient to attract the applicability of Section 149 for holding the members of the unlawful assembly guilty for the commission of the offence by any member of such assembly. In this case the appellants, along with others, have been proved to have formed an unlawful assembly, the common object of

which was to commit murder and arson and in prosecution of the said common object they raided the house of the informant armed with guns and committed offence. The courts below have, therefore, rightly held that the accused persons formed an unlawful assembly, the common object of which was to commit the murder of the informant and his family members and in prosecution of the said common object six persons were killed. The appellants were also proved to have hired the services of some extremists for the purposes of eliminating the family of the complainant.

9. The reliance of the learned defence counsel on the judgment of this Court in ***Mukteshwar Rai* v. *State of Bihar*** [AIR 1992 SC 483] is misplaced inasmuch as in that case the existence of the common object was negated in view of the fact that the prosecution had failed to prove that the accused were armed at the time of commission of the offence of murder and were proved to be the members of the unlawful assembly, the object of which was to commit the offence of mischief only punishable under Section 436 of the Indian Penal Code. In the instant case, as noticed earlier, there is consistent and reliable evidence of the prosecution establishing that all the accused had attacked the house of the informant at the dead of night when they were armed with deadly weapons like guns and rifles. Similarly, the facts of the case in ***Umrao Singh* v. *State of U.P.*** [(2002) 9 SCC 215] are distinguishable. In that case this Court on facts found that the members of the unlawful assembly shared the common object but the offence committed in pursuance of the said object was found to be punishable under Section 304 (Part I) of the Indian Penal Code. In the case of ***Fatta* v. *State of U.P.*** [AIR 1979 SC 1504] relied upon by the learned counsel for the appellant, it was held that the mere fact that no overt act was attributable to the members of the unlawful assembly, was not sufficient to disprove the charge under Section 149 of the Indian Penal Code. However, the question regarding the applicability of the aforesaid section depends upon facts of each case. In the instant case the prosecution has established the existence of the common object of the unlawful assembly for attracting the applicability of Section 149 of the Indian Penal Code and the mere fact that no overt act has been attributed to each of the accused persons is not sufficient to hold that charge under Section 149 of the Indian Penal Code has not been proved against them.

10. We have, therefore, no doubt in our mind that the appellants have rightly been convinced for the commission of various offences by the trial court, as confirmed by the appellate court and sentenced accordingly. There is no merit in these appeals, which are accordingly dismissed.

* * * * *

Suresh v. *State of U.P.*

(2001) 3 SCC 673

THOMAS, J. - Section 34 of the Indian Penal Code is a very commonly invoked provision in criminal cases. With a plethora of judicial decisions rendered on the subject the contours of its ambit seem well-nigh delineated. Nonetheless, when these appeals were heard a two-Judge Bench felt the need to take a re-look at the provision as to whether and if so to what extent it can be invoked as an aid in this case. Hence these appeals were heard by a larger Bench.

2. In one of the appeals A-1 Suresh and his brother-in-law, A-2 Ramji, are fighting their last chance to get extricated from the death penalty imposed on them by a Session Court which was confirmed by a Division Bench of the High Court. In the other appeal Pavitri Devi, the wife of A-1 Suresh (also sister of A-2 Ramji) is struggling to sustain the acquittal secured by her from the High Court in reversal of the conviction for murder ordered by the Sessions Court with the aid of Section 34 IPC.

3. On the night of 5-10-1996 when Ramesh (brother of the appellant Suresh) and his wife and children went to bed as usual, they would have had no foreboding that it was going to be the last night they were sleeping on this terrestrial terrain. But after they, in their sleep, crossed the midnight line and when the half crescent moon appeared with its waned glow above their house, the night turned red by the bloodiest killing spree befallen on the entire family. The motley population of that small house was hacked to pieces by armed assailants, leaving none, but a single tiny tot, alive. The sole survivor of the gory carnage could have seen what happened inside his sweet home only in the night which itself turned carmine. He narrated the tale before the Sessions Court with the visible scars of the wounds he sustained on his person.

4. That infant witness (PW 3 Jitendra) told the trial court that he saw his uncle (A-1 Suresh) in the company of his brother-in-law (A-2 Ramji) acting like demons, cutting the sleeping children with axe and chopper. He also said that his aunt (A-3 Pavitri Devi) clutched the tuft of his mother's hair and yelled like a demoness in thirst for the blood of the entire family.

5. Lalji (PW 1), the uncle of the decreased Ramesh (who is uncle of A-1 Suresh also) and Amar Singh (PW 2) a neighbour gave evidence supporting the version of PW 3 Jitendra. But the said two witnesses did not attribute any overt act to Pavitri Devi except saying that she too was present near the scene of occurrence. The house of the accused was situated not for away from the scene of occurrence, but across the road which abuts the house of the decreased.

6. The doctor (PW 5 C.M. Tiwari) who conducted the autopsy on the dead bodies of all the deceased described the horrifying picture of the mauled bodies. The youngest of the victims was one-year-old child whose skull was cut into two and the brain was torn as under. The next was a three-year-old male child who was killed with his neck axed and the spinal cord, trachea and the larynx were snipped. The next in line was PW 3 Jitendra – a seven year old child. (His injuries can be separately stated). His immediate next elder was Monisha-a

nine-year-old female child, who too was axed on the neck, mouth and chest with her spinal cord cut into two.

7. The mother of those little children, Ganga Devi, was inflicted six injuries which resulted in her skull being broken into pieces. The last was Ramesh – the bread-winner of the family, who was the father of the children. Four wounds were inflicted on him. All of them were on the neck and above that. The injuries on Ramesh, when put together, neared just short of decapitation.

8. PW 3 Jitendra had three incised wounds on the scapular region, but the doctor who attended on him (PW 6 S.K. Verma) did not probe into the depth of one of them, presumably because of the fear that he might require an immediate surgical intervention. However, he was not destined to die and hence the injuries on him did not turn fatal.

9. The motive for the above dastardly massacre was the greed for a bit of land lying adjacent to the house compound of the deceased which A-I Suresh claimed to be his. But the deceased Ramesh clung to that land and it resulted in burgeoning animosity in the mind of Suresh which eventually grew alarmingly wild.

10. The evidence of PW 1 Lalji and PW 2 Amar Singh was considered by the Sessions Court in the light of various contentions raised by the counsel for the accused. The trial Judge found the said evidence reliable. The Division bench of the High Court considered the said evidence over again and they did not see any reason to dissent from the finding made by the trail court: The evidence of PW 3 Jitendra, the sole survivor of the carnage, was evaluated with greater care as he was an infant of seven years. Learned Judges of the Division Bench of the High Court accepted the evidence of PW 3 only to the extent it secured corroboration from the testimony of P.Ws 1 and 2.

11. Though Mr. K.B. Sinha, learned Senior Counsel made an endeavour to make some tears into the fabric of the testimony of P.Ws 1 and 2, he failed to satisfy us that there is any infirmity in the findings recorded by the two courts regarding the reliability of the evidence of those two witnesses. As the learned Senior Counsel found it difficult to turn the table regarding the evidence against the accused which is formidable as well as trustworthy, he focused on two aspects. First is that acquittal of Pavitri Devi does not warrant interference from this court. Second is that this is not a case belonging to the category which compels the Court to award death penalty to the two appellants, Suresh and Ramji.

12. We will now deal with the role played by Pavitri Devi to see whether the Court can interfere with the acquittal order passed in her favour by the High Court. P.W. 3 said that while he was sleeping the blood gushed out of the wounds sustained by his father reached his mouth and when he woke up he saw the incident. According to him, Pavitri Devi caught hold of his mother's hair and pulled her up, thereafter she went outside and exhorted that everybody should be killed. But P.Ws 1 and 2 did not support the aforesaid version pertaining to Pavitri Devi. According to them, when they reached the scene of occurrence Pavitri Devi was standing in front of the house of the deceased while the other two were inside the house engaged in the act of inflicting blows on the victims.

13. The position which the prosecution succeeded in establishing against A-3 Pavitri Devi is that she was also present at the scene of occurrence. Learned counsel for the State

contended that such presence was in furtherance of the common intention of the three accused to commit the murders and hence she can as well be convicted for the murders under Section 302 IPC with the aid of Section 34 IPC. Mr. K.B. Sinha, learned counsel contended that if Section 34 IPC is to be invoked against Pavitri Devi the prosecution should have established that she had done some overt act in furtherance of the common intention.

14. We heard arguments at length on the ambit of Section 34 IPC. We have to consider whether the accused who is sought to be convicted with the aid of that section, should have done some act, even assuming that the said accused also shared the common intention with the other accused.

15. Section 34 reads thus:

> *34.Acts done by several persons in furtherance of common intention:* When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

16. As the section speaks of doing "a criminal act by several persons" we have to look at Section 33 IPC which defines the "Act". As per it, the word "act" denotes as well a series of acts as a single act. This means a criminal act can be a single act or it can be the conglomeration of a series of acts. How can a criminal act be done by several persons?

17. In this context, a reference to Sections 35, 37 and 38 IPC, in juxtaposition with Section 34, is of advantage. Those four provisions can be said to belong to one cognate group wherein different positions when more than one person participating in the commission of one criminal act are adumbrated. Section 35 says that when an act is done by several persons each of such persons who joins in the act with *mens rea* is liable for the act "in the same manner as if the act were done by him alone with that knowledge or intention". The section differs from Section 34 only regarding one postulate. In the place of common intention of all such person (in furtherance of which the criminal act is done), as is required in Section 34, it is enough that each participant who joins others in doing the criminal act, has the required *men rea.*

18. Section 37 deals with the commission of an offence "by means of several acts". The section renders anyone who intentionally co-operates in the commission of that offence "by doing any one of those acts" to be liable for that offence. Section 38 also shows another facet of one criminal act being done by several persons without connecting the common bond i.e., "in furtherance of the common intention of all". In such a case, they would be guilty of different offence or offences but not for the same offence.

19. Hence, under Section 34, one criminal act, composed of more than one act, can be committed by more than one persons and if such commission is in furtherance of the common intention of all of them, each would be liable for the criminal act so committed.

20. To understand the section better, it is useful to recast it in a different form by way of an illustration. This would highlight the difference when several persons do not participate in the crime committed by only one person even though there was common intention of all the several persons. Suppose, a section was drafted like this: "When a criminal act is done by one

person in furtherance of the common intention of several persons, each of such several persons is liable for that act in the same manner as if it were done by all such persons."

21. Obviously Section 34 is not meant to cover a situation which may fall within the fictiously concocted section caricatured above. In that concocted provision, the co-accused need not do anything because the act done by the principal accused would nail the co-accused also on the ground that such act was done by that single person in furtherance of the common intention of all the several persons. But Section 34 is intended to meet a situation wherein all the co-accused have also done something to constitute the commission of a criminal act.

22. Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract Section 34, e.g., the co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that they can be used to inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this: One of such persons, in furtherance of the common intention overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. We do not find any reason why Section 34 cannot apply in the case of those two persons indicated in the illustrations.

23. Thus to attract Section 34 IPC two postulates are indispensable: (1) The criminal act (consisting of a series of acts) should have been done, not by one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.

24. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34 IPC should have done some act which has nexus with the offence. Such an act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessary be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32 IPC. So the act mentioned in Section 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e.g., a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 IPC.

25. There may be other provisions in the IPC like Section 120-B or Section 109 which could then be invoked to catch such non-participating accused. Thus participation in the crime in furtherance of the common intention is a *sine qua non* Section 34 IPC. Exhortation to other

accused, even guarding the scene etc. would amount to participation. Of course, when the allegation against an accused is that he participated in the crime by oral exhortation or by guarding the scene the court has to evaluate the evidence very carefully for deciding whether that person had really done any such act.

26. A Division Bench of the Madras High Court has said as early as in 1923 that "evidence of some distinct act by the accused, which can be regarded as part of the criminal act in question, must be required to justify the application on Section 34 IPC." (vide ***Aydroos* v. *Emperor*** AIR 1923 Mad. 187).

27. In ***Barendra Kumar Ghosh* v. *King Emperor*** the Judicial Committee after referring to the cognate provision adverted to above, held thus:

> Read together, these sections are reasonably plain. Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable, for the result of them all, as if he had done them himself, for that act" and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it.

28. We have come across the observations made by another Judicial Committee of the Privy Council of equal strength in ***Mahbub Shah* v. *Emperor***. The observation is that Section 34 IPC can be invoked if it is shown that the criminal act was done by one of the accused in furtherance of the common intention of all. On the fact situation their Lordships did not have to consider the other component of the section. Hence the said observation cannot be understood to have obviated the necessity of proving that "the criminal act was done by several persons" which is a component of Section 34 IPC.

29. In ***Pandurang* v. *State of Hyderabad*,** Vivian Bose. J., speaking for a three-Judge bench of this court focused on the second component in Section 34 IPC i.e., "furtherance of the common intention". There was no need for the Bench to consider about the acts committed by the accused charged, in order to ascertain whether all the accused committed the criminal act involved therein. In other words, the first postulate was not a question which came up for consideration in the case. Hence the said decision, cited by both sides for supporting their respective contention, is not of much use in the case.

30. Mr. Pramod Swarup, learned counsel for the State invited our attention to the decision of this Court in ***State of U.P.* v. *Iftikhar Khan*** [(1973) 1 SCC 512] in which it was observed that to attract Section 34 IPC it is not necessary that any overt act should have been done by the co-accused. In that case, four accused persons were convicted on a fact situation that two of them were armed with pistols and the other two were armed with lathis and all the four together walked in a body towards the deceased and after firing the pistols at the deceased all the four together left the scene. The finding of fact in that case was also the same. When an argument was made on behalf of those two persons who were armed with lathis, that they did not do any overt act, this Court made the above observation. From the facts of that case, it can be said that there was no act on behalf of the two lathi holders although the deceased was killed with pistols alone. The criminal act in that case was done by all the persons in furtherance of the common intention to finish the deceased. Hence, the observation made by Vaidialingam, J., in the said case has to be understood on the said peculiar facts.

31. It is difficult to conclude that a person, merely because he was present at or near the scene, without doing anything more, without even carrying a weapon and without even marching along with the other assailants, could also be convicted with the aid of Section 34 IPC for the offence committed by the other accused. In the present case, the FIR shows that A-3 Pavitri Devi was standing on the road when the incident happened. Either she would have reached on the road on hearing the sound of the commotion because her house is situated very close to the scene, or she would have merely followed her husband and brother out of curiosity since they were going armed with axe and choppers during the wee hours of the night. It is not a necessary conclusion that she too would have accompanied the other accused in furtherance of the common intention of all the three.

32. Mr. Pramod Swarup, learned counsel for the State contented that if she remained at the scene without sharing the common intention, she would have prevented the other two accused from doing the ghastly acts because both of them were her husband and brother respectively. The inaction of Pavitri Devi in doing so need not necessarily lead to the conclusion that she shared a common intention with the others. There is nothing to show that she had not earlier tried to dissuade her husband and brother from rushing to attack the deceased.

33. Thus we are unable to hold that Pavitri Devi shared common intention with the other accused and hence her remaining passively on the road is too insufficient for reversing the order of acquittal passed by the High Court in order to convict her with the aid of Section 34 IPC.

34. Mr. K.B. Singh, learned Senior Counsel made an all out effort to save the convicted appellants from death penalty. The trial court and the High Court have given very cogent reasons and quite elaborately for choosing the extreme penalty. Knowing fully well that death penalty is now restricted to the rarest of rare cases in which the lesser alternative is unquestionably foreclosed as held by the Constitution Bench in ***Bachan Singh* v. *State of Punjab*** [(1980) 2 SCC 684] we could not persuade ourselves in holding that the acts committed by A-1 Suresh and A-2 Ramji should be pulled out of contours of the extremely limited sphere. Mr. K.B. Sinha cited a number of decisions including ***Panchhi* v. *State of U.P.*** [(1998) 7 SCC 177] in an endeavour to show that this Court had chosen to give the alternative sentence inspite of the ferocity of the acts comparable with the facts in this case. Even after bestowing our anxious consideration, we cannot persuade ourselves to hold that this is not a rarest of rare cases in which the lesser alternative is unquestionably foreclosed.

35. Accordingly, we dismiss both the appeals.

SETHI, J. (*for himself and Agrawal, J.*)(*Concurring*)- We agree with the conclusions arrived at by Brother Thomas, J. in his lucid judgment.

37. However, in view of the importance of the matter, in so far as the interpretation of Section 34 of the Indian Penal Code is concerned, we have chosen to express our views in the light of consistent legal approach on the subject throughout the period of judicial pronouncements. For the applicability of Section 34 to a co-accused, who is proved to have common intention, it is not the requirement of law that he should have actually done something to incur the criminal liability with the aid of this section. It is now well settled that

no overt act is necessary to attract the applicability of Section 34 for a co-accused who is otherwise proved to be sharing common intention with the ultimate act done by any one of the accused having such intention.

38. Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

39. The dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as "the Code") is the element of participation in action resulting in the ultimate "criminal act". The "act" referred to in latter part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate done criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.

40. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown to not have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have pre-conceived result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in ***Shatrughan Patar*** v. ***Emperor*** [AIR 1919 Patna 111] held that it is only when a court with some certainty hold that a particular accused must have pre-conceived or pre-meditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.

41. In ***Barendra Kumar Ghosh*** v. ***King Emperor*** [AIR 1925 PC 1] the Judicial Committee dealt with the scope of Section 34 dealing with the acts done in furtherance of the common intention, making all equally liable for the results of all the acts of others. It was observed:

> The words of Section.34 are not to be eviscerated by reading them in this exceedingly limited sense. By Section 33 a criminal act in Section 34 includes a series of acts and, further, "act" includes omissions to act, for example, *an omission to interfere in order to prevent a murder being done before one's very eyes.* By Section 37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. *Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and wait'*. By Section 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. Section 34 deals with the doing of separate acts, similar of diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it. Section 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. Section 38 provides for different punishments for different offences as an alternative to one punishment for one offence, *whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other*. (Emphasis supplied)

Referring to the presumption arising out of Section 114 of the Evidence Act, the Privy Council further held:

> As to S.114, it is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition; *Abhi Misser* v. *Lachmi Narain* [ILR (1900) 27 Cal.566]. Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. Section 114 deals with the case where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidentiary not punitory. *Because participation de facto (as this case shows) may sometimes be obscure in detail, it is established by the presumption juris et de jure that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by* Section *114 brings the case within the ambit of* Section *34*. (Emphasis supplied)

42. The classic case on the subject is the judgment of the Privy Council in ***Mahboob Shah* v. *Emperor*** [AIR 1945 PC 118]. Referring to Section 34 prior to its amendment in 1870 wherein it was provided:

> When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone.

It was noticed that by amendment, the words "in furtherance of common intention of all" were inserted after the word "persons" and before the word "each" so as to make the object of Section clear. Dealing with the scope of Section, as it exists today, it was held:

> Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intention of all' nor does it say 'an intention common to all'. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. *To invoke the aid of* Section *34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were one by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan*. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case. (Emphasis supplied)

43. A Full Bench of the Patna High Court in ***King Emperor* v. *Barendra Kumar Ghose*** [AIR 1924 Cal. 257] which was later approved by the Privy Council, dealt with the scope of Section 34 *in extenso* and noted its effects from all possible interpretations put by various High Courts in the country and the distinguished authors on the subject. The Court did not agree with the limited construction given by Stephen, J. in ***Emperor* v. *Nirmal Kanta Roy*** [ILR (1914) 41 Cal.1072] and held that such an interpretation, if accepted, would lead to disastrous results. Concurring with Mookerjee, J., and giving the section a wider view, Richardson, J. observed:

> It appears to me that Section 34 regards the act done as the united act of the immediate perpetrator and his confederates present at the time and that the language used is susceptible of that meaning. The language follows a common mode of speech. In ***R*. v. *Salmon*** [1880 (6) QBD 79] three men had been negligently firing at a mark. One of them - it was not known which - had unfortunately killed a boy in the rear of the mark. They were all held guilty of manslaughter. Lord Coleridge, C.J., said: 'The death resulted from the action of the three and they are all liable'. Stephen, J. said: 'Firing a rifle' under such circumstances 'is a highly dangerous act, and all are responsible; for they unite to fire at the spot in question and they all omit to take any precautions whatsoever to prevent danger.
>
> Moreover, Sections 34, 35 and 37 must be read together, and the use in section 35 of the phrase 'each of such persons who joins in the act' and in Section 37 of the phrase, 'doing any one of those acts, either singly or jointly with any other person' indicates the true meaning of Section 34. So section 38 speaks of 'several persons engaged or concerned in a criminal act'. The different mode of expression may be puzzling but the sections must, I think, be construed as enunciating a consistent principle of liability. Otherwise the result would be chaotic.

> To put it differently, an act is done by several persons when all are principals in the doing of it, and it is immaterial whether they are principals in the first degree or principals in the second degree, no distinction between the two categories being recognised.
>
> This view of Section 34 gives it an intelligible content in conformity with general notions. The opposing view involves a distinction dependent on identity or similarity of act which, if admissible at all, is wholly foreign to the law, both civil and criminal, and leads nowhere.

44. Approving the judgments of the Privy Council in ***Barendra Kumar Ghose*** and ***Mahboob Shah's*** cases (*supra*) a three Judge Bench of this Court in ***Pandurang* v. *State of Hyderabad*** [AIR 1955 SC 216] held that to attract the applicability of Section 34 of the Code the prosecution is under an obligation to establish that there existed a common intention which requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of all. This Court had in mind the ultimate act done in furtherance of the common intention. In the absence of a pre-arranged plan and thus a common intention even if several persons simultaneously attack a man and each one of them by having his individual intention, namely, the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section. In a case like that each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any or the other. The Court emphasised the sharing of the common intention and not the individual acts of the persons constituting the crime. Even at the cost of repetition it has to be emphasised that for proving the common intention it is necessary either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference and "incriminating facts must be incompatible with the innocence of the accused and incapable of explanation or any other reasonable hypothesis". Common intention, arising at any time prior to the criminal act, as contemplated under Section 34 of the Code, can thus be proved by circumstantial evidence.

45. In ***Shreekantiah Ramayya Munipalli* v. *State of Bombay*** [AIR 1955 SC 287] this Court held:

> It is true there must be some sort of preliminary planning which may or may not be at the scene of the crime and which may have taken place long beforehand, but there must be added to it the element of physical presence at the scene of occurrence coupled with actual participation which, of course, *can be of a passive character such as standing by a door, provided that is done with the intention of assisting in furtherance of the common intention of them all* and there is a readiness to play his part in the pre-arranged plan when the time comes for him to act.(Emphasis supplied)

46. This Court again in ***Tukaram Ganapat Pandare* v. *State of Maharashtra*** [AIR 1974 SC 514] reiterated that Section 34 lays down the rule of joint responsibility for criminal act performed by a plurality of persons and even mere distance from the scene of crime cannot exclude the culpability of the offence. "Criminal sharing, overt or covert, by active presence or by distant direction making out a certain measure of jointness in the commission of the act is the essence of Section 34".

47. In a case where the deceased was murdered by one of the two accused with a sharp edged weapon at 10.30 p.m. while he was sleeping on a cot in his house while the other accused, his brother, without taking part stood by with a spear in his hand to overcome any outside interference with the attainment of the criminal act and both the accused ran away together after the murder, this Court in ***Lalai* v. *State of U.P.*** [AIR 1974 SC 2118] held that these facts had a sufficient bearing on the existence of a common intention to murder.

48. In ***Ramaswami Ayyangar* v. *State of Tamil Nadu*** [AIR 1976 SC 2027] this Court declared that Section 34 is to be read along with preceding Section 33 which makes it clear that the "act" mentioned in Section 34 includes a series of acts as a single act. The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise. Even a person not doing any particular act but only standing guard to prevent any prospective aid to the victims may be guilty of common intention. However, it is essential that in case of an offence involving physical violence it is essential for the application of Section 34 that such accused must be physically present at the actual commission of crime for the purposes of facilitating accomplishment of "criminal act" as mentioned in that section. In ***Ramaswami's*** case (*supra*) it was contended that A-2 could not be held vicariously liable with the aid of Section 34 for the act of other accused on the grounds: firstly, he did not physically participate in the fatal beating administered by co-accused to the deceased and thus the "criminal act" of murder was not done by all the accused within the contemplation of Section 34; and secondly, the prosecution had not shown that the act of A-2 in beating P.W. was committed in furtherance of the common intention of all the three pursuant to a pre-arranged plan. Repelling such an argument this Court held that such a contention was fallacious which could not be accepted. The presence of those who in one way or the other facilitate the execution of the common design itself tantamounts to actual participation in the "criminal act". The essence of Section 34 is simultaneously consensus of the minds of persons participating in the criminal action to bring about a particular result. Conviction of A-2 under Section 302/34 of the Code in that case was upheld.

49. In ***Rambilas Singh* v. *State of Bihar*** [AIR 1989 SC 1593] this Court held:

> It is true that in order to convict persons vicariously under S.34 or S.149 IPC, it is not necessary to prove that each and everyone of them had indulged in over acts. Even so, there must be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused or in prosecution of the common object of the members of the unlawful assembly.(Emphasis supplied)

50. Again a three Judge Bench of this Court in ***State of U.P.* v. *Iftikhar Khan*** [1973 (1) SCC 512] after relying upon the host of judgments of Privy Council and this Court, held that for attracting Section 34 it is not necessary that any overt act must be done by a particular accused. The section will be attracted if it is established that the criminal act has been done by one of the accused persons in furtherance of the common intention. If this is shown, the liability for the crime may be imposed on any one of the person in the same manner as if the act was done by him alone. In that case on proof of the facts that all the four accused persons were residents of the same village and accused Nos.1 and 3 were brothers who were bitterly

inimical to the deceased and accused Nos.2 and 4 were their close friends, accused Nos.3 and 4 had accompanied the other two accused who were armed with pistols; all the four came together in a body and ran away in a body after the crime coupled with no explanation being given for their presence at the scene, the Court held that the circumstances led to the necessary inference of a prior concert and pre-arrangement which proved that the "criminal act" was done by all the accused persons in furtherance of their common intention.

51. In ***Krishnan* v. *State of Kerala*** [JT 1996 (7) SC 612] this Court even assuming that one of the appellants had not caused the injury to the deceased, upheld his conviction under Section 302/34 of the Penal Code holding:

> 15. Question is whether it is obligatory on the part of the prosecution to establish commission of overt act to press into service Section 34 of the Penal Code. It is no doubt true that court likes to know about overt act to decide whether the concerned person had shared the common intention in question. Question is whether overt act has always to be established? I am of the view that establishment of a overt act is not a requirement of law to allow Section 34 to operate inasmuch this section gets attracted when "a criminal act is done by several persons in furtherance of common intention of all". What has to be, therefore, established by the prosecution is that all the concerned persons had shared the common intention. Court's mind regarding the sharing of common intention gets satisfied when overt act is established qua each of the accused. But then, there may be a case where the proved facts would themselves speak of sharing of common intention: *res ipsa loquitur*.

52. In ***Surender Chauhan* v. *State of M.P.*** [(2000) 4 SCC 110] this Court held that apart from the fact that there should be two or more accused, two factors must be established - (i)common intention and (ii) participation of the accused in the commission of the offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability. Referring to its earlier judgment this Court held:

> 11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them (***Ramaswami Ayyangar* v. *State of T.N.***, 1976 (3) SCC 779). The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence (***Rajesh Govind Jagesha* v. *State of Maharashtra***, 1999 (8) SCC 428). To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established" (i) common intention, and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious

liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case.

53. For appreciating the ambit and scope of Section 34, the preceding Sections 32 and 33 have always to be kept in mind. Under Section 32 acts include illegal omissions. Section 33 defines the "act" to mean as well a series of acts as a single act and the word "omission" denotes as well a series of omissions as a single omission. The distinction between a "common intention" and a "similar intention" which is real and substantial is also not to be lost sight of. The common intention implies a pre-arranged plan but in a given case it may develop at the spur of the moment in the course of the commission of the offence. Such common intention which developed at the spur of the moment is different from the similar intention actuated by a number of persons at the same time. The distinction between "common intention" and "similar intention" may be fine but is nonetheless a real one and if overlooked may lead to miscarriage of justice.

54. After referring to ***Mahboob Shah's*** case (*supra*) this Court in ***Mohan Singh* v. *State of Punjab*** [AIR 1963 174] observed, it is now well settled that the common intention required by Section 34 is different from the same intention or similar intention. The persons having similar intention which is not the result of pre-concerted plan cannot be held guilty for the "criminal act" with the aid of Section 34. Similarly the distinction of the words used in Section 10 of the Indian Evidence Act "in reference to their common intention" and the words used in Section 34 "in furtherance of the common intention" is significant. Whereas Section 10 of the Indian Evidence Act deals with the actions done by conspirators in reference to the common object, Section 34 of the Code deals with persons having common intention to do a criminal act.

56. However, in this case on facts, the prosecution has not succeeded in proving that A3 Pavitri Devi shared the common intention with the other two accused persons, one of whom was her husband and the other her brother. It has come in evidence that when the witnesses reached on the spot, they found the said accused standing on the road whereas the other accused were busy committing the crime inside the house. The exaggerated version of PW3 regarding the participation of Pavitri Devi by allegedly catching hold of his mother's hair cannot be accepted as P.Ws 1 and 2 have not supported the aforesaid version. The High Court was, therefore, justified in holding that Pavitri Devi, A3 did not share the common intention with the other accused persons. By her mere presence near the place of occurrence at or about the time of crime in the absence of other evidence, direct or circumstantial, cannot hold her guilty with the aid of Section 34. But in case the prosecution had succeeded in proving on facts of her sharing of common intention with A1 and A2, she could not be acquitted of the charge framed against her only on the ground that she had actually not done any overt act. The appeal of the State filed against Pavitri Devi has no merit and has thus rightly been dismissed by Brother Thomas, J.

* * * * *

Asgarali Pradhania v. *Emperor*

AIR 1933 Cal 893

LORT WILIAMS, J. - The appellant was convicted under Section 312/511, I.P.C., of an attempt to cause a miscarriage. The complainant was 20 years of age, and had been married but divorced by consent. She was living in her father's house, where she used to sleep in the cook shed. The appellant was a neighbour who had lent money to her father, and was on good terms with him. He was a married man with children. According to the complainant he gave her presents, and promised to marry her. As a result sexual intercourse took place and she became pregnant. She asked him to fulfill his promise, but he demurred and suggested that she should take drugs to procure a miscarriage. One night he brought her a bottle half full of a red liquid, and a paper packet containing a powder. After he had gone she tasted the powder, but finding it salty and strong, spat in out. She did not try the liquid. The following night the appellant came again and finding that she had not taken either the powder or the liquid, he pressed her to take them, but she refused saying that she was afraid for her own life, and that the powder irritated her tongue. Thereupon he asked her to open her mouth, and approached her with the bottle, and took hold of her chin. But she snatched the bottle from him and cried out loudly, and her father and some neighbours came, and the appellant fled. The police were informed, and upon analysis, sulphate of copper was detected in the powder, but the amount was not ascertained. No poison was detected in the liquid. According to the medical evidence, copper sulphate has no direct action on the uterus, and is not harmful unless taken in sufficiently large quantities, when it may induce abortion. One to three grains may be used as an astringent, two to ten grains as an emetic, one ounce would be fatal. According to **Taylor's *Medical Jurisprudence*** (Edn. 5), p. 166.

> there is no drug or combination of drugs which will, when taken by the mouth, cause a healthy uterus to empty itself, unless it be given in doses sufficiently large to seriously endanger, by poisoning, the life of the woman who takes it or them.

The defence was a denial of all the facts, some suggestion that the complainant was of loose character, and a statement that the prosecution was due to enmity. Two points have been raised on behalf of the appellant, one being that the complainant was an accomplice and that her evidence was not corroborated, that she was willing to destroy the foetus but was afraid of the consequences to herself. On the facts stated I am satisfied that the complainant cannot be regarded as an accomplice and in any case there is some corroboration of her evidence, in the discovery of the drugs and the appellant's flight which was observed by several witnesses. The other is a point of some importance, namely, that the facts proved do not constitute an attempt to cause miscarriage. This depends upon what constitutes an attempt to commit an offence, within the meaning of Section 511 I.P.C., which provides as follows:

> Whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed and in such attempt does any act towards the commission of the offence shall be punished etc.
>
> Illustrations: (A) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(B) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

It is argued that as there was no evidence to show that either the liquid or the powder was capable of causing a miscarriage, the appellant cannot be convicted of an attempt to do so. This contention depends upon a correct definition of the word "attempt' within the meaning of the section. ***In R.* v. *McPherson*** [(1857) D & B 202] the prisoner was charged with breaking and entering the prosecutor's house and stealing therein certain specified chattels and was convicted of attempting to steal those chattels. Unknown to him those chattels had been stolen already. Cockburn, C.J. held that the conviction was wrong because

> the word 'attempt' clearly conveys with it the idea that if the attempt had succeeded the offence charged would have been committed. An attempt must be to do that, which if successful, would amount to the felony charged, but here that attempt never could have succeeded.

In ***R.* v. *Cheeseman*** [(1862) 5 LT 717] Lord Blackburn said:

> There is not doubt a difference between the preparation antecedent to an offence and the actual attempt. But if the actual transaction had commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime.

In ***R.* v. *Collins*** [(1864) 10 LT 581] Cockburn, C.J., following ***McPherson's*** case held that if a person puts his hand into the pocket of another, with intent to steal what he can find there, and the pocket is empty, he cannot be convicted of an attempt to steal. Because an attempt to commit felony can only in point of law be made out where, if no interruption had taken place, the attempt could have been carried out successfully, so as to constitute the offence which the accused is charged with attempting to commit. It is clear however from the illustrations to S. 511, that Lord Machulay and his colleagues who drafted the Indian Penal Code, which was enacted in 1860, did not intend to follow these decisions, and I agree with the remarks upon this point made in ***Mac Crea's*** case [(1983) 15 All. 173]. The Calcutta High Court in ***Empress* v. *Riasat Ali*** [(1881) 7 Cal 352] held that the definitions in ***McPherson's*** case and Cheeseman's case were sound. In England the decisions were reconsidered in ***R.* v. *Brown*** [(1889) 24 QBD 357] and ***R* v. *Ring*** [(1892) 17 Cox 491]. The Judges expressed dissatisfaction with the decisions in ***R.* v. *Collins*** and with that in ***R.* v. *Dodd*** [(1877) Unreported] which proceeded upon the view that a person could not be convicted of an attempt to commit an offence which he could not actually commit, and expressly overruled them saying that they were no longer law. The judgment in Brown's case however has been criticised as unsatisfactory, and it has been contended that ***R.* v. *Brown*** and ***R.* v. *Ring*** have not completely overruled ***R.* v. *Collins*** [Pritchard's Quarter Sessions (Edn.2)]. In ***Amrita Bazar Patrika Press, Ltd***. [AIR 1920 Cal 478] the decision in ***R.* v. *Collins*** was again quoted with approval, apparently in ignorance of the fact that it had been expressly overruled in the English Courts. Mookerjee, J., held that in the language of Stephen [***Digest of Criminal Law***, Art. 50]:

> An attempt to commit a crime is an act done with intent to commit that crime and forming part of a series of acts which would constitute its actual commission if it were

> not interrupted. To put the matter differently, attempt is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and possessing except for failure to consummate, all the elements of a substantive crime; in other words an attempt consists in the intent to commit a crime, combined with the doing of some act adapted to but falling short of its actual commission; it may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted.

The decision in ***McPherson's*** and ***Collin's*** case are clearly incompatible with illustrations to S. 511, and in my opinion are not law either in India or in England. Nevertheless, the statements of law to which I have referred are correct, so far as they go, and were not intended to be exhaustive or comprehensive definitions applicable to every set of facts which might arise. So far as the law in England is concerned, in the draft Criminal Code prepared by Lord Blackburn, and Barry, Lush, and Stephen, JJ., the following definition appears (Art.74):

> An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omission had not been interrupted either by the voluntary determination of the offender not to complete the offence or by some other cause. *Everyone who believing that a certain state of facts exists does or omits an act the doing or omitting of which would, if that state of facts existed, be attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was by reason of the non-existence of that state of facts at the time of the act or omission impossible.

To this definition the Commissioners appended a note to the effect that the passage between the asterisks "declares the law differently from R. v. Collins" which at the date of the drafting of the Code had not been overruled. The first part of this definition was accepted in ***R.* v. *Laitwood*** [(1910) 4 Cri App Rep 248 at 252] and purporting to be in accordance with the latter part, it was held by Darling, J., that if a pregnant woman, believing that she is taking a "noxious thing" within the meaning of the offences against the Poison Act, 1861, S. 58, does with intent to procure her own abortion take a thing in fact harmless, she is guilty of attempting to commit an offence against the first part of that section : ***R.* v. *Brown*** [(1899) 63 JP 790]. In **Russell on *Crimes*** [Edn. 8, Vol. 1 at p. 145] two American definitions are quoted from Bishop :

> Where the non-consummation of the intended criminal result is caused by an obstruction in the way, or by the want of the thing to be operated upon, if such an impediment is of a nature to be unknown to the offender, who used what seemed appropriate means, the punishable attempt is committed. Whenever the laws make criminal one step towards the accomplishment of an unlawful object done with the intent or purpose of accomplishing it; a person taking that step with that intent or purpose and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that by reason of some fact unknown to him at the time of his criminal attempt it could be fully carried into effect in the particular instance.

So far as the law in India is concerned, it is beyond dispute that there are four stages in every crime, the intention to commit, the preparation to commit, the attempt to commit, and if

the third stage is successful, the commission itself. Intention alone, or intention followed by preparation are not sufficient to constitute an attempt. But intention followed by preparation, followed by any "act done towards the commission of the offence" is sufficient. "Act done towards the commission of the offence" are the vital words in this connection.

Thus, if a man thrusts his hand into the pocket of another with intent to steal, he does an act towards the commission of the offence of stealing, though unknown to him the pocket is empty. He tries to steal, but is frustrated by a fact, namely the emptiness of the pocket, which is not in any way due to any act or omission on his part. He does an act towards the commission of the offence of pocket picking, by thrusting his hand into the pocket of another with intent to steal. Similarly, he may fail to steal the watch of another because the latter is too strong for him, or because the watch is securely fastened by a guard. Nevertheless he may be convicted of an attempt to steal. Blackburn, and Mellor, JJ.: ***R.* v. *Hensle*** [11 Cox 570 at p. 573].

But if one who believes in witchcraft puts a spell on another, or burns him in effigy, or curses him with the intention of causing him hurt, and believing that his actions will have that result, he cannot in my opinion be convicted of an attempt to cause hurt. Because what he does is not an act towards the commission of that offence, but an act towards the commission of something which cannot, according to ordinary human experience result in hurt to another, within the meaning of the Penal Code. His failure to cause hurt is due to his own act or omission, that is to say, his act was intrinsically useless, or defective, or inappropriate for the purpose he had in mind, owing to the undeveloped state of his intelligence, or to ignorance of modern science. His failure was due, broadly speaking, to his own volition. Similarly, if a man with intent to hurt another by administering poison prepares and administers some harmless substance, believing it to be poisonous, he cannot in my opinion, be convicted of an attempt to do so. And this was decided in ***Empress* v. *Mt. Rupsir Panku*** [(1895) 9 CPLR (Cri) 14] with which I agree. The learned Judicial Commissioner says:

> In each of the illustrations to S. 511, there is not merely an act done with the intention to commit an offence which is unsuccessful because it could not possibly result in the completion of the offence, but an act is done 'towards the commission of the offence,' that is to say the offence remains incomplete only because something yet remains to be done, which the person intending to commit the offence is unable to do, by reason of circumstances independent of his own volition. It cannot be said that in the present case the prisoner did an act towards the commission of the offence.' The offence which she intended to commit was the administration of poison to her husband. The act which she committed was the 'administration of a harmless substance'.

This reasoning is applicable to the case now under consideration. The appellant intended to administer something capable of causing a miscarriage. As the evidence stands, he administered a harmless substance. This cannot amount to an "act towards the commission of the offence" of causing a miscarriage. But if A, with intent to hurt B by administering poison, prepares a glass for him and fills it with poison, but while A's back is turned, C who has observed A's act, pours away the poison and fills the glass with water, which A in ignorance of what C has done, administers to B, in my opinion A is guilty and can be convicted of an attempt to cause hurt by administering poison. His failure was not due to any act or omission

of his own, but to the intervention of a factor independent of his own volition. This important distinction is correctly stated by Turner, J., in Ramsaran's case (1872) 4 NWP 46, at pp. 47 and 48, where he observes that

> To constitute an attempt there must be an act done with the intention of committing an offence and in attempting the commission. In each of the illustrations to S. 511 we find an act done with the intention of committing an offence, and immediately enabling the commission of the offence, although it was not an act which constituted a part of the offence, and in each we find the intention of the person making the attempt was frustrated by circumstances independent of his own volition.

In ***Queen-Empress* v. *Luxman Narayan Joshi*** [(1900)2 Bom LR 286] Sir Lawrence Jenkins, C. J., defined "attempt" as:

> An intentional preparatory action which failed in object through circumstances independent of the person who seeks its accomplishment. And in ***Queen-Empress* v. *Vinayak Narayan*** (1900) 2 Bom LR 304 the same learned Judge defined "attempt" as when a man does an intentional act with a view to attain a certain end, and fails in his object through some circumstance independent of his own will..

These also are good definitions so far as they go, but they fail to make clear that there must be something more than intention coupled with mere preparation. As was said in ***Raman Chettiar* v. *Emperor*** [AIR 1927 Mad 77, at p. 96 (of 28 Cr. L.J.)] :

> The actual transaction must have begun and an act to bear upon the mind of the victim must have been done before a preparation can be said to be an attempt." Here it is necessary to observe the distinction that 'an act to bear' is not the same thing as 'an act which has borne.

In ***Empress* v. *Ganesh Balvant*** [(1910) 34 Bom 378] it was said that:

> some external act, something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence is necessary to constitute an offence. It does not matter that the progress was interrupted.

In ***Queen-Empress* v. *Gopala*** [(1896) Rat Un Cri Cases 865] Parsons and Ranade, JJ., stated that, in their opinion, a person physically in capable of committing rape cannot be found guilty of an attempt to commit rape, because his acts would not be acts "towards the commission of the offence." In the American and English ***Encyclopaedia of Law*** [Vol. 3 p. 250, (Edn. 2)] "attempt" is defined as:

> an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and possession, except for failure to consummate, all the elements of the substantive crime.

In **Russell on *Crimes*** [(Edn. 8) Vol. 1, pp. 145 and 148] the following definitions are given:

> No act is indictable as an attempt to commit felony or misdemeanour, unless it is a step towards the execution of the criminal purpose, and is an act directly approximating to or immediately connected with, the commission of the offence which the person doing it has in view. There must be an overt act intentionally done towards the commission of some offence, one or more of series of acts which would constitute the crime if the accused

were not prevented by interruption, or physical impossibility, or did not fail, for some other cause, in completing his criminal purpose.

The question in each case is whether the acts relied on constituting the attempt were done with intent to commit the complete offence, and as one or more of a series of acts or omissions directly forming some of the necessary step towards completing that offence, but falling short of completion by the intervention of causes outside the volition of the accused or because the offender of his own free will desisted from completion of his criminal purpose for some reason other than mere change of mind.

I do not propose to embark upon the dangerous course of trying to state any general proposition, or to add to the somewhat confusing number of definitions of what amounts to an "attempt." within the meaning of Section 511 Penal Code. I will content myself with saying that, on the facts stated in this case, and for the reasons already given the appellant cannot in law, be convicted of an attempt to cause a miscarriage. What he did was not an "act done towards the commission of the offence" of causing a miscarriage. Neither the liquid nor the powder being harmful, they could not have caused a miscarriage. The appellant's failure was not due to a factor independent of himself. Consequently, the conviction and sentence must be set aside and the appellant acquitted.

* * * * *

Abhayanand Mishra v. *State of Bihar*

(1962) 2 SCR 241: AIR 1961 SC 1698

RAGHUBAR DAYAL, J. - This appeal, by special leave, is against the order of the High Court at Patna dismissing the appellant's appeal against his conviction under Section 420, read with Section 511 of the Indian Penal Code.

2. The appellant applied to the Patna University for permission to appear at the 1954 MA examination in English as a private candidate, representing that he was a graduate having obtained his B.A. degree in 1951 and that he had been teaching in a certain school. In support of his application, he attached certain certificates purporting to be from the Headmaster of the School, and the Inspector of Schools. The university authorities accepted the appellant's statements and gave permission and wrote to him asking for the remission of the fees and two copies of his photograph. The appellant furnished these and on April 9, 1954, proper admission card for him was dispatched to the Headmaster of the School.

3. Information reached the University about the appellant's not being a graduate and not being a teacher. Inquiries were made and it was found that the certificates attached to the application were forged, that the appellant was not a graduate and was not a teacher and that in fact he had been de-barred from taking any university examination for a certain number of years on account of his having committed corrupt practice at a university examination. In consequence, the matter was reported to the police which on investigation prosecuted the appellant.

4. The appellant was acquitted of the charge of forging those certificates, but was convicted of the offence of attempting to cheat inasmuch as he, by false representations, deceived the University and induced the authorities to issue the admission card, which, if the fraud had not been detected, would have been ultimately delivered to the appellant.

5. Learned counsel for the appellant raised two contentions. The first is that the facts found did not amount to the appellant's committing an attempt to cheat the University but amounted just to his making preparations to cheat the University. The second is that even if the appellant had obtained the admission card and appeared at the M.A. examination, no offence of cheating under Section 420 IPC would have been committed as the University would not have suffered any harm to its reputation. The idea of the University suffering in reputation is too remote.

6. The offence of cheating is defined in Section 415 IPC, which reads:

> Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'.
>
> *Explanation*— A dishonest concealment of facts is a deception within the meaning of this section.

The appellant would therefore have cheated the University if he had (*i*) deceived the University; (*ii*) fraudulently or dishonestly induced the University to deliver any property to him; or (*iii*) had intentionally induced the University to permit him to sit at the MA examination which it would not have done if it was not so deceived and the giving of such permission by the University caused or was likely to cause damage or harm to the University in reputation. There is no doubt that the appellant, by making false statements about his being a graduate and a teacher, in the applications he had submitted to the University, did deceive the University and that his intention was to make the University give him permission and deliver to him the admission card which would have enabled him to sit for the MA examination. This card is property. The appellant would therefore have committed the offence of cheating if the admission card had not been withdrawn due to certain information reaching the University.

7. We do not accept the contention for the appellant that the admission card has no pecuniary value and is therefore not property. The admission card as such has no pecuniary value, but it has immense value to the candidate for the examination. Without it he cannot secure admission to the examination hall and consequently cannot appear at the examination.

8. In ***Queen-Empress* v. *Appasami*** [(1889) ILR 12 Mad 151] it was held that the ticket entitling the accused to enter the examination room and be there examined for the Matriculation test of the University was 'property'.

9. In ***Queen-Empress* v. *Soshi Bhushan*** [(1893) ILR 15 All 210] it was held that the term property in Section 463 IPC included the written certificate to the effect that the accused had attended, during a certain period, a course of law lectures and had paid up his fees.

10. We need not therefore consider the alternative case regarding the possible commission of the offence of cheating by the appellant, by his inducing the University to permit him to sit for the examination, which it would not have done if it had known the true facts and the appellant causing damage to its reputation due to its permitting him to sit for the examination. We need not also therefore consider the further question urged for the appellant that the question of the University suffering in its reputation is not immediately connected with the accused's conduct in obtaining the necessary permission.

11. Another contention for the appellant is that the facts proved do not go beyond the stage of preparation for the commission of the offence of cheating, and do not make out the offence of attempting to cheat. There is a thin line between the preparation for and an attempt to commit an offence. Undoubtedly, a culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence, therefore, can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. This is clear from the general expression attempt to commit an offence and is exactly what the provisions of Section 511 IPC, require. The relevant portion of Section 511 IPC is:

> Whoever attempts to commit an offence punishable by this Code ... or to cause such a offence to be committed and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished....

These provisions require that it is only when one, firstly, attempts to commit an offence and, secondly, in such attempt, does any act towards the commission of the offence, that he is punishable for that attempt to commit the offence. It follows, therefore, that the act which would make the culprit's attempt to commit an offence punishable must be an act which, by itself or in combination with other acts, leads to the commission of the offence. The first step in the commission of the offence of cheating, therefore, must be an act which would lead to the deception of the person sought to be cheated. The moment a person takes some step to deceive the person sought to be cheated, he has embarked on a course of conduct which is nothing less than an attempt to commit the offence, as contemplated by Section 511. He does the act with the intention to commit the offence and the act is a step towards the commission of the offence.

12. It is to be borne in mind that the question whether a certain act amounts to an attempt to commit a particular offence is a question of fact dependent on the nature of the offence and the steps necessary to take in order to commit it. No exhaustive precise definition of what would amount to an attempt to commit an offence is possible. The cases referred to make this clear.

13. We may refer to some decided cases on the construction of Section 511 IPC In ***Queen* v. *Ramsarun Chowbey*** [(1872) 4 NWP 46]. It was said at p. 47:

> To constitute then the offence of attempt under this Section (Section 511), there must be an act done with the intention of committing an offence, and for the purpose of committing that offence, and it must be done in attempting the commission of the offence.
>
> Two illustrations of the offence of attempt as defined in this Section are given in the Code; both are illustrations of cases in which the offence has been committed. In each we find an act done with the intent of committing an offence and immediately enabling the commission of the offence, although it was not an act which constituted a part of the offence, and in each we find the intention of the person making the attempt was frustrated by circumstances independent of his own volition.
>
> From the illustrations it may be inferred that the legislature did not mean that the act done must be itself an ingredient (so to say) of the offence attempted....

The learned Judge said, further at p. 49:

> I regard that term (attempt) as here employed as indicating the actual taking of those steps which lead immediately to the commission of the offence, although nothing be done, or omitted, which of itself is a necessary constituent of the offence attempted.

14. We do not agree that the "act towards the commission of such offence" must be "an act which leads immediately to the commission of the offence". The purpose of the illustration is not to indicate such a construction of the section, but to point out that the culprit has done all that is necessary for the commission of the offence even though he may not

actually succeed in his object and commit the offence. The learned Judge himself emphasized this by observing at p. 48:

> The circumstances stated in the illustrations to Section 511 of the Indian Penal Code, would not have constituted attempts under the English law, and I cannot but think that they were introduced in order to show that the provisions of Section 511 of the Indian Penal Code, were designed to extend to a much wider range of cases than would be deemed punishable as offences under the English law.

15. ***In the matter of the petition of R. MacCrea*** [ILR 15 All 173] it was held that whether any given act or series of acts amounted to an attempt which the law would take notice of or merely to preparation, was a question of fact in each case and that Section 511 was not meant to cover only the penultimate act towards the completion of an offence and not acts precedent, if those acts are done in the course of the attempt to commit the offence, and were done with the intent to commit it and done towards its commission. Knox, J., said at p. 179:

> Many offences can easily be conceived where, with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit the offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be a very considerable interval of time. There may be the interposition of inquiries and other acts upon his part. The acts whereby those preparations may be brought to bear upon her mind may be several in point of number, and yet the first act after preparations completed will, if criminal in itself be beyond all doubt, equally an attempt with the ninety and ninth act in the series.
>
> Again, the attempt once begun and a criminal act done in pursuance of it towards the commission of the act attempted, does not cease to be a criminal attempt, in my opinion, because the person committing the offence does or may repent before the attempt is completed.

Blair, J., said at p. 181:

> It seems to me that that section (Section 511) uses the word 'attempt' in a very large sense; it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence, that is, conducive to its commission, is itself punishable, and though the act does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act which would form the final part of an attempt in the larger sense is the only act punishable under the section. It says expressly that whosoever in such attempt, obviously using the word in the larger sense, does any act, shall be punishable. The term 'any act' excludes the notion that the final act short of actual commission is alone punishable.

We fully approve of the decision and the reasons therefor.

16. Learned counsel for the appellant relied on certain cases in support of his contention. They are not much to the point and do not in fact express any different opinion about the construction to be placed on the provisions of Section 511 IPC. Any different view expressed

has been due to an omission to notice the fact that the provisions of Section 511 IPC, differ from the English law with respect to "attempt to commit an offence".

17. In ***Queen* v. *Paterson*** [ILR 1 All 316] the publication of banns of marriage was not held to amount to an attempt to commit the offence of bigamy under Section 494 of the IPC. It was observed at p. 317:

> The publication of banns may, or may not be, in cases in which a special license is not obtained, a condition essential to the validity of a marriage, but common sense forbids us to regard either the publication of the banns or the procuring of the license as a part of the marriage ceremony.

The distinction between preparation to commit a crime and an attempt to commit it was indicated by quoting from **Mayne's *Commentaries on the Indian Penal Code*** to the effect:

> Preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission, after the preparations have been made.

18. In ***Regina* v. *Padala Venkatasami*** [(1881) ILR 3 Mad. 4] the preparation of a copy of an intended false document, together with the purchase of stamped paper for the purpose of writing that false document and the securing of information about the facts to be inserted in the document, were held not to amount to an attempt to commit forgery, because the accused had not, in doing these acts, proceeded to do an act towards the commission of the offence of forgery.

19. In ***In the matter of the petition of Riasat Ali*** [(1881) ILR 7 Cal 352] the accused's ordering the printing of one hundred receipt forms similar to those used by a company and his correcting proofs of those forms were not held to amount to his attempting to commit forgery as the printed form would not be a false document without the addition of a seal or signature purporting to be the seal or signature of the company. The learned Judge observed at p. 356:

> ... I think that he would not be guilty of an attempt to commit forgery until he had done some act towards making one of the forms a false document. If, for instance, he had been caught in the act of writing the name of the Company upon the printed form and had only completed a single letter of the name, I think that he would have been guilty of the offence charged, because (to use the words of Lord Blackburn) 'the actual transaction would have commenced, which would have ended in the crime of forgery, if not interrupted'.

The learned Judge quoted what Lord Blackburn said in ***Reg.* v. *Chessman*** Lee & Cave's Rep 145 :

> There is no doubt a difference between the preparation antecedent to an offence and the actual attempt; but if the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime.

He also quoted what Cockburn, C.J., said in ***Mc'Pherson*** case Dears & B, 202:

> The word 'attempt' clearly conveys with it the idea, that if the attempt had succeeded, the offence charged would have been committed. An attempt must be to do that which, if successful, would amount to the felony charged.

20. It is not necessary for the offence under Section 511 IPC that the transaction commenced must end in the crime or offence, if not interrupted.

21. In re: ***Amrita Bazar Patrika Press Ltd.*** [(1920) ILR 47 Cal 190] Mukherjee, J., said at p. 234:

> In the language of Stephen (Digest of Criminal Law, Article 50), an attempt to commit a crime is an act done with an intent to commit that crime and forming part of a series of act which would constitute its actual commission if it were not interrupted. To put the matter differently, attempt is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime; in other words, an attempt consists in the intent to commit a crime, combined with the doing of some act adapted to, but falling short of, its actual commission; it may consequently be denned as that which if not prevented would have resulted in the full consummation of the act attempted: Reg. v. Collins (1864) 9 Cox 497.

22. This again is not consistent with what is laid down in Section 511 and not also with what the law in England is.

23. In **Stephen's** ***Digest of Criminal Law***, 9th Edn. "attempt" is defined thus:

> An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts, which would constitute its actual commission if it were not interrupted.
>
> The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case.
>
> An act done with intent to commit a crime, the commission of which in the manner proposed was, in fact, impossible, is an attempt to commit that crime.
>
> The offence of attempting to commit a crime may be committed in cases in which the offender voluntarily desists from the actual commission of the crime itself.

In ***In re: T. Munirathnam Reddi*** (AIR 1955 A.P. 118) it was said at p. 122:

> The distinction between preparation and attempt may be clear in some cases, but, in most of the cases, the dividing line is very thin. Nonetheless, it is a real distinction.
>
> The crucial test is whether the last act, if uninterrupted and successful, would constitute a crime. If the accused intended that the natural consequence of his act should result in death but was frustrated only by extraneous circumstances, he would be guilty of an attempt to commit the offence of murder. The illustrations in the section (Section 511) bring out such an idea clearly. In both the illustrations, the accused did all he could do but was frustrated from committing the offence of theft because the article was removed from the jewel box in one case and the pocket was empty in the other case.

The observations "the crucial test is whether the last act, if uninterrupted and successful, would constitute a crime" were made in connection with an attempt to commit murder by shooting at the victim and are to be understood in that context. There, the nature of the offence was such that no more than one act was necessary for the commission of the offence.

24. We may summarise our views about the construction of Section 511 IPC, thus: A person commits the offence of "attempt to commit a particular offence when (*i*) he intends to

commit that particular offence; and (*ii*) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.

25. In the present case, the appellant intended to deceive the University and obtain the necessary permission and the admission card and, not only sent an application for permission to sit at the university examination, but also followed it up, on getting the necessary permission, by remitting the necessary fees and sending the copies of his photograph, on the receipt of which the University did issue the admission card. There is therefore hardly any scope for saying that what the appellant had actually done did not amount to his attempting to commit the offence and had not gone beyond the stage of preparation. The preparation was complete when he had prepared the application for the purpose of submission to the University. The moment he despatched it, he entered the realm of attempting to commit the offence of "cheating". He did succeed in deceiving the University and inducing it to issue the admission card. He just failed to get it and sit for the examination because something beyond his control took place inasmuch as the University was informed about his being neither a graduate nor a teacher.

26. We therefore hold that the appellant has been rightly convicted of the offence under Section 420, read with Section 511 IPC, and accordingly dismiss the appeal.

* * * *

Om Parkash v. *State of Punjab*

(1962) 2 SCR 254: AIR 1961 SC 1782

RAGHUBAR DAYAL, J. - This appeal, by special leave, is against the order of the Punjab High Court dismissing the appellant's appeal against his conviction under Section 307 IPC.

2. Bimla Devi, PW 7, was married to the appellant in October 1951. Their relations got strained by 1953 and she went to her brother's place and stayed there for about a year, when she returned to her husband's place at the assurance of the appellant's maternal uncle that she would not be maltreated in future. She was, however, ill-treated and her health deteriorated due to alleged maltreatment and deliberate under-nourishment. In 1956, she was deliberately starved and was not allowed to leave the house and only sometimes a morsel or so used to be thrown to her as alms are given to beggars. She was denied food for days together and used to be given gram husk mixed in water after five or six days. She managed to go out of the house in April 1956, but Romesh Chander and Suresh Chander, brothers of the appellant, caught hold of her and forcibly dragged her inside the house where she was severely beaten. Thereafter, she was kept locked inside a room.

3. On June 5, 1956, she happened to find her room unlocked, her mother-in-law and husband away and, availing of the opportunity, went out of the house and managed to reach the Civil Hospital, Ludhiana, where she met lady Doctor Mrs. Kumar, PW 2, and told her of her sufferings. The appellant and his mother went to the hospital and tried their best to take her back to the house, but were not allowed to do so by the lady Doctor. Social workers got interested in the matter and informed the brother of Bimla Devi, one Madan Mohan, who came down to Ludhiana and, after learning all facts, sent information to the police station by letter on June 16, 1956. In his letter he said:

> My sister Bimla Devi Sharma is lying in death bed. Her condition is very serious. I am told by her that deliberate attempt has been made by her husband, mother-in-law and brother-in-law and sister-in-law. I was also told that she was kept locked in a room for a long time and was beaten by all the above and was starved.
>
> I therefore request that a case may be registered and her statement be recorded, immediately.

The same day, at 9.15 p.m. Dr Miss Dalbir Dhillon sent a note to the police saying. "My patient Bimla Devi is actually ill. She may collapse any moment".

4. Shri Sehgal, Magistrate, PW 9, recorded her statement that night and stated in his note:

> Blood transfusion is taking place through the right forearm and consequently the right hand of the patient is not free. It is not possible to get the thumb impression of the right hand thumb of the patient. That is why I have got her left hand thumb-impression.

5. The impression formed by the learned Judge of the High Court on seeing the photographs taken of Bimla Devi a few days later, is stated thus in the judgment:

> The impression I formed on looking at the two photographs of Bimla was that at that time she appeared to be suffering from extreme emaciation. Her cheeks appeared to be hollow.

> The projecting bones of her body with little flesh on them made her appearance skeletal. The countenance seemed to be cadaverous.

After considering the evidence of Bimla Devi and the doctors, the learned Judge came to the conclusion:

> So far as the basic allegations are concerned, which formed the gravamen of the offence, the veracity of her statement cannot be doubted. After a careful scrutiny of her statement, I find her allegations as to starvation, maltreatment, etc. true. The exaggerations and omissions to which my attention was drawn in her statement are inconsequential.

After considering the entire evidence on record, the learned Judge said:

> After having given anxious thought and careful consideration to the facts and circumstances as emerge from the lengthy evidence on the record, I cannot accept the argument of the learned counsel for the accused, that the condition of acute emaciation in which Bimla Devi was found on 5th of June, 1956, was not due to any calculated starvation but it was on account of prolonged illness, the nature of which was not known to the accused till Dr Gulati had expressed his opinion that she was suffering from tuberculosis.

He further stated:

> The story of Bimla Devi as to how she was ill-treated, and how, her end was attempted to be brought about or precipitated, is convincing, despite the novelty of the method in which the object was sought to be achieved.... The conduct of the accused and of his mother on 5th of June, 1956, when soon after Bimla Devi's admission in the hospital they insisted on taking her back home, is significant and almost tell-tale. It was not for better treatment or for any treatment that they wanted to take her back home. Their real object in doing so could be no other than to accelerate her end.

6. The appellant was acquitted of the offence under Section 342 IPC, by the Additional Sessions Judge, who gave him the benefit of doubt, though he had come to the conclusion that Bimla Devi's movements were restricted to a certain extent. The learned Judge of the High Court considered this question and came to a different conclusion. Having come to these findings, the learned Judge considered the question whether on these facts an offence under Section 307 IPC, had been established or not. He held it proved.

7. Mr. Sethi, learned counsel for the appellant, has challenged the correctness of this view in law. He concedes that it is only when a person is helpless and is unable to look after himself that the person having control over him is legally bound to look after his requirements and to see that he is adequately fed. Such persons, according to him, are infants, old people and lunatics. He contends that it is no part of a husband's duty to spoon-feed his wife, his duty being simply to provide funds and food. In view of the finding of the court below about Bimla Devi's being confined and being deprived of regular food in pursuance of a scheme of regularly starving her in order to accelerate her end, the responsibility of the appellant for the condition to which she was brought up to the 5th of June, 1956, is clear. The findings really go against any suggestion that the appellant had actually provided food and funds for his wife Bimla Devi.

8. The next contention for the appellant is that the ingredients of an offence under Section 307 are materially different from the ingredients of an offence under Section 511 IPC. The difference is that for an act to amount to the commission of the offence of attempting to commit an offence, it need not be the last act and can be the first act towards the commission of the offence, while for an offence under Section 307, it is the last act which, if effective to cause death, would constitute the offence of an attempt to commit murder. The contention really is that even if Bimla Devi had been deprived of food for a certain period, the act of so depriving her does not come under Section 307 IPC, as that act could not, by itself, have caused her death, it being necessary for the period of starvation to continue for a longer period to cause death. We do not agree with this contention.

9. Both the sections are expressed in similar language. If Section 307 is to be interpreted as urged for the appellant, Section 308 too should be interpreted that way. Whatever may be said with respect to Section 307 IPC, being exhaustive or covering all the cases of attempts to commit murder and Section 511 not applying to any case of attempt to commit murder on account of its being applicable only to offences punishable with imprisonment for life or imprisonment, the same cannot be said with respect to the offence of attempt to commit culpable homicide punishable under Section 308. An attempt to commit culpable homicide is punishable with imprisonment for a certain period and therefore but for its being expressly made an offence under Section 308, it would have fallen under Section 511 which applies to all attempts to commit offences punishable with imprisonment where no express provisions are made by the Code for the punishment of that attempt. It should follow that the ingredients of an offence of attempt to commit culpable homicide not amounting to murder should be the same as the ingredients of an offence of attempt to commit that offence under Section 511. We have held this day in ***Abhayanand Mishra* v. *State of Bihar*** [Criminal Appeal No. 226 of 1959] that a person commits the offence of attempting to commit a particular offence, when he intends to commit that particular offence and, having made preparations and with the intention to commit that offence does an act towards its commission and that such an act need not be the penultimate act towards the commission of that offence, but must be an act during the course of committing such offence. It follows therefore that a person commits an offence under Section 308 when he has an intention to commit culpable homicide not amounting to murder and in pursuance of that intention does an act towards the commission of that offence whether that act be the penultimate act or not. On a parity of reasoning, a person commits an offence under Section 307 when he has an intention to commit murder and, in pursuance of that intention, does an act towards its commission irrespective of the fact whether that act is the penultimate act or not. It is to be clearly understood, however, that the intention to commit the offence of murder means that the person concerned has the intention to do certain act with the necessary intention or knowledge mentioned in Section 300. The intention to commit an offence is different from the intention or knowledge requisite for constituting the act as that offence. The expression "whoever attempts to commit an offence" in Section 511, can only mean "whoever: intends to do a certain act with the intent or knowledge necessary for the commission of that offence". The same is meant by the expression "whoever does an act with such intention or knowledge and under such circumstances that if he, by that act, caused death, he would be guilty of murder" in Section 307. This simply means that the act must be done with the intent or knowledge requisite for the commission of the offence of murder. The

expression "by that act" does not mean that the immediate effect of the act committed must be death. Such a result must be the result of that act whether immediately or after a lapse of time.

10. The word "act" again, does not mean only any particular, specific, instantaneous act of a person, but denotes, according to Section 33 of the Code, as well, a series of acts. The course of conduct adopted by the appellant in regularly starving Bimla Devi comprised a series of acts and therefore acts falling short of completing the series, and would therefore come within the purview of Section 307 of the Code.

11. Learned counsel for the appellant has referred us to certain cases in this connection. We now discuss them.

12. The first is ***Queen-Empress* v. *Nidha*** [(1892) ILR 14 All 38]. Nidha, who had been absconding, noticing certain chowkidars arrive, brought up a sort of a blunderbuss he was carrying, to the hip and pulled the trigger. The cap exploded, but the charge did not go off. He was convicted by the Sessions Judge under Sections 299 and 300 read with Section 511, and not under Section 307 IPC, as the learned Judge relied on a Bombay case - ***Regina* v. *Francis Cassidy*** [Bom HC Reps Vol. IV, P. 17] - in which it was held that in order to constitute the offence of attempt to murder, under Section 307 IPC, the act committed by the person must be an act capable of causing, in the natural and ordinary course of events, death. Straight, J., both distinguished that case and did not agree with certain views expressed therein. He expressed his view thus, at p. 43:

> It seems to me that if a person who has an evil intent does an act which is the last possible act that he could do towards the accomplishment of a particular crime that he has in his mind, he is not entitled to pray in his aid an obstacle intervening not known to himself. If he did all that he could do and completed the only remaining proximate act in his power, I do not think he can escape criminal responsibility, and this because his own set volition and purpose having been given effect to their full extent, a fact unknown to him and at variance with his own belief, intervened to prevent the consequences of that act which he expected to ensue, ensuing.

Straight, J. gave an example earlier which itself does not seem to fit in with the view expressed by him later. He said:

> No one would suggest that if A intending to fire the stack of B, goes into a grocery shop and buys a box of matches, that he has committed the offence of attempting to fire the stack of B. But if he, having that intent, and having bought the box of matches, goes to the stack of B and lights the match, but it is put out by a puff of wind, and he is so prevented and interfered with, that would establish in my opinion an attempt.

The last act, for the person to set fire to the stack would have been his applying a lighted match to the stack. Without doing this act, he could not have set fire and, before he could do this act, the lighted match is supposed to have been put out by a puff of wind.

13. Illustration (*d*) to Section 307, itself shows the incorrectness of this view. The illustration is:

> A intending to murder Z, by poison, purchases poison and mixes the same with food which remains in A's keeping; A has not yet committed the offence in this section. A

> places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

A's last act, contemplated in this illustration, is not an act which must result in the murder of *Z*. The food is to be taken by *Z*. It is to be served to him. It may not have been possible for *A* to serve the food himself to *Z*, but the fact remains that *A*'s act in merely delivering the food to the servant is fairly remote to the food being served and being taken by *Z*.

14. This expression of opinion by Straight, J., was not really with reference to the offence under Section 307 IPC, but was with reference to attempts to commit any particular offence and was stated, not to emphasize the necessity of committing the last act for the commission of the offence, but in connection with the culprit taking advantage of an involuntary act thwarting the completion of his design by making it impossible for the offence being committed. Straight, J., himself said earlier:

> For the purpose of constituting an attempt under Section 307 IPC, there are two ingredients required, first, an evil intent or knowledge, and secondly, an act done.

15. In ***Emperor* v. *Vasudeo Balwant Gogte*** [(1932) ILR 56 Bom 434] a person fired several shots at another. No injury was in fact occasioned due to certain obstruction. The culprit was convicted of an offence under Section 307 IPC. Beaumont, C.J., said at p. 438:

> I think that what Section 307 really means is that the accused must do an act with such a guilty intention and knowledge and in such circumstances that but for some intervening fact the act would have amounted to murder in the normal course of events.

This is correct. In the present case, the intervening fact which thwarted the attempt of the appellant to commit the murder of Bimla Devi was her happening to escape from the house and succeeding in reaching the hospital and thereafter securing good medical treatment.

16. It may, however, be mentioned that in cases of attempt to commit murder by fire-arm, the act amounting to an attempt to commit murder is bound to be the only and the last act to be done by the culprit. Till he fires, he does not do any act towards the commission of the offence and once he fires, and something happens to prevent the shot taking effect, the offence under Section 307 is made out. Expressions, in such cases, indicate that one commits an attempt to murder only when one has committed the last act necessary to commit murder. Such expressions, however, are not to be taken as precise exposition of the law, though the statements in the context of the cases are correct.

17. In ***Mi Pu* v. *Emperor*** [(1909) 10 Cri LJ 363] a person who had put poison in the food was convicted of an offence under Section 328 read with Section 511 IPC, because there was no evidence about the quantity of poison found and the probable effects of the quantity mixed in the food. It was therefore held that the accused cannot be said to have intended to cause more than hurt. The case is therefore of no bearing on the question under determination.

18. In ***Jeetmal* v. *State*** [AIR 1950 MB 21] it was held that an act under Section 307, must be one which, by itself, must be ordinarily capable of causing death in the natural ordinarily course of events. This is what was actually held in ***Cassidy*** case and was not approved in ***Nidha*** case or in ***Gogte*** case.

19. We may now refer to ***Rex* v. *White*** [(1910) 2 KB 124]. In that case, the accused, who was indicted for the murder of his mother, was convicted of attempt to murder her. It was held that the accused had put two grains of cyanide of potassium in the wine glass with the intent to murder her. It was, however, argued that there was no attempt at murder because "the act of which he was guilty, namely, putting the poison in the wine glass, was a completed act and could not be and was not intended by the appellant to have the effect of killing her at once; it could not kill unless it were followed by other acts which he might never have done". This contention was repelled and it was said:

> There seems no doubt that the learned Judge in effect did tell the jury that if this was a case of slow poisoning the appellant would be guilty of the attempt to murder. We are of opinion that this direction was right, and that the completion or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murder even although this completed act would not, unless followed by the other acts, result in killing. It might be the beginning of the attempt, but would nonetheless be an attempt.

This supports our view.

20. We therefore hold that the conviction of the appellant under Section 307 IPC, is correct and accordingly dismiss this appeal.

* * * * *

State of Maharashtra v. *Mohd. Yakub*

(1980) 3 SCC 57: AIR 1980 SC 1111

R.S. SARKARIA, J. - This appeal by special leave preferred by the State of Maharashtra, is directed against a judgment, dated November 1, 1973, of the Bombay High Court.

2. Mohd. Yakub Respondent 1, Shaikh Jamadar Mithubhai Respondent 2, and Issak Hasanali Shaikh Respondent 3, were tried in the court of the Judicial Magistrate First Class, Bassein, Bombay, in respect of three acts of offences punishable under Section 135 read with Section 135(2) of the Customs Act, 1962. The *first* charge was the violation of Sections 12(1), 23(1) and 23(d) of the Foreign Exchange Regulation Act, 1947, the *second* was violation of Exports (Control) Order No. 1 of 1968 E. T.C. dated March 8, 1968; and the *third* was the contravention of the provisions of Sections 7, 8, 33 and 34 of the Customs Act, 1962. They were also charged for violation of the Exports (Control) Order No. 1 of 1968 E.T.C. dated March 8, 1968 issued under Sections 3 and of the Imports and Exports (Control) Act, 1947 punishable under Section 5 of the said Act. The gist of the charges was that the respondents attempted to smuggle out of India 43 silver ingots, weighing 1312.410 kgs., worth about Rs 8 lakhs, in violation of the Foreign Exchange Regulation Act, the Imports and Exports (Control) Act, 1947, and the Customs Act.

3. On receiving some secret information that silver would be transported in Jeep No. MRC-9930 and Truck No. BMS-796 from Bombay to a coastal place near Bassein, Shri Wagh, Suprintendent of Central Excise, along with Inspector Dharap and the staff proceeded in two vehicles to keep a watch on the night of September 14, 1968 at Shirsat Naka on the National Highway No. 8, Bombay City. At about midnight, the aforesaid jeep was seen coming from Bombay followed by a truck. These two vehicles were proceeding towards Bassein. The officers followed the truck and the jeep which, after travelling some distance from Shirsat Naka, came to a fork in the road and thereafter, instead of taking the road leading to Bassein, proceeded on the new National Highway leading to Kaman village and Ghodbunder creek. Ultimately, the jeep and truck halted near a bridge at Kaman creek where after the accused removed some small and heavy bundles from the truck and placed them aside on the ground. The customs officers rushed to the spot and accosted the persons present there. At the same time, the sound of the engine of a mechanised sea-craft, from the side of the creek, was heard by the officers. The officers surrounded the vehicle and found four silver ingots on the footpath leading to the creek. Respondent 1 was the driver and the sole occupant of the jeep, while the other two respondents were the driver and cleaner of the truck. The officers sent for Kana and Sathe, both residents of Bassein. In their presence, Respondent 1 was questioned about his identity. He falsely gave his name and address as Mohamed Yusuf s/o Sayyed Ibrabim residing at Kamathipura. From the personal search of Respondent 1, a pistol, knife and currency notes of Rs 2,133 were found. Fifteen silver ingots concealed in a shawl were found in the rear side of the jeep and twenty-four silver ingots were found lying under sawdust bay in the truck. The truck and the jeep, together with the accused-respondents and the silver ingots, were taken to Shirsat Naka where a detailed *panchnama* was drawn up. Respondent 1 had no licence for keeping a pistol. Consequently, the matter was reported to Police Station, Bassein, for prosecuting the respondent under the Arms Act.

4. The respondents and the vehicles and the silver ingots were taken to Bombay on September 15, 1968. The statements of the respondents under Section 108 of the Customs Act were recorded by Shri Wagh, Superintendent of Central Excise. The Collector, Central Excise, by his order dated May 28, 1969, confiscated the silver ingots. After obtaining the requisite sanction, the Assistant Collector, Central Excise made a complaint against all the three accused in the court of the Judicial Magistrate, Bassein, for trial in respect of the aforesaid offences.

5. The plea of the accused was of plain denial of the prosecution case. They stated that they were not aware of the alleged silver and that they had just been employed for carrying the jeep and the truck to another destination. They alleged that they were driven to the creek by the police.

6. The trial Magistrate convicted the accused of the aforesaid offences and sentenced Accused 1 to two years' rigorous imprisonment and a fine of Rs 2000 and, in default, to suffer further six months' rigorous imprisonment. Accused 2 and 3 were to suffer six months' rigorous imprisonment and to pay a fine of Rs 500 and, in default, to suffer two months' rigorous imprisonment.

7. The accused preferred three appeals in the court of the Additional Sessions Judge, Thana, who, by his common judgment dated September 30, 1973, allowed the appeals and acquitted them on the ground that the facts proved by the prosecution fell short of establishing that the accused had 'attempted' to export silver in contravention of the law, because the facts proved showed no more than that the accused had only made 'preparation' for bringing this silver to the creek and "had not yet committed any act amounting to a direct movement towards the commission of the offence". In his view, until silver was put in the boat for the purpose of taking out of the country with intent to export it, the matter would be merely in the. stage of preparation falling short of an 'attempt' to export it. Since 'preparation' to commit the offence of exporting silver was not punishable under the Customs Act, he acquitted the accused.

8. Against this acquittal, the State of Maharashtra carried an appeal to the High Court, which, by its judgment dated November 1, 1973, dismissed the appeal and upheld the acquittal of the accused-respondents. Hence, this appeal.

9. In the instant case, the trial Court and the Sessions Judge concurrently held that the following circumstances had been established by the prosecution:

(a) The officers (Shri Wagh and party) had received definite information that silver would be carried in a truck and a jeep from Bombay to Bassein for exporting from the country and for this purpose they kept a watch at Shirsat Naka and then followed the jeep and the truck at some distance.
(b) Accused 1 was driving the jeep, while Accused 2 was driving the truck and Accused 3 was cleaner on it.
(c) Fifteen silver ingots were found concealed in the jeep and 24 silver ingots were found hidden in the truck.
(d) The jeep and the truck were parked near the Kaman creek from where they could be easily loaded in some sea-craft.

(e) Four silver ingots from the vehicle had been actually unloaded and were found lying by the side of the road near the footpath leading to the sea.
(f) On being questioned, Accused 1 gave his false name and address.
(g) The accused were not dealers in silver.

10. The trial Magistrate further held that just when the officers surrounded these vehicles and caught the accused, the sound of the engine of a mechanised vessel was heard from the creek. The first appellate Court did not discount this fact, but held that this circumstance did not have any probative value.

11. The question, therefore, is whether from the facts and circumstances, enumerated above, it could be inferred beyond reasonable doubt that the respondents had attempted to export the silver in contravention of law from India?

12. At the outset, it may be noted that the Evidence Act does not insist on absolute proof for the simple reason that perfect proof in this imperfect world is seldom to be found. That is why under Section 3 of the Evidence Act, 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. This definition of 'proved' does not draw any distinction between circumstantial and other evidence. Thus, if the circumstances listed above establish such a high degree of probability that a prudent man ought to act on the supposition that the appellant was attempting to export silver from India in contravention of the law that will be sufficient proof of that fact in issue.

13. Well then, what is an "attempt" Kenny in his ***OUTLINES OF CRIMINAL LAW*** defined "attempt" to commit a crime as the "last proximate act which a person does towards the commission of an offence, the consummation of the offence being hindered by circumstances beyond his control". This definition is too narrow. What constitutes an "attempt" is a mixed question of law and fact, depending largely on the circumstances of the particular case. "Attempt" defies a precise and exact definition. Broadly speaking, all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage, he makes preparations to commit it. The third stage is reached when the culprit takes deliberate overt steps to commit the offence. Such overt act or step in order to be 'criminal' need not be the penultimate act towards the commission of the offence. It is sufficient if such act or acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence. As pointed out in ***Abhayanand Mishra* v. *State of Bihar*** [AIR 1961 SC 1698] there is a distinction between 'preparation' and 'attempt'. Attempt begins where preparation ends. In sum, a person commits the offence of 'attempt to commit a particular offence' when (*i*) he *intends* to commit that particular offence and (*ii*) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence *but must be an act during the course of committing that offence.*

14. Now, let us apply the above principles to the facts of the case in hand. The intention of the accused to export the silver from India by sea was clear from the circumstances enumerated above. They were taking the silver ingots concealed in the two vehicles under the cover of darkness. They had reached close to the sea-shore and had started unloading the silver there near a creek from which the sound of the engine of a sea-craft was also heard. Beyond the stage of preparation, most of the steps necessary in the course of export by sea had been taken. The only step that remained to be taken towards the export of the silver was to load it on a sea-craft for moving out of the territorial waters of India. But for the intervention of the officers of law, the unlawful export of silver would have been consummated. The clandestine disappearance of the sea-craft when the officers intercepted and rounded up the vehicles, and the accused at the creek reinforces the inference that the accused had deliberately attempted to export silver by sea in contravention of law.

15. It is important to bear in mind that the penal provisions with which we are concerned have been enacted to suppress the evil of smuggling precious metal out of India. Smuggling is an anti-social activity which adversely affects the public revenues, the earning of foreign exchange, the financial stability and the economy of the country. A narrow interpretation of the word "attempt" therefore, in these penal provisions which will impair their efficacy as instruments for combating this baneful activity has to be eschewed. These provisions should be construed in a manner which would suppress the mischief, promote their object, prevent their subtle evasion and foil their artful circumvention. Thus construed, the expression "attempt" within the meaning of these penal provisions is wide enough to take in its fold any one or series of acts committed, beyond the stage of preparation in moving the contraband goods deliberately to the place of embarkation, such act or acts being reasonably proximate to the completion of the unlawful export. The inference arising out of the facts and circumstances established by the prosecution, unerringly pointed to the conclusion, that the accused had committed the offence of attempting to export silver out of India by sea, in contravention of law.

16. For reasons aforesaid, we are of opinion that the High Court was in error in holding that the circumstances established by the prosecution fell short of constituting the offence of an 'attempt' to export unlawfully, silver out of India. We, therefore, allow this appeal, set aside the acquittal of the accused-respondents and convict them under Section 135(1)(*a*) of the Customs Act, 1962 read with Section 5 of the Imports and Exports (Control) Act, 1947 and the order issued thereunder, and sentence them as under:

17. Accused-Respondent 1, Mohd. Yakub is sentenced to suffer one year's rigorous imprisonment with a fine of Rs 2000 and, in default, to suffer six months' further rigorous imprisonment. Accused-Respondents 2 and 3, namely Shaikh Jamadar Mithubhai and Issak Hasanali Shaikh are each sentenced to six months' rigorous imprisonment with a fine of Rs 500 and, in default to suffer two months' further rigorous imprisonment.

CHINNAPPA REDDY, J. (*concurring*) - I concur in the conclusion of my brother Sarkaria, J. in whose judgment the relevant facts have been set out with clarity and particularity. I wish to add a few paragraphs on the nature of the *actus reus* to be proved on a charge of an attempt to commit an offence.

19. The question is what is the difference between preparation and perpetration?

20. An attempt to define 'attempt' has to be a frustrating exercise. Nonetheless a search to discover the characteristics of an attempt, if not an apt definition of attempt, has to be made.

21. In England Parke, B. described the characteristics of an 'attempt' in ***Reg.* v. *Eagleton*** [(1855) Dears CC 515] as follows:

> The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are . . .

22. The dictum of Parke, B. is considered as the locus classic us on the subject and the test of 'proximity' suggested by it has been accepted and applied by English courts though with occasional but audible murmur about the difficulty in determining whether an act is immediate or remote. Vide, Lord Goddard, C.J. in ***Gardner* v. *Akeroyd*** [(1952) 2 All ER 306] ". . . it is sometimes difficult to determine whether an act is immediately or remotely connected with the crime of which it is alleged to be an attempt '. Parke, B., himself appeared to have thought that the last possible act before the achievement of the end constituted the attempt. This was indicated by him in the very case of ***Reg.* v. *Eagleton*** where he further observed:

> . . . and if, in this case . . . any further step on the part of the defendant had been necessary to obtain payment . . . we should have thought that the obtaining credit . . . would not have been sufficiently proximate to the obtaining of the money. But, on the statement in this case, no other act on the part of the defendant would have been required. It was the last act, depending on himself towards the payment of the money, and therefore it ought to be considered as an attempt.

As a general principle the test of 'the last possible act before the achievement of the end' would be entirely unacceptable. If that principle be correct, a person who has cocked his gun at another and is about to pull the trigger but is prevented from doing so by the intervention of someone or something cannot be convicted of attempt to murder.

23. Another popular formulation of what constitutes 'attempt' is that of Stephen in his ***DIGEST OF THE CRIMINAL LAW*** where he said:

> An attempt to commit a crime is an act done with intent to commit that crime and forming part of a series of acts, which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case.

While the first sentence is an attempt at defining 'attempt', the second sentence is a confession of inability to define. The attempt at definition fails precisely at the point where it should be helpful. See the observations of Parker, C.J. in ***Davey* v. *Lee*** [(1968) 1 QB 366] and of Prof. Glanville Williams in his essay on Police Control of Intending Criminal in 1955 ***Criminal Law Review***.

24. Another attempt at definition was made by Professor Turner in (1934)5 **Cambridge Law Journal** 230, and this was substantially reproduced in Archbold's ***CRIMINAL***

PLEADING, EVIDENCE AND PRACTICE (36th Edn.). Archbold's reproduction was quoted with approval in ***Davey* v. *Lee*** and was as follows:

> . . . the actus reus necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of a specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime.

25. We must at once say that it was not noticed in Archbold's (36th Edn.) nor was it brought to the notice of the Divisional Court which decided ***Davey* v. *Lee*** [**RUSSEL ON *CRIME*** (12th Edn.) edited by Prof. Turner, p. 18] that Prof. Turner was himself not satisfied with the definition propounded by him and felt compelled to modify it, as he thought that to require that the act could not reasonably be regarded as having any other purpose than the commission of the specific crime went too far and it should be sufficient "to show *prima facie*, the offender's intention to commit the crime which he is charged with attempting".

26. Editing 12th edition of **Russell on *Crime*** and 18th edition of Kenny's ***OUTLINES OF CRIMINAL LAW***, Professor Turner explained his modified definition as follows:

> It is therefore suggested that a practical test for actus reus in attempt is that the prosecution must prove that the steps taken by the accused must have reached the point when they themselves clearly indicate what was the end towards which they were directed. In other words the steps taken must themselves be sufficient to show, prima facie, the offender's intention to commit the crime which he is charged with attempting. That there may be abundant other evidence to establish his mens rea (such as a confession) is irrelevant to the question of whether he had done enough to constitute the actus reus.

We must say here that we are unable to see any justification for excluding evidence aliunde on the question of *mens rea* in considering what constitutes the *actus reus.* That would be placing the *actus reus* in too narrow a pigeon-hole.

27. In ***Haughton* v. *Smith***, [1975 AC 476 492], Hailsham, L.C. quoted Parke, B. from the ***Eagleton*** case and Lord Parker, C.J. from ***Davey* v. *Lee*** and proceeded to mention three propositions as emerging from the two definitions:

> (1) There is a distinction between the intention to commit a crime and an attempt to commit it .... (2) In addition to the intention, or mens rea, there must be an overt act of such a kind that it is intended to form and does form part of a series of acts which would constitute the actual commission of the offence if it were not interrupted . . . . (3) The act relied on as constituting the attempt must not be an act merely preparatory to commit the completed offence, but must bear a relationship to the completion of the offence referred to in Reg. v. Eagleton, as being 'proximate' to the completion of the offence in Davey v. Lee as being 'immediately and not merely remotely connected with the completed offence . . .

28. In ***Director of Public Prosecutions* v. *Stonehouse*** [(1977) 2 All ER 909] Lord Diplock and Viscount Dilhorne, appeared to accept the 'proximity' test of Parke, B., while Lord Edmund-Davies accepted the statement of Lord Hailsham as to what were the true

ingredients of a criminal attempt. Whatever test was applied, it was held that the facts clearly disclosed an attempt in that case.

29. In India, while attempts to commit certain specified offences have themselves been made specific offences (e.g.;. Sections 307, 308, Indian Penal Code etc.), an attempt to commit an offence punishable under the Penal Code, generally, is dealt with under Section 511, Indian Penal Code. But the expression 'attempt' has not been defined anywhere.

30. In ***Abhayanand Mishra* v. *State of Bihar***, Raghubar Dayal and Subba Rao, JJ., disapproved of the test of last act which if uninterrupted and successful would constitute a criminal offence and summarised their views as follows:

> A person commits the offence of 'attempt to commit a particular offence' when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.

31. In ***Malkiat Singh* v. *State of Punjab*** [(1969) 2 SCR 663, 667] a truck which was carrying paddy, was stopped at Samalkha 32 miles from Delhi and about 15 miles from the Delhi-Punjab boundary. The question was whether the accused were attempting to export paddy from Punjab to Delhi. It was held that on the facts of the case, the offence of attempt had not been committed. Ramaswami, J., observed:

> The test for determining whether the act of the appellants constituted an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless In the present case it is quite possible that the appellants may have been warned that they had no licence to carry the paddy and they may have changed their mind at any place between Samalkha Barrier and the Delhi-Punjab boundary and not have proceeded further in their journey.

We think that the test propounded by the first sentence should be understood with reference to the facts of the case. The offence alleged to be contemplated was so far removed from completion in that case that the offender had yet ample time and opportunity to change his mind and proceed no further, his earlier acts being completely harmless. That was what the court meant, and the reference to the appellants in the sentence where the test is propounded makes it clear that the test is propounded with reference to the particular facts of the case and not as a general rule. Otherwise, in every case where an accused is interrupted at the last minute from completing the offence, he may always say that when he was interrupted he was about to change his mind.

32. Let me now state the result of the search and research: In order to constitute 'an attempt', first, there must be an intention to commit a particular offence, second, some act must have been done which would necessarily have to be done towards the commission of the offence, and, third, such act must be 'proximate' to the intended result. The measure of proximity is not in relation to time and action but in relation to intention. In other words, the act must reveal, with reasonable certainty, in conjunction with other facts and circumstances and not necessarily in isolation, an intention, as distinguished from a mere desire or object, to

commit the particular offence, though the act by itself may be merely suggestive or indicative of such intention; but, that it must be, that is, it must be indicative or suggestive of the intention. For instance, in the instant case, had the truck been stopped and searched at the very commencement of the journey or even at Shirsat Naka, the discovery of silver ingots in the truck might at the worst lead to the inference that the accused had prepared or were preparing for the commission of the offence. It could be said that the accused were transporting or attempting to transport silver somewhere but it would not necessarily suggest or indicate that the intention was to export silver. The fact that the truck was driven up to a lonely creek from where the silver could be transferred into a sea-faring vessel was suggestive or indicative though not conclusive, that the accused wanted to export the silver. It might have been open to the accused to plead that the silver was not to be exported but only to be transported in the course of inter-coastal trade. But, the circumstance that all this was done in a clandestine fashion, at dead of night, revealed, with reasonable certainty, the intention of the accused that the silver was to be exported.

33. In the result I agree with the order proposed by Sarkaria, J.

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Smt. Gian Kaur v. *State of Punjab*

(1996) 2 SCC 648

J.S. VERMA, J. Leave granted in special leave petitions.

2. The appellants Gian Kaur and her husband Harbans Singh were convicted by the Trial Court under Section 306, Indian Penal Code, 1860 (for short "IPC") and each sentenced to six years R.I. and fine of Rs. 2,000/-, or, in default, further R.I. for nine months, for abetting the commission of suicide by Kulwant Kaur. On appeal to the High Court, the conviction of both has been maintained but the sentence of Gian Kaur alone has been reduced to R.I. for three years. These appeals by special leave are against their conviction and sentence under Section 306, IPC.

3. The conviction of the appellants has been assailed, *inter alia*, on the ground that Section 306, IPC is unconstitutional. The first argument advanced to challenge the constitutional validity of Section 306, IPC rests on the decision in ***P. Rathinam* v. *Union of India*** [(1994) 3 SCC 394] by a Bench of two learned Judges of this Court wherein Section 309, IPC has been held to be unconstitutional as violative of Article 21 of' the Constitution. It is urged that 'right to die' being included in Article 21 of the Constitution as held in ***P. Rathinam*** declaring Section 309, IPC to be unconstitutional, any person abetting the commission of suicide by another is merely assisting in the enforcement of the fundamental right under Article 21; and, therefore, Section 306. IPC penalising assisted suicide is equally violative of Article 21. This argument, it is urged, is alone sufficient to declare that Section 306, IPC also is unconstitutional being violative of Article 21 of the Constitution.

4. One of the points directly raised is the inclusion of the `right to die' within the ambit of Article 21 of the Constitution, to contend that any person assisting the enforcement of the `right to die' is merely assisting in the enforcement of the fundamental right under Article 21 which cannot be penal; and Section 306, IPC making that act punishable, therefore, violates Article 21. In view of this argument based on the decision in ***P. Rathinam***, a reconsideration of that decision is inescapable.

5. In view of the significance of this contention involving a substantial question of law as to the interpretation of Article 21 relating to the constitutional validity of Section 306, I.P.C. which requires reconsideration of their decision in ***P.Rathinam***, the Division Bench before which these appeals came up for hearing has referred the matter to a Constitution Bench for deciding the same. This is how the matter comes before the Constitution Bench.

6. In addition to the learned counsel for the parties the learned Attorney General of India who appeared in response to the notice, we also requested Shri Fali S. Nariman and Shri Soli J. Sorabjee, Senior Advocates to appear as *amicus curiae* in this matter. All the learned counsels appearing before us have rendered great assistance to enable us to decide this ticklish and sensitive issue.

7. We may now refer to the submissions of the several learned counsel who ably projected the different points of view.

8. Shri Ujagar Singh and Shri B.S. Malik appeared in these matters for the appellants to support the challenge to the constitutional validity of Sections 306 and 309, IPC. Both the learned counsels contended that Section 306 as well as Section 309 are unconstitutional. Both of them relied on the decision in ***P. Rathinam***. However, Shri Ujagar Singh supported the conclusion in ***P. Rathinam*** of the constitutional invalidity of Section 309, IPC only on the ground of violation of Article 14 and not Article 21. Shri B.S. Malik contended that Section 309 is violative of Articles 14 and 21. He strongly relied on the ground based on Article 21 in ***P. Rathinam*** for holding Section 309 to be invalid. He urged that "right to die" being included within the ambit of Article 21, assistance in commission of suicide cannot be an offence and, therefore, Section 306 IPC also is violative of Article 21. He contended that Section 306 is unconstitutional for this reason alone. Shri S.K. Gambhir appearing in one of the connected matters did not advance any additional argument.

9. The learned Attorney General contended that Section 306 IPC constitutes a distinct offence and can exist independently of Section 309 IPC. The learned Attorney General did not support the decision in ***P. Rathinam*** and the construction made of Article 21 therein to include the "right to die". Shri F.S. Nariman submitted that Sections 306 and 309 constitute independent substantive offences and Section 306 can exist independently of Section 309. Shri Nariman then contended that the desirability of deleting Section 309 from the IPC is different from saying that it is unconstitutional. He also submitted that the debate on euthanasia is not relevant for deciding the question of constitutional validity of Section 309. He submitted that Article 21 cannot be construed to include within it the so called 'right to die' since Article 21 guarantees protection of life and liberty and not its extinction. He submitted that Section 309 does not violate even Article 14 since the provision of sentence therein gives ample discretion to apply that provision with compassion to an unfortunate victim of circumstances attempting to commit suicide. Shri Nariman referred to the reported decisions to indicate that the enforcement of this provision by the courts has been with compassion to ensure that it is not harsh in operation. Shri Nariman submitted that the decision in ***P. Rathinam*** requires reconsideration as it is incorrect. Shri Soli J. Sorabjee submitted that Section 306 can survive independently of Section 309, IPC as it does not violate either Article 14 or Article 21. Shri Sorabjee did not support the construction made of Article 21 in ***P. Rathinam*** to include therein the 'right to die' but he supported the conclusion that Section 309 is unconstitutional on the ground that it violates Article 14 of the Constitution. Shri Sorabjee submitted that it has been universally acknowledged that a provision to punish attempted suicide is monstrous and barbaric and, therefore, it must be held to be violative of Article 14 of the Constitution. Shri Sorabjee's argument, therefore, is that Section 306, IPC must be upheld as constitutional but Section 309 should be held as unconstitutional, not as violative of Article 21 as held in ***P. Rathinam*** but being violative of Article 14 of the Constitution. He also sought assistance from Article 21 to support the argument based on Article 14.

10. At this stage, it would be appropriate to refer to the decisions wherein the question of constitutional validity of Section 309, IPC was considered.

11. ***Maruti Shripati Dubal*** **v.** ***State of Maharashtra*** [(1987) Cri.L.J. 743] is the decision by a Division Bench of the Bombay High Court. In that decision, P.B.Sawant, J., as he then was, speaking for the Division Bench held that Section 309 IPC is violative of Article 14 as

well as Article 21 of the Constitution. The provision was held to be discriminatory in nature and also arbitrary so as to violate the equality guaranteed by Article 14. Article 21 was construed to include the 'right to die', or to terminate one's own life. For this reason it was held to violate Article 21 also.

12. ***State*** v. ***Sanjay Kumar Bhatia*** [(1985) Cri.L.J. 931] is the decision of the Delhi High Court. Sachar, J., as he then was, speaking for the Division Bench said that the continuance of Section 309 IPC is an anachronism unworthy of human society like ours. However, the question of its constitutional validity with reference to any provision of the Constitution was not considered. Further consideration of this decision is, therefore, not necessary.

13. ***Chenna Jagadeeswar*** **v.** ***State of Andhra Pradesh*** [1988 Cr.L.J.549] is the decision by a Division Bench of the Andhra Pradesh High Court. The challenge to the constitutional validity of Section 309 IPC was rejected therein. The argument that Article 21 includes the 'right to die' was rejected. It was also pointed out by Amarethwari, J. speaking for the Division Bench that the Courts have sufficient power to see that unwarranted harsh treatment or prejudice is not meted out to those who need care and attention. This negatived the suggested violation of Article 14.

14. The only decision of this Court is ***P.Rathinam*** by a Bench of two learned Judges. Hansaria, J. speaking for the Division Bench rejected the challenge to the constitutional validity of Section 309 based on Article 14 but upheld the challenge on the basis of Article 21 of the Constitution. The earlier decisions of the Bombay High Court and the Andhra Pradesh High Court were considered and agreement was expressed with the view taken by the Andhra Pradesh High Court as regards Section 309 qua Article 14. The decision then proceeds to consider the challenge with reference to Article 21 of the Constitution. It was held that Article 21 has enough positive content in it so that it also includes the 'right to die' which inevitably leads to the right to commit suicide. Expressing agreement with the view of the Bombay High Court in respect of the content of Article 21, it was held as under:

> Keeping in view all-the above, we state that right to live of which Article 21 speaks of can be said to bring in its trail the right not to live a forced life.

The conclusion of the discussion was summarised as under:

> On the basis of what has been held and noted above, we state that Section 309 of the Penal Code deserves to be effaced from the statute book to humanize our penal laws. It is a cruel and irrational provision, and it may result in punishing a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide. Then an act of suicide cannot be said to be against religion, morality or public policy, and an act of attempted suicide has no baneful effect on society. Further, suicide or attempt to commit it causes no harm to others, because of which State's interference with the personal liberty of the persons concerned is not called for.
>
> We, therefore, hold that Section 309 violates Article 21, and so, it is void. May it be said that the view taken by us would advance not only the cause of humanization, which is a need of the day, but of globalization also, as by effacing Section 309, we would be attuning this part of our criminal law to the global wavelength. (Page 429)

15. At this stage it may be mentioned that reference has been made in ***P.Rathinam*** and the Bombay High Court decision to the debate relating to euthanasia, the sociological and psychological factors contributing to suicidal tendencies and the global debate on the desirability of not punishing 'attempt to commit suicide'. The absence of provisions to punish attempted suicide in several jurisdictions has also been noticed. The desirability of attempted suicide not being made a penal offence and the recommendation of the Law Commission to delete Section 309 from the Indian Penal Code has also been adverted to. We may refer only to the recommendation contained in the ***42nd Report*** (1971) of the Law Commission of India which contains the gist of this logic and was made taking into account all these aspects. The relevant extract is, as under:

> 16.31 Section 309 penalizes an attempt to commit suicide. It may be mentioned that suicide was regarded as permissible in some circumstances in ancient India. In the Chapter on "The hermit in the forest", Manu's Code (See: ***Laws of Manu***, translated by George Buhler, ***Sacred Books of the East*** edited by F.Max Muller, (1967 Reprint) Vol.25, page 204,J Shlokas 31 ad 32) says –
>
> > '31. Or let him walk, fully determined and going straight on, in a north-easterly direction, subsisting on water and air, until his body sinks to rest.
> >
> > 32. A Brahmana having got rid of his body by one of those modes (i.e. drowning, precipitating burning or starving) practised by the great sages, is exalted in the world of Brahamana, free from sorrow and fear.'

Two commentators of Manu, Govardhana and Kulluka (See ***Medhatithi's commentary on Manu***), say that a man may undertake the *mahaprasthana* (great departure) on a journey which ends in death, when he is incurably diseased or meets with a great misfortune, and that, because it is taught in the Sastras, it is not opposed to the Vedic rules which forbid suicide (See : ***Laws of Manu***, translated by George Buhler, ***Sacred Books of the East*** edited by F.Max Muller, (1967 Reprint) Vol.25, page 204, footnote 31). To this Max Muller adds a note as follows :- (See: *Ibid*)

> From the parallel passage of Apas tambha II, 23, 2, it is, however, evident that a voluntary death by starvation was considered the befitting conclusion of a hermit's life. The antiquity and general prevalence of the practice may be inferred from the fact that the Jaina ascetics, too, consider it particularly meritorious.

16.32 Looking at the offence of attempting to commit suicide, it has been observed by an English writer: (See: H.Romilly Fedden: ***Suicide*** (London, 1938), page 42).

> It seems a monstrous procedure to inflict further suffering on even a single individual who has already found life so unbearable, his chances of happiness so slender, that he has been willing to face pain and death in order to cease living. That those for whom life is altogether bitter should be subjected to further bitterness and degradation seems perverse legislation.
>
> Acting on the view that such persons deserve the active sympathy of society and not condemnation or punishment, the British Parliament enacted the Suicide Act in 1961 whereby attempt to commit suicide ceased to be an offence.

> 16.33 We included in our Questionnaire the question whether attempt to commit suicide should be punishable at all. Opinion was more or less equally divided. We are, however definitely of the view that the penal Provision is harsh and unjustifiable and it should be repealed." (emphasis supplied)

16. A Bill was introduced in 1972 to amend the Indian Penal Code by deleting Section 309. However, the Bill lapsed and no attempt has been made as yet to implement that recommendation of the Law Commission.

17. The desirability of retaining Section 309 in the statute is a different matter and non-sequitur in the context of constitutional validity of that provision which has to be tested with reference to some provision in the Constitution of India. Assuming for this purpose that it may be desirable to delete Section 309 from the Indian Penal Code for the reasons which led to the recommendation of the Law Commission and the formation of that opinion by persons opposed to the continuance of such a provision, that cannot be a reason by itself to declare Section 309 unconstitutional unless it is held to be violative of any specific provision in the Constitution. For this reason, challenge to the constitutional validity of Section 309 has been made and is also required to be considered only with reference to Articles 14 and 21 of the Constitution. We, therefore, proceed now to consider the question of constitutional validity with reference to Articles 14 and 21 of the Constitution. Any further reference to the global debate on the desirability of retaining a penal provision to punish attempted suicide is unnecessary for the purpose of this decision. Undue emphasis on that aspect and particularly the reference to euthanasia cases tends to befog the real issue of the constitutionality of the provision and the crux of the matter which is determinative of the issue.

18. In ***P. Rathinam*** it was held that the scope of Article 21includes the 'right to die'. ***P. Rathinam*** held that Article 21 has also a positive content and is not merely negative in its reach. Reliance was placed on certain decisions to indicate the wide ambit of Article 21 wherein the term life' does not mean 'mere animal existence' but right to live with human dignity' embracing quality of life. Drawing analogy from the interpretation of freedom of speech and expression' to include freedom not to speak, freedom of association and movement' to include the freedom not to join any association or to move anywhere, freedom of business' to include freedom not to do business, it was held in ***P. Rathinam*** that logically it must follow that right to live would include right not to live, i.e., right to die or to terminate one's life. Having concluded that Article 21 includes also the right to die, it was held that Section 309. IPC was violative of Article 21. This is the only basis in ***P. Rathinam*** to hold that Section 309, IPC is unconstitutional.

'*Right to die*' - *Is it included in Article 21*?

19. The first question is: Whether, the scope of Article 21 also includes the 'right to die'? Article 21 is as under: Article 21

> 21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law."

20. A significant part of the judgment in ***P. Rathinam*** on this aspect is as under:

> If a person has a right to live, question is whether he has right not to live. The Bombay High Court stated in paragraph 10 of its judgment that as all the

fundamental rights are to be read together, as held in R.C. Cooper v. Union of India [(1970) 1 SCC 248] what is true of one fundamental right is also true of another fundamental right. It was then stated that is not, and cannot be, seriously disputed that fundamental rights have their positive as well as negative aspects. For example, freedom of speech and expression includes freedom not to speak. Similarly, the freedom of association and movement includes freedom not to join any association or move anywhere. So too, freedom of business includes freedom not to do business. It was, therefore, stated that logically it must follow that the right to live will include right not to live, i.e., right to die or to terminate one's life.

Two of the above named and critics of the Bombay judgment have stated that the aforesaid analogy is "misplaced", which could have arisen on account of superficial comparison between the freedoms, ignoring the inherent difference between one fundamental right and ,the other. It has been argued that the negative aspect of the right to live would mean the end or extinction of the positive aspect, and so, it is not the suspension as such of the right as is in the case of 'silence' or 'non-association' and 'no movement'. It has also been stated that the right to life stands on different footing from other rights as all other rights are derivable from the right to live.

The aforesaid criticism is only partially correct inasmuch as though the negative aspect may not be inferable on the analogy of the rights conferred by different clauses of Article 19, one may refuse to live, if his life be not according to the person concerned worth living or if the richness and fullness of life were not to demand living further. One may rightly think that having achieved all worldly pleasures or happiness, he has; some thing to achieve beyond this life. This desire for communion with God may very rightly lead even a very healthy mind to think that he would forego his right to live and would rather choose not to live. In any case, a person cannot be forced to enjoy right to life to his detriment, disadvantage or disliking.

* * *

Keeping in view all the above, we state that right to live of which Article 21 speaks of can be said to bring in its trail the right not to live a forced life.

In this context, reference may be made to what Alan A. Stone, while serving as Professor of Law and Psychiatry in Harvard University stated in his 1987 Jonas Robitscher Memorial Lecture in Law and Psychiatry, under the caption 'The Right to Die: New Problems for Law and Medicine and Psychiatry'. (This lecture has been printed at pp.627 to 643 of ***Emory Law Journal***, Vol.37, 1988). One of the basic theories of the lecture of Professor Stone was that right to die inevitably leads to the right to commit suicide." (emphasis supplied) (Pages 409-410)

21. From the above extract, it is clear that in substance the reason for that view is, that if a person has a right to live, he also has a right not to live. The decisions relied on for taking that view relate to other fundamental rights which deal with different situations and different kind of rights. In those cases the fundamental right is of a positive kind, for example, freedom of speech, freedom of association, freedom of movement, freedom of business etc. which were held to include the negative aspect of there being no compulsion to exercise that right by doing the guaranteed positive act. Those decisions merely held that the right to do an act includes also the right not to do an act in that manner. It does not flow from those decisions

that if the right is for protection from any intrusion thereof by others or in other words the right has the negative aspect of not being deprived by others of its continued exercise e.g. the right to life or personal liberty, then the converse positive act also flows there from to permit expressly its discontinuance or extinction by the holder of such right. In those decisions it is the negative aspect of the right that was invoked for which no positive or overt act was required to be done by implication. This difference in the nature of rights has to be borne in mind when making the comparison for the application of this principle.

22. When a man commits suicide he has to undertake certain positive overt acts and the genesis of those acts cannot be traced to, or be included within the protection of the 'right to life' under Article 21. The significant aspect of 'sanctity of life' is also not to be overlooked. Article 21 is a provision guaranteeing protection of life and personal liberty and by no stretch of imagination can extinction of life be read to be included in ‘protection of life'. Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, we find it difficult to construe Article 21 to include within it the right to die as a part of the fundamental right guaranteed therein. 'Right to life' is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of right to life. With respect and in all humility, we find no similarity in the nature of the other rights, such as the right to freedom of speech etc. to provide a comparable basis to hold that the 'right to life' also includes the 'right to die'. With respect, the comparison is inapposite, for the reason indicated in the context of Article 21. The decisions relating to other fundamental rights wherein the absence of compulsion to exercise a right was held to be included within the exercise of that right, are not available to support the view taken in ***P. Rathinam*** *qua* Article 21.

23. To give meaning and content to the word 'life' in Article 21, it has been construed as life with human dignity. Any aspect of life which makes it dignified may be read into it but not that which extinguishes it and is, therefore, inconsistent with the continued existence of life resulting in effacing the right itself. The ‘right to die’, if any, is inherently inconsistent with the ‘right to life’ as is ‘death’ with ‘life’.

24. Protagonism of euthanasia on the view that existence in persistent vegetative state (PVS) is not a benefit to the patient of a terminal illness being unrelated to the principle of 'sanctity of life' or the right to live with dignity' is of no assistance to determine the scope of Article 21 for deciding whether the guarantee of ‘right to life’ therein includes the ‘right to die’. The right to life' including the right to live with human dignity would mean the existence of such a right upto the end of natural life. This also includes the right to a dignified life upto the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. But the 'right to die' with dignity at the end of life is not to be confused or equated with the right to die an unnatural death curtailing the natural span of life.

25. A question may arise, in the context of a dying man, who is, terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the 'right to die' with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These

are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced. The debate even in such cases to permit physician assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the process of certain natural death is not available to interpret Article 21 to include therein the right to curtail the natural span of life.

26. We are, therefore, unable to concur with the interpretation of Article 21 made in ***P. Rathinam***. The only reason for which Section 309 is held to be violative of Article 21 in ***P. Rathinam*** does not withstand legal scrutiny. We are unable to hold that Section 309 I.P.C. is violative of Article 21.

27. The only surviving question for consideration now is whether Section 309 IPC is violative of Article 14, to support the conclusion reached in ***P.Rathinam***.

28. The basis of the decision in ***P. Rathinam***, discussed above, was not supported by any of the learned counsel except Shri B.S. Malik. On the basis of the decision in ***P.Rathinam*** it was urged that Section 306 also is violative of Article 21, as mentioned earlier. On the view we have taken that Article 21 does not include the right to die' as held in ***P. Rathinam***, the first argument to challenge the constitutional validity of Section 306, IPC also on that basis fails, and is rejected.

Article 14 - Is it violated by Section 309, I.P.C.?

29. We would now consider the constitutional validity of Section 309 with reference to Article 14 of the Constitution. In substance, the argument of Shri Ujagar Singh, Shri B.S. Malik and Shri Soli J. Sobrajee on this point is that it is a monstrous and barbaric provision which violates the equality clause being discriminatory and arbitrary. It was contended that attempted suicide is not punishable in any other civilized society and there is a strong opinion against the retention of such a penal provision which led the Law Commission of India also to recommend its deletion. Shri Sorabjee contended that the wide amplitude of Article 14 together with the right to live with dignity included in Article 21, renders Section 309 unconstitutional. It is in this manner, invoking Article 21 limited to life with dignity (not including therein the right to die) that Shri Sorabjee refers to Article 21 along with Article 14 to assail the validity of Section 309, IPC. The conclusion reached in ***P. Rathinam*** is supported on this ground.

30. We have formed the opinion that there is no merit in the challenge based even on Article 14 of the Constitution. The contention based on Article 14 was rejected in ***P. Rathinam*** also. It was held therein as under:

> The Bombay High Court held Section 309 as violation of Article 14 also mainly because of two reasons. First, which act or acts in series of acts will constitute attempt to suicide, where to draw the line, is not known – some attempts may be serious while others non-serious. It was stated that in fact philosophers, moralists and sociologists were not agreed upon what constituted suicide. The want of plausible definition or even guidelines, made Section 309 arbitrary as per the learned Judges. Another reason given was that Section 309 treats all attempts to commit suicide by the same measure without referring to the circumstances in which attempts are made.

> *The first of the aforesaid reasons is not sound, according to us, because whatever differences there may be as to what constitutes suicide, there is no doubt that suicide is intentional taking of one's life*, as stated at p.1521 of ***Encyclopaedia of Crime and Justice***, Vol. IV, 1983 Edn. Of course, there still exists difference among suicide researchers as to what constitutes suicidal behavior, for example, whether narcotic addiction, chronic alcoholism, heavy cigarette smoking, reckless driving, other risk-taking behaviors are suicidal or not. It may also be that different methods are adopted for committing suicide, for example, use of fire-arm, poisoning especially by drugs, overdoses, hanging, inhalation of gas. Even so, suicide is capable of a broad definition, as has been given in the aforesaid ***Webster's Dictionary***. Further, on a prosecution being launched it is always open to an accused to take the plea that his act did not constitute suicide where-upon the court would decide this aspect also.
>
> *Insofar as treating of different attempts to commit suicide by the same measure is concerned, the same also cannot be regarded as violative of Article 14, inasmuch as the nature, gravity and extent of attempt may be taken care of by tailoring the sentence appropriately. It is worth pointing out that Section 309 has only provided the maximum sentence which is up to one year. It provides for imposition of fine only as a punishment. It is this aspect which weighed with the Division Bench of Andhra Pradesh High Court in its aforesaid decision to disagree with the Bombay view by stating that in certain cases even Probation of Offenders Act can be pressed into service, whose Section 12 enables the court to ensure that no stigma or disqualification is attached to such a person. …*
>
> *We agree with the view taken by the Andhra Pradesh High Court as regards Section 309 qua Article 14.* (Page 405) (emphasis supplied)

With respect, we are in agreement with the view so taken *qua* Article 14, in ***P. Rathinam***.

31. We have already stated that the debate on the desirability of retaining such a penal provision of punishing attempted suicide, including the recommendation for its deletion by the Law Commission are not sufficient to indicate that the provision is unconstitutional being violative of Article 14. Even if those facts are to weigh, the severity of the provision is mitigated by the wide discretion in the matter of sentencing since there is no requirement of awarding any minimum sentence and the sentence of imprisonment is not even compulsory. There is also no minimum fine prescribed as sentence, which alone may be the punishment awarded on conviction under Section 309, IPC. This aspect is noticed in ***P. Rathinam*** for holding that Article 14 is not violated.

32. The reported decisions show that even on conviction under Section 309, IPC, in practice the accused has been dealt with compassion by giving benefit under the Probation of Offenders Act, 1958 or Section 562 of the Code of Criminal Procedure, 1908 corresponding to Section 360 of the Criminal Procedure Code, 1973 : ***Barkat* v. *Emperor***, AIR 1934 Lah. 514; ***Emperor* v. *Dwarka Pooja***, 14 Bom.L.R. 146; ***Emperor* v. *Dhirajia***, AIR 1940 All 486; ***Ram Sunder* v. *State of Uttar Pradesh***, AIR 1962 All. 262; ***Valentino* v. *State***, AIR 1967 Goa 138; ***Phulbhai* v. *State of Maharashtra***, 1976 Cr.L.J. 1519; ***Maharani* v. *State of M.P.***, AIR 1981 SC 1776; ***Rukhmina Devi* v. *State of U.P.***, 1988 Cr.L.J. 548. The above quoted discussion in ***P. Rathinam*** *qua* Article 14 is sufficient to reject the challenge based on Article 14.

33. We may briefly refer to the aid of Article 21 sought by Shri Sorabjee to buttress the challenge based on Article 14. We have earlier held that right to die is not included in the `right to life' under Article 21. For the same reason, right to live with human dignity cannot be construed to include within its ambit the right to terminate natural life, at least before commencement of the natural process of certain death. We do not see how Article 21 can be pressed into service to support the challenge based on Article 14. It cannot, therefore, be accepted that Section 309 is violative either of Article 14 or Article 21 of the Constitution.

34. It follows that there is no ground to hold that Section 309, IPC is constitutionally invalid. The contrary view taken in ***P. Rathinam*** on the basis of the construction made of Article 21 to include therein the right to die cannot be accepted by us to be correct. That decision cannot be supported even on the basis of Article 14. It follows that Section 309, IPC is not to be treated as unconstitutional for any reason.

Validity of Section 306 I.P.C.

35. The question now is whether Section 306, IPC is unconstitutional for any other reason. In our opinion, the challenge to the constitutional validity of Section 309, IPC having been rejected, no serious challenge to the constitutional validity of Section 306 survives. We have already rejected the main challenge based on P. Rathinam on the ground that 'right to die' is included in Article 21.

36. It is significant that Section 306 enacts a distinct offence which is capable of existence independent of Section 309, IPC. Sections 306 and 309 read as under:

> 306. *Abetment of suicide* - If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.
>
> 309. *Attempt to commit suicide* - Whoever attempts to commit suicide and does any act towards the commission of such offence shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both.

37. Section 306 prescribes punishment for abetment of suicide while Section 309 punishes attempt to commit suicide. Abetment of attempt to commit suicide is outside the purview of Section 306 and it is punishable only under Section 309 read with Section 107, IPC. In certain other jurisdictions, even though attempt to commit suicide is not a penal offence yet the abettor is made punishable. The provision there provides for the punishment of abetment of suicide as well as abetment of attempt to commit suicide. Thus, even where the punishment for attempt to commit suicide is not considered desirable, its abetment is made a penal offence. In other words assisted suicide and assisted attempt to commit suicide are made punishable for cogent reasons in the interest of society. Such a provision is considered desirable to also prevent the danger inherent in the absence of such a penal provision. The arguments which are advanced to support the plea for not punishing the person who attempts to commit suicide do not avail for the benefit of another person assisting in the commission of suicide or in its attempt. This plea was strongly advanced by the learned Attorney General as well as the *amicus curiae* Shri Nariman and Shri Sorabjee. We find great force in the submission.

38. The abettor is viewed differently, inasmuch as he abets the extinguishment of life of another persons and punishment of abetment is considered necessary to prevent abuse of the absence of such a penal provision. The Suicide Act, 1961 in the English Law contains the relevant provisions as under:

> 1. *Suicide to cease to be a crime*. – The rule of law whereby it is a crime for a person to commit suicide is hereby abrogated.
>
> NOTE
>
> *Suicide*. "*Felo de se* or suicide is, where a man of the age of discretion, and *compos mentis*, voluntarily kills himself by stabbing, poison or any other way" and was a felony at common law: see 1 Hale PC 411-419, This section abrogates that rule of law, *but, by virtue of s 2(1) Post, a person who aids abets, counsels or procures the suicide or attempted suicide of another is guilty of a statutory offence*.
>
> The requirement that satisfactory evidence of suicidal intent is always necessary to establish suicide as a cause of death is not altered by the passing of this Act : see *R.* v. *Cardiff Coroner, ex p Thomas* [1970] 3 All ER 469, [1970] 1 WLR 1475.
>
> 2. *Criminal liability for complicity in another's suicide*. – (1) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years." (emphasis supplied)

39. This distinction is well recognized and is brought out in certain decisions of other countries. The Supreme Court of Canada in ***Rodriguez* v. *B.C. (A.G.)*** [107 D.L.R. (4th Series) 342] states as under:

> Sanctity of life, as we will see, has been understood historically as excluding freedom of choice in the self-infliction of death and certainly in the involvement of others in carrying out that choice. At the very least, no new consensus has emerged in society opposing the right of the state to regulate the involvement of others in exercising power over individuals ending their lives. (at page 389)

40. ***Airedale N.H.A. Trust* v. *Bland*** [1993 (2) W.L.R. 316 (H.L.)] was a case relating to withdrawal of artificial measures for continuance of life by a physician. Even though it is not necessary to deal with physician assisted suicide or euthanasia cases, a brief reference to this decision cited at the Bar may be made. In the context of existence in the persistent vegetative state of no benefit to the patient, the principle of sanctity of life, which it is the concern of the State, was stated to be not an absolute one. In such cases also, the existing crucial distinction between cases in which a physician decides not to provide, or to continue to provide, for his patient, treatment or care which could or might prolong his life, and those in which he decides, for example, by administering a lethal drug, actively to bring his patient's life to an end, was indicated and it was then stated as under: (All ER p.867: WLR p.368)

> But it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be [see ***R.* v. *Cox*** (unreported), 18 September, 1992] per Ognall, J. in the Crown Court at Winchester. So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and on the other hand

> euthanasia -actively causing his death to avoid or to end his suffering. *Euthanasia is not lawful at common law. It is of course well known that there are many responsible members of our society who believe that euthanasia should be made lawful but that result could, I believe, only be achieved by legislation which expresses the democratic will that so fundamental a change should be made in our law. and can, if enacted, ensure that such legalized killing can only be carried out subject to appropriate supervision and control….* .(emphasis supplied) (at page 368)

41. The desirability of bringing about such a change was considered to be the function of the legislature by enacting a suitable law providing therein adequate safeguards to prevent any possible abuse.

42. The decision of the United States Court of Appeals for the Ninth Circuit in ***Compassion in Dying* v. *State of Washington*** [49 F.3d 586] which reversed the decision of United States District Court. W.D. Washington reported in 850 Federal Supplement 1454, has also relevance. The constitutional validity of the State statute that banned physician assisted suicide by mentally competent terminally ill adults was in question. The District Court held unconstitutional the provision punishing for promoting a suicide attempt. On appeal. that judgment was reversed and the constitutional validity of the provision was upheld.

43. This caution even in cases of physician assisted suicide is sufficient to indicate that assisted suicides outside that category have no rational basis to claim exclusion of the fundamental of sanctity of life. The reasons assigned for attacking a provision which penalizes attempted suicide are not available to the abettor of suicide or attempted suicide. Abetment of suicide or attempted suicide is a distinct offence which is found enacted even in the law of the countries where attempted suicide is not made punishable. Section 306 I.P.C. enacts a distinct offence which can survive independent of Section 309 in the I.P.C. The learned Attorney General as well as both the learned *amicus curiae* rightly supported the constitutional validity of Section 306 I.P.C.

44. The Bombay High Court in ***Naresh Marotrao Sakbre* v. *Union of India*** [1895 Crl.L.J. 96] considered the question of validity of Section 306 I.P.C. and upheld the same. No decision holding Section 306 I.P.C. to be unconstitutional has been cited before us. We find no reason to hold either Section 309 or Section 306 I.P.C. to be unconstitutional.

45. For the reasons we have given, the decisions of the Bombay High Court in ***Maruti Shripati Dubal* v. *State of Maharashtra*** [1987 Crl. L.J. 743] and of a Division Bench of this Court in ***P. Rathinam***, wherein Section 309 I.P.C. has been held to be unconstitutional, are not correct. The conclusion of the Andhra Pradesh High Court in ***Chenna Jagadeeswar* v. *State of Andhra Pradesh*** [1988 Crl.L.J. 549] that Section 309 I.P.C. is not violative of either Article 14 or Article 21 of the Constitution is approved for the reasons given herein. The questions of constitutional validity of Sections 306 and 309 I.P.C. are decided accordingly, by holding that neither of the two provisions is constitutionally invalid.

46. These appeals would now be listed before the appropriate Division Bench for their decision on merits in accordance with law treating Sections 306 and 309 I.P.C. to be constitutionally valid.

* * * * *

PART – B : CRIMINAL PROCEDURE

Dilip K. Basu v. *State of West Bengal*

(1997) 6 SCC 642

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

ORDER

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

1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the district and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

7. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The 'Inspection Memo' must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

8. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all *tehsils* and districts as well.

9. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

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

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

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

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

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

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

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

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

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

* * * * *

State of Haryana v. *Dinesh Kumar*

(2008) 3 SCC 222

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

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

13(A): Have you ever been arrested?

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

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

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

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

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

directed the appellants herein to take steps to issue an appointment letter to the respondent subject to fulfillment of other conditions by him.

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

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

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

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

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

petitions against the writ petitioners upon holding that they had withheld important information regarding their prosecutions in a criminal case though ultimately they were acquitted.

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

> 46. Arrest how made (1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.
>
> (2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.
>
> (3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.
>
> (4) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made.

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

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

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

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

18. Mr. Chaudhary submitted that the ordinary dictionary meaning of arrest is to legally restrain a person’s movements for the purpose of detaining a person in custody by

authority of law. He submitted that in Dinesh Kumar's writ petition the High Court had erred in coming to a finding that he had never been arrested since he had voluntarily appeared before the Magistrate and had been granted bail immediately.

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

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

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

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

the manner known to law, which is so understood by the person arrested. In this connection, a debatable question that arises for our consideration is whether the mere taking into custody of a person by an authority empowered to arrest would amount to arrest of that person and whether the terms arrest and custody are synonymous.

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

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

> 7. When is a person in custody, within the meaning of Section 439 Cr. P.C.? When he is, in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubiotics are unfair evasion of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.
>
> 8. Custody, in the context of Section 439, (we are not, be noted, dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and order of the court.
>
> 9. He can be in custody not merely when the police arrest him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions Sections 107 and 108 of the Customs Act do not contemplate immediate arrest of a person being

summoned in connection with an enquiry, but only contemplates surrendering to the custody of the Customs Officer which could subsequently lead to arrest and detention.

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

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

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

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

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

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

28. It must, therefore, be held that the views expressed by the High Court in Dinesh Kumar's writ petition regarding arrest were incorrect, while the views expressed in the writ

petitions filed by Lalit Kumar and Bhupinder correctly interpreted the meaning of the expressions arrest and custody. However, how far the same would apply in the ultimate analysis relating to the filling up of column 13(A) is another matter altogether.

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

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

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

32. The appeals are disposed of accordingly.

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Lalita Kumari **v.** *Govt. of Uttar Pradesh*

2008(11) SCALE 154

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

O R D E R

3. The grievance in the present writ petition is that the occurrence had taken place in the month of May and, in that very month, on 11th May, 2008, the written report was submitted by the petitioner before the Officer In-charge of the concerned Police Station, who sat tight over the matter. Thereafter, when the Superintendent of Police was moved, a First Information Report (for short "F.I.R.") was registered. Even thereafter, steps were not taken either for apprehending the accused or recovery of the minor girl child. It is a matter of experience of one of us (B.N. Agrawal, J.) while acting as Judge of Patna High Court, Chief Justice of Orissa High Court and Judge of this Court that in spite of law laid down by this Court, the concerned police authorities do not register F.I.Rs unless some direction is given by the Chief Judicial Magistrate or the High Court or this Court. Further experience shows that even after orders are passed by the concerned courts for registration of the case, the police does not take the necessary steps and when matters are brought to the notice of the Inspecting Judges of the High Court during the course of inspection of Courts and Superintendents of Police are taken to task, then only F.I.Rs are registered. In large number of cases investigations do not commence even after registration of F.I.Rs and in case like the present one, steps are not taken for recovery of the kidnapped person or apprehending the accused person with reasonable despatch. At times it has been found that when harsh orders are passed by the Members of the Judiciary in a State, the police becomes hostile to them; for instance in Bihar when a bail petition filed by a police personnel, who was accused was rejected by a member of Bihar Superior Judicial Service, he was assaulted in the Court room for which contempt proceeding was initiated by Patna High Court and the erring police officials were convicted and sentenced to suffer imprisonment.

4. On the other hand, there are innumerable cases that where the complainant is a practical person, F.I.Rs are registered immediately, copies thereof are made over to the complainant on the same day, investigation proceeds with supersonic jet speed, immediate steps are taken for apprehending the accused and recovery of the kidnapped persons and the properties which were subject matter of theft or dacoity. In the case before us allegations have been made that the Station House Officer of the concerned Police Station is pressurising the complainant to withdraw the complaint, which, if true, is a very disturbing state of affairs. We do not know there may be innumerable such instances.

5. In view of the above, we feel that it is high time to give directions to Governments of all the States and Union Territories besides their Director Generals of Police/Commissioners of Police as the case may be to the effect that if steps are not taken for registration of F.I.Rs immediately and copies thereof are not made over to the complainants, they may move the concerned Magistrates by filing complaint petitions to give direction to the

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

6. Keeping in mind these facts, we are of the view that notices should be issued to Government of all the States and Union Territories besides Director Generals of Police/Commissioners of Police as the case may be.

7. Issue notice to the Chief Secretaries of all the States and Union Territories and the Director Generals of Police/Commissioners of Police, as the case may be, to show cause as to why aforesaid directions be not given by this Court.

8. Notices may be sent to the parties by Fax and it should be mentioned therein that the order has been put on the Website of the Supreme Court of India so that they may file response without loss of time.

9. Let the Registry place this order on the Website immediately on receipt of the file so that the concerned authorities know about the same and that the person concerned may file response within the time granted hereunder .

10. Three weeks' time is allowed to file response.

11. Place this matter on 8th August, 2008.

* * * * *

Lalita Kumari v. *State of Uttar Pradesh*

(2012) 4 SCC 1

DALVEER BHANDARI, J.: 1.We propose to deal with the abovementioned writ petition, the criminal appeals and the contempt petition by this judgment. The question of law involved in these cases is identical, therefore, all these cases are being dealt with by a common judgment. n order to avoid repetition, only the facts of the writ petition of Lalita Kumari's case are recapitulated.

2. The petition has been filed before this Court under Article 32 of the Constitution of India in the nature of habeas corpus to produce Lalita Kumari, the minor daughter of Bhola Kamat.

3. On 5.5.2008, Lalita Kumari, aged about six years, went out of her house at 9 p.m. When she did not return for half an hour and Bhola Kamat was not successful in tracing her, he filed a missing report at the police station Loni, Ghaziabad, U.P.

4.On 11.5.2008, respondent no.5 met Bhola Kamat and informed him that his daughter has been kidnapped and kept under unlawful confinement by the respondent nos. 6 to 13. The respondent-police did not take any action on his complaint. Aggrieved by the inaction of the local police, Bhola Kamat made a representation on 3.6.2008 to the Senior Superintendent of Police, Ghaziabad. On the directions of the Superintendent of Police, Ghaziabad, the police station Loni, Ghaziabad registered a First Information Report (F.I.R.) No.484 dated 6.6.2008 under Sections 363/366/506/120B IPC against the private respondents.

5. Even after registration of the FIR against the private respondents, the police did not take any action to trace Lalita Kumari. According to the allegation of Bhola Kamat, he was asked to pay money for initiating investigation and to arrest the accused persons. Ultimately, the petitioner filed this petition under Article 32 of the Constitution before this Court.

6. This Court on 14.7.2008 passed a comprehensive order expressing its grave anguish on non-registration of the FIR even in a case of cognizable offence. The Court also issued notices to all Chief Secretaries of the States and Administrators of the Union Territories. In response to the directions of the Court, various States and the Union Territories have filed comprehensive affidavits.

7. The short, but extremely important issue which arises in this petition is whether under Section 154 of the Code of Criminal Procedure Code, a police officer is bound to register an FIR when a cognizable offence is made out or he has some latitude of conducting some kind of preliminary enquiry before registering the FIR.

8. Mr. S.B. Upadhyay, learned senior advocate appearing for the petitioner has tried to explain the scheme of Section 154 Cr.P.C. with the help of other provisions of the Act. According to him, whenever information regarding cognizable offence is brought to the notice of the SHO, he has no option but to register the First Information Report.

9. This Court also issued notice to the learned Attorney General for India to assist the Court in this matter of general public importance. Mr. Harish P. Raval, the learned Additional Solicitor General appeared before the Court and made comprehensive

submissions. He also filed written submissions which were settled by him and re-settled by the learned Attorney General for India.

10. Learned Additional Solicitor General submitted that the issue which has been referred to this Court has been decided by a three-Judge Bench of this Court in the case of ***Aleque Padamsee* v. *Union of India*** [(2007) 6 SCC 171]. In this case, this Court while referring to the judgment in the case of ***Ramesh Kumari* v. *State (NCT of Delhi)*** [(2006) 2 SCC 677] in paragraph 2 of the judgment has observed as under:-

> "Whenever cognizable offence is disclosed the police officials are bound to register the same and in case it is not done, directions to register the same can be given."

11. The State of Gujarat, the respondent in the above case, on the facts thereof, contended that on a bare reading of a complaint lodged, it appears that no offence was made and that whenever a complaint is lodged, automatically and in a routine manner an FIR is not to be registered. This Court after considering Chapter XII and more particularly Sections 154 and 156 held (paragraphs 6 and 7) that "whenever any information is received by the police about the alleged commission of offence which is a cognizable one, there is a duty to register the FIR." There could be no dispute on that score as observed by this Court. The issue referred to in the reference has already been answered by the Bench of three Judges. The judgment in ***Aleque Padamsee*** is not referred in the reference order. It is therefore prayed that the present reference be answered accordingly.

12. It was submitted on behalf of the Union of India that Section 154 (1) provides that every information relating to the commission of a cognizable offence if given orally, to an officer in charge of a police station shall be reduced in writing by him or under his directions. The provision is mandatory. The use of the word "shall" by the legislation is indicative of the statutory intent. In case such information is given in writing or is reduced in writing on being given orally, it is required to be signed by the persons giving it. It is further provided that the substance of commission of a cognizable offence as given in writing or reduced to writing "shall" be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. Sub-section (2) provides that a copy of such information as recorded in sub-section (1) shall be given forthwith free of cost to the informant.

13. In light of the provisions contained in Section 154 (1) and the law laid by this Court on the subject, the following submissions were placed by the Union of India for consideration of this Court.

> a) The statutory intention is manifest on a bare reading of provisions of Section 154(1) to the effect that when an officer incharge of a police station to whom information relating to commission of cognizable offence has been disclosed, he has no discretion save and except to reduce the said information in writing by him or under his direction.
> b) Section 154(1) does not have ambiguity and is in clear terms.
> c) The use of expression "shall" clearly manifest the mandatory statutory intention.
> d) In construing a statutory provision, the first and the foremost rule of construction

is the literal construction. It is submitted that all that the Court has to see at the very outset is what does that provision say. If the provision is unambiguous and if from that provision, the legislative intent is clear, the Court need not call into it the other rules on construction of statutes. [Para 22 of ***Hiralal Rattanlal v. State of U.P.*** , 1973(1) SCC 216]. This judgment is referred to and followed in a recent decision of this Court in ***B. Premanand v. Mohan Koikal*** [(2011) 4 SCC 266 paras 8 and 9]. It is submitted that the language employed in Section 154 is the determinative factor of the legislative intent. There is neither any defect nor any omission in words used by the legislature. The legislative intent is clear. The language of Section 154(1), therefore, admits of no other construction.

e) The use of expression "shall" is indicative of the intention of the legislature which has used a language of compulsive force. There is nothing indicative of the contrary in the context indicating a permissive interpretation of Section 154. It is submitted that the said Section ought to be construed as preemptory. The words are precise and unambiguous (***Govindlal Chhaganlal Patel v. Agricultural Produce Market Committee, Godhra,*** [1975 (2) SCC 482]. It is submitted that it is settled law that judgments of the courts are not to be construed as statutes [para 11 of three-Judge Bench decision of this court in the case of ***M/s Amar Nath Om Prakash v. State of Punjab,*** (1985) 1 SCC 345]. The abovesaid decision is followed by a judgment of this Court in the case of ***Hameed Joharan (dead) and others v. Abdul Salam (dead) by Lrs.,*** [(2001) 7 SCC 573].

f) The provision of Section 154(1) read in light of statutory scheme do not admit of conferring any discretion on the officer in charge of the police station of embarking upon an preliminary enquiry prior to registration of an FIR. A preliminary enquiry is a term which is alien to the Code of Criminal Procedure, 1973 which talks of (i) investigation (ii) inquiry and (iii) trial. These terms are definite connotations having been defined under Section 2 of the Act.

g) The concept of preliminary enquiry as contained in Chapter IX of the CBI (Crime) Manual, first published in 1991 and thereafter updated on 15.7.2005 cannot be relied upon to import the concept of holding of preliminary enquiry in the scheme of the Code of Criminal Procedure.

h) The interpretation of Section 154 cannot be depended upon a Manual regulating the conduct of officers of an organization, i.e., CBI.

i) A reference to para 9.1. of the said Manual would show that preliminary enquiry is contemplated only when a complaint is received or information is available which may after verification as enjoined in the said Manual indicates serious misconduct on the part of the public servant but is not adequate to justify registration of a regular case under provisions of Section 154 Cr.P.C. Such preliminary inquiry as referred to in para 9.1 of the CBI Manual as also to be registered after obtaining approval of the competent authority. It is submitted that these provisions cannot be imported into the statutory scheme of Section 154 so as to provide any discretion to a police officer in the matter of registration of an FIR.

j) The purpose of registration of an FIR are manifold –that is to say

i) To reduce the substance of information disclosing commission of a

cognizable offence, if given orally, into writing
ii) if given in writing to have it signed by the complainant
iii) to maintain record of receipt of information as regards commission of cognizable offences
iv) to initiate investigation on receipt of information as regards commission of cognizable offence
v) to inform Magistrate forthwith of the factum of the information received.

14. Reference has also been made to the celebrated judgment of the Privy Council in the case of ***Emperor v. Khwaza Nazim Ahmad*** [AIR 1945 PC 18] in which it is held that for the receipt and recording of an information, report is not a condition precedent to the setting in motion of a criminal investigation. It is further held, that no doubt, in the great majority of cases criminal prosecution are undertaken as a result of the information received and recorded in this way (as provided in Sections 154 to 156 of the earlier Code). It is further held that there is no reason why the police, if in possession through their own knowledge or by means of credible though informal intelligence which genuinely leads them to the belief that a cognizable offence has been committed, should not of their own motion undertake an investigation into the truth of the matters alleged. It is further held that Section 157 of the Code when directing that a police officer, who has a reason to suspect from information or otherwise, that an offence which he is empowered to investigate under Section 156 has been committed, he shall proceed to investigate the facts and circumstances of the case. It is further held in the said judgment that, in truth the provisions as to an information report (commonly called a First Information Report) are enacted for other reasons. Its object is to obtain early information of alleged criminal activity, to record the circumstances before there is time for them to be forgotten or embellished, and it has to be remembered that the report can be put in evidence when the informant is examined, if it is desired to do so. It is further held in the said judgment that there is a statutory right on part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities.

15. On behalf of the Union of India reference was made to the judgment of this Court delivered in ***State of Uttar Pradesh v. Bhagwant Kishore Joshi*** [AIR 1964 SC 221] wherein it has been held vide para 8 that Section 154 of the Code prescribed the mode of recording the information received orally or in writing by an officer in charge of a police station in respect of commission of a cognizable offence. Section 156 thereof authorizes such an officer to investigate any cognizable offence prescribed therein. Though, ordinarily investigation is undertaken on information received by a police officer, the receipt of information is not a condition precedent for investigation.

16.It is further held that Section 157 prescribes the procedure in the matter of such an investigation which can be initiated either on information or otherwise. It is also held that it is clear from the said provision that an officer in charge of a police station can start investigation either on information or otherwise. The judges in the said judgment referred to a decision of this Court in the case of ***H.N. Rishbud and Inder Singh v. The State of Delhi*** [1955 SCR (1) 1150] at pp.1157-58 that the graphic description of the stages is only

a restatement of the principle that a vague information or an irresponsible rumour would not by itself constitute information within the meaning of Section 154 of the Code or the basis of an investigation under Section 157 thereof. The said case was in respect of an offence alleged under Prevention of Corruption Act, 1947. The said case was under the old Code which did not define the term 'investigation' (paragraph 18 of the concurring judgment of Justice Mudholkar at page 226). It is also observed that the main object of investigation mean to bring home the offence to the offender. The essential part of the duty of an investigating officer in this connection is, apart from arresting the offender, to collect all material necessary for establishing the accusation "against" the offender.

17. The following observations in the concurring judgment of ***Bhagwant Kishore Joshi*** were found in paragraph 18 :

> "In the absence of any prohibition in the Code, express or implied, I am of opinion that it is open to a Police Officer to make preliminary enquiries before registering an offence and making a full scale investigation into it. No doubt, s. 5A of the Prevention of Corruption Act was enacted for preventing harassment to a Government servant and with this object in view investigation, except with the previous permission of a Magistrate, is not permitted to be made by an officer below the rank of a Deputy Superintendent of Police. Where however, a Police Officer makes some preliminary enquiries, does not arrest or even question an accused or question any witnesses but merely makes a few discreet enquiries or looks at some documents without making any notes, it is difficult to visualise how any possible harassment or even embarrassment would result therefrom to the suspect or the accused person."

18.In case of ***H.N. Rishbud***, in the case under the Prevention of Corruption Act, 1947, it is observed as under:-

> "Investigation usually starts on information relating to the commission of an offence given to an officer in charge of a police station and recorded under section 154 of the Code. If from information so received or otherwise, the officer in charge of the police station has reason to suspect the commission of an offence, he or some other subordinate officer deputed by him, has to proceed to the spot to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender."

It is further held :-

> "Thus, investigation primarily consists in the ascertainment of the facts and circumstances of the case. By definition, it includes "all the proceedings under the Code for the collection of evidence conducted by a police officer".

It is further held in the said judgment that :

> "Thus, under the Code investigation consists generally of the following steps:(1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various

persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places of seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under section 173."

19. It was further submitted that this Court in the case of ***Damodar v. State of Rajasthan*** [2004(12) SCC 336] referred to the observations of the judgment of this Court rendered in case of ***Ramsinh Bavaji Jadeja v. State of Gujarat*** [1994 (2) SCC 685] and observed that the question as to at what stage the investigation commence has to be considered and examined on the facts of each case especially when the information of alleged cognizable offence has been given on telephone. The said case deals with information received on telephone by an unknown person. In paragraph 10 it is observed thus "in order to constitute the FIR, the information must reveal commission of act which is a cognizable offence."

20. It is further observed in paragraph 11 in the case of ***Damodar*** that in the context of the facts of the said case, that any telephonic information about commission of a cognizable offence, if any, irrespective of the nature and details of such information cannot be treated as an FIR. It is further held that if the telephonic message is cryptic in nature and the officer in charge proceeds to the place of occurrence on the basis of that information to find out the details of the nature of the offence, if any, then it cannot be said that the information which had been received by him on telephone shall be deemed to be an FIR.

21. It is also observed that the object and purpose of giving such telephonic message is not to lodge an FIR, but to make the officer in charge of the police station reach the place of occurrence. It is further held that if the information given on telephone is not cryptic and on the basis of that information the officer in charge is prima facie satisfied about commission of a cognizable offence and he proceeds from the police station after recording such information, to investigate such offence, then any statement made by any person in respect of the said offence including the participants shall be deemed to be statement made by a person to the police officer in the course of investigation covered by Section 162 of the Code.

22. This Court in the case of ***Binay Kumar Singh v. The State of Bihar*** [1997(1) SCC 283] observed as under:-

"It is evidently a cryptic information and is hardly sufficient for discerning the commission of any cognizable offence therefrom. Under Section 154 of the Code the information must unmistakably relate to the commission of a cognizable offence and it shall be reduced to writing (if given orally) and shall be signed by its maker. The next requirement is that the substance thereof shall be entered in a book kept in the police station in such form as the State Government has prescribed. First information report (FIR) has to be prepared and it shall be forwarded to the magistrate who is empowered to take cognizance of such offence upon such report. The officer in charge of a police

station is not obliged to prepare FIR on any nebulous information received from somebody who does not disclose any authentic knowledge about commission of the cognizable offence. It is open to the officer-in-charge to collect more information containing details about the occurrence, if available, so that he can consider whether a cognizable offence has been committed warranting investigation thereto."

23. It is submitted that in the said judgment what fell for consideration of the Court was the conviction and sentence in respect of the offence under Sections 302/149 of the IPC in respect of a murder which took place in a Bihar village wherein lives of 13 people were lost and 17 other were badly injured along with burning alive of large number of mute cattle and many dwelling houses. It is also submitted that the interpretation of Section 154 was not directly in issue in the said judgment.

24. Reliance is placed on a decision of this Court in the case of ***Madhu Bala v. Suresh Kumar*** [1997 (8) SCC 476] in the context of Sections 156(3) 173(2), 154 and 190(1) (a) and (b) and more particularly upon the following paragraphs of the said judgment. The same read as under:-

"Coming first to the relevant provisions of the Code, Section 2(d) defines "complaint" to mean any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence, but does not include a police report. Under Section 2(c) "cognizable offence" means an offence for which, and "cognizable case" means a case in which a police officer may in accordance with the First Schedule (of the Code) or under any other law for the time being in force, arrest without a warrant. Under Section 2(r) "police report" means a report forwarded by a police officer to a Magistrate under sub- section (2) of Section 173 of the Code. Chapter XII of the Code comprising Sections 154 to 176 relates to information to the police and their powers to investigate. Section 154 provides, inter alia, that the officer in charge of a police station shall reduce into writing every information relating to the commission of a cognizable offence given to him orally and every such information if given in writing shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. Section 156 of the Code with which we are primarily concerned in these appeals reads as under:

"(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above mentioned." On completion of investigation undertaken under Section 156(1)

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

25. Learned counsel for the Union of India relied on the following passage from ***Madhu Bala:***

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

26. Mr. Raval also relied on the following passage from ***Madhu Bala' s case***:-

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

station and then investigate into the same. In our opinion when an order for investigation under Section 156(3) of the Code is to be made the proper direction to the police would be "to register a case at the police station treating the complaint as the first information report and investigate into the same".

27. This Court in the case of ***Hallu v. State of Madhya Pradesh*** [1974 (4) SCC 300] in the context of Section 154 of the Code held (para 7) that Section 154 of the Code does not require that the Report must be given by a person who has personal knowledge of the incident reported. It is further held that the said Section speaks of an information relating to the commission of a cognizable offence given to an officer in charge of a police station.

28. Mr. Raval placed reliance on para 8 of the judgment of this Court in the case of ***Rajinder Singh Katoch v. Chandigarh Administration*** [2007 (10) SCC 69] wherein this Court observed as under:-

> "8.Although the officer in charge of a police station is legally bound to register a first information report in terms of Section 154 of the Code of Criminal Procedure, if the allegations made by them give rise to an offence which can be investigated without obtaining any permission from the Magistrate concerned, the same by itself, however, does not take away the right of the competent officer to make a preliminary enquiry, in a given case, in order to find out as to whether the first information sought to be lodged had any substance or not. In this case the authorities had made investigations into the matter. In fact, the Superintendent of Police himself has, pursuant to the directions issued by the High Court, investigated into the matter and visited the spot in order to find out the truth in the complaint of the petitioner from the neighbours. It was found that the complaint made by the appellant was false and the same had been filed with an ulterior motive to take illegal possession of the first floor of the house."

29. While referring to the decision of this Court in ***Ramesh Kumari*** in para 11 of the judgment in ***Rajinder Singh's case***, it is observed as under:-

> "11. We are not oblivious to the decision of this Court in ***Ramesh Kumari v. State (NCT of Delhi)*** wherein such a statutory duty has been found in the police officer. But, as indicated hereinbefore, in an appropriate case, the police officers also have a duty to make a preliminary enquiry so as to find out as to whether allegations made had any substance or not."

30. It is further submitted that the above observations run concurrently to the settled principles of law and more particularly the three judge Bench decision of this Court in ***Aleque Padamsee***.

31. In the context of the statutory provisions, the learned counsel for the Union of India drew the attention of this Court to the decision of this Court in the case of ***Superintendent of Police, CBI v. Tapan Kumar Singh*** [AIR 2003 SC 4140] , paragraph 20 at page 4145 as under:-

> "It is well settled that a First Information Report is not an encyclopedia, which must disclose all facts and details relating to the offence reported. An informant may

lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eye witness so as to be able to disclose in great details all aspects of the offence committed. What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence. At this stage it is enough if the police officer on the basis of the information given suspects the commission of a cognizable offence, and not that he must be convinced or satisfied that a cognizable offence has been committed. If he has reasons to suspect, on the basis of information received, that a cognizable offence may have been committed, he is bound to record the information and conduct an investigation. At this stage it is also not necessary for him to satisfy himself about the truthfulness of the information. It is only after a complete investigation that he may be able to report on the truthfulness or otherwise of the information. Similarly, even if the information does not furnish all the details, he must find out those details in the course of investigation and collect all the necessary evidence. The information given disclosing the commission of a cognizable offence only sets in motion the investigative machinery, with a view to collect all necessary evidence, and thereafter to take action in accordance with law. The true test is whether the information furnished provides a reason to suspect the commission of an offence, which the concerned police officer is empowered under Section 156 of the Code to investigate. If it does, he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation. The question as to whether the report is true, whether it discloses full details regarding the manner of occurrence, whether the accused is named, and whether there is sufficient evidence to support the allegations are all matters which are alien to the consideration of the question whether the report discloses the commission of a cognizable offence. Even if the information does not give full details regarding these matters, the investigating officer is not absolved of his duty to investigate the case and discover the true facts, if he can."

32. This Court in its decision in the case of ***Ramesh Kumari*** has observed as under in paragraphs 3, 4 and 5 :-

"3. Mr Vikas Singh, the learned Additional Solicitor General, at the outset, invites our attention to the counter-affidavit filed by the respondent and submits that pursuant to the aforesaid observation of the High Court the complaint/representation has been subsequently examined by the respondent and found that no genuine case was established. We are not convinced by this submission because the sole grievance of the appellant is that no case has been registered in terms of the mandatory provisions of Section 154(1) of the Criminal Procedure Code. Genuineness or otherwise of the information can only be considered after registration of the case. Genuineness or credibility of the

information is not a condition precedent for registration of a case. We are also clearly of the view that the High Court erred in law in dismissing the petition solely on the ground that the contempt petition was pending and the appellant had an alternative remedy. The ground of alternative remedy nor pending of the contempt petition would be no substitute in law not to register a case when a citizen makes a complaint of a cognizable offence against a police officer.

4. That a police officer mandatorily registers a case on a complaint of a cognizable offence by the citizen under Section 154 of the Code is no more *res integra*. The point of law has been set at rest by this Court in ***State of Haryana v. Bhajan Lal***. This Court after ex amining the whole gamut and intricacies of the mandatory nature of Section 154 of the Code has arrived at the finding in paras 31 and 32 of the judgment as under: (SCC pp. 354-55)

31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the police officer concerned cannot embark upon an 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 reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157. (As we have proposed to make a detailed discussion about the power of a police officer in the field of investigation of a cognizable offence within the ambit of Sections 156 and 157 of the Code in the ensuing part of this judgment, we do not propose to deal with those sections in extenso in the present context.) In case, an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by sub-section (3) of Section 154 of the Code.

32. Be it noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression 'information' without qualifying the same as in Section 41(1)(a) or (g) of the Code wherein the expressions, 'reasonable complaint' and 'credible information' are used. Evidently, the non-qualification of the word 'information' in Section 154(1) unlike in Section 41(1) (a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word 'information' without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of

1861) passed by the Legislative Council of India read that 'every complaint or information' preferred to an officer in charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that 'every complaint' preferred to an officer in charge of a police station shall be reduced in writing. The word 'complaint' which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word 'information' was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190(c) of the present Code of 1973 (Act 2 of 1974). An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be an information and that information must disclose a cognizable offence."

33. Finally, this Court in ***Ramesh Kumari*** in para 33 said :-

> "33. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information."

34. The views expressed by this Court in paras 31, 32 and 33 as quoted above leave no manner of doubt that the provision of Section 154 of the Code is mandatory and the officer concerned is duty-bound to register the case on the basis of such an information disclosing cognizable offence.

35. In the case of ***Ramesh Kumari*** , this Court has held that the views expressed by this Court in the case of ***State of Haryana v. Bhajan Lal*** [1992 Suppl. (1) SCC 335] leave no matter of doubt that the provisions of Section 154 of the Code is mandatory and the officer concerned is duty bound to register the case on the basis of such information disclosing a cognizable offence.

36. Mr. Raval while concluding his arguments reiterated that Section 154 of the Code it is mandatory for the officer concerned to register the case on the basis of such information including cognizable offence. According to Union of India, the police officer has no discretion in the matter and this is according to the legislative intention behind enacting Section 154 of the Code of Criminal Procedure.

37. Mr. Ratnakar Das, learned senior advocate appearing for the State of U.P. adopted the arguments addressed by Mr. Raval on behalf of the Union of India and submitted that the word 'shall' appearing in Section 154 mandates the police to enter the information about commission of a cognizable offence in a book in such form commonly known as "First Information Report'. At that stage, the police cannot go into the question about the truth or otherwise of the information and make a roving enquiry.

38. It was also submitted by Mr. Das that the word 'information' is not qualified by credible information. It has to be recorded with utmost dispatch and if its recording is dependent upon any type of preliminary enquiry, then there would be a great temptation to incorporate the details and circumstances advantageous to the prosecution which may be lacking in the earlier information. Similarly, if the police is given the power to

hold a preliminary inquiry before registration of an FIR it may benefit the wrongdoer because by afflux of time, the evidence would be obliterated or destroyed and thereby justice would be denied to the victim of crime.

39. Mr. Das gave an example that in a bride burning case, when a person makes a complaint that the husband and the in-laws of his daughter have doused her with kerosene and set her ablaze and arrangements were being made to cremate the dead body, in that case, if the police instead of taking immediate steps to register an FIR proceeds to the spot to seize the dead body and the burnt clothes etc. on the plea that he is required to make preliminary enquiry to ascertain the truth, then during the interregnum, no evidence would be available to bring the offenders to book. It needs to mention that power is conferred upon the police under the Code to make seizure in course of investigation and not during the enquiry. So, the police being in connivance with the accused may permit them to cremate the dead body in order to cause disappearance of the evidence.

40. It is further submitted by Mr. Das that now-a-days custodial violence is on the rise. Horror of Bhagalpur blinding case and the Maya Tyagi case in Uttar Pradesh are still in the minds of the people. It is complained that the police do not take action against their own brethren who commit crimes. Most of the times the Court intervenes and it is only then that the person wronged gets justice. In such cases if the police is given handle to hold a preliminary enquiry the offender will get a scope to fabricate evidence and ultimately the police will deny registration of an FIR on the ground that the preliminary enquiry does not reveal any such offence having been committed at all.

41. It was submitted on behalf of the Union of India and the State of U.P. that in the Code the Legislature never intended to incorporate any provision for conducting any 'preliminary enquiry' before registering an FIR when a report regarding commission of a cognizable offence is made. The specific question on this issue was never raised or agitated earlier before this Court at any point of time whether as a general rule the police should hold a preliminary enquiry before registering an FIR and take further steps in the investigation. Only in two cases in respect of the offence under Prevention of Corruption Act which was to be investigated by the Central Bureau of Investigation (CBI) this Court taking note of the peculiar facts and circumstances of those cases, made an observation that where public servant is charged with acts of dishonesty amounting to serious misdemeanor, registering an FIR should be preceded by some suitable preliminary enquiry. In another case in which dispute regarding property between the brothers was involved, this Court in the peculiar facts of that case made an observation that though the officer in charge of a police station is legally bound to register a First Information Report in terms of Section 154 of the Code, if the allegations give rise to an offence which can be investigated without obtaining permission from the Magistrate, the same however, does not take away the right of the competent officer to make a preliminary enquiry in a given case in order to find whether the FIR sought to be lodged has any substance or not.

42. According to him, the grievance of the appellant in the said case was that his report which revealed commission of a cognizable case was not treated as an FIR by the concerned police. It was not the issue nor was any argument advanced as to whether registering of an FIR as provided under Section 154 of the Code should be preceded by some

sort of preliminary enquiry or not. In such view of the matter, the observation of this Court that it does not take away the right of the competent officer to make a preliminary enquiry in a given case is nothing but a passing observation.

43. According to Mr. Das, the provision of law about registration of an FIR is very clear and whenever information relating to cognizable offence is received by the police, in that event the police had no option but to register the FIR.

44. Mr. Shekhar Naphade, learned Senior counsel appearing for the State of Maharashtra on the other hand has taken a different view as taken by the Union of India and submitted that before registering an FIR under Section 154 Cr.P.C. it is open to the SHO to hold a preliminary enquiry to ascertain whether there is prime facie case of commission of cognizable offence or not.

45. Mr. Naphade has comprehensively explained the statutory scheme of Section 154 Cr.P.C.. According to him, Sections 41, 57 154(3) 156(1) and 156(3), 157, 167, 190 and 202 are an integral part of the statutory scheme relating to investigation of crimes. These provisions clearly contemplate that the police officer can exercise powers under the aforesaid provisions provided he is prima-facie satisfied that there are reasonable grounds to believe that the accused is guilty of commission of the cognizable offence.

46. Section 154 of Cr.P.C. forms a part of a chain of statutory provisions relating to investigation, and therefore, it must follow that the provisions of Sections 41, 157, 167 etc. have a bearing on the interpretation of Section 154 of Cr.P.C. The said judgments have interpreted Section 154 of Cr.P.C. purely on the literal interpretation test and while doing so, the other important tests of statutory interpretation, like a statute must be read as a whole and no provision of a statute should be considered and interpreted de-hors the other provisions, the rule of purposive construction etc. are lost sight of. He referred to the following cases- ***Tarachand v. State of Haryana***[1971 (2) SCC 579], ***Sandeep Rammilan Shukla v. State of Maharashtra*** [2009 (1) Mh.L.J. 97], ***Sakiri Vasu v. State of Uttar Pradesh*** [2008 (2) SCC 409], ***Nasar Ali v. State of Uttar Pradesh*** [1957 SCR 657], ***Union of India v. W.N. Chadha*** [1993 (Suppl.) 4 SCC 260], ***State of West Bengal v. S.N. Basak*** [1963 (2) SCR 52].

47. Mr. Naphade submitted that in the case of allegations relating to medical negligence on the part of doctors, this Court has clearly held that no medical professional should be prosecuted merely on the basis of the allegations in the complaint. There should be an in-depth enquiry into the allegations relating to negligence and this necessarily postulates a preliminary enquiry before registering an FIR or before entering on investigation. He reported to ***State of M.P. v. Santosh Kumar*** [2006 (6) SCC 1] and ***Dr. Suresh Gupta v. Govt. of NCT of Delhi*** [2004(6) SCC 422].

48. He also submitted that the same principle can also be made applicable to the people of different categories. The literal interpretation of Section would mean the registration of an FIR to a mechanical act. The registration of an FIR results into serious consequences for the person named as accused therein. It immediately results in loss of reputation, impairment of his liberty, mental anguish, stigma, etc. It is reasonable to assume that the legislature could not have contemplated that a mere mechanical act on the part of SHO should give rise to such

consequences.

49. He submitted that the registration of an FIR under Section 154 of Cr.P.C. is an administrative act of a police officer. In the case of ***Rai Sahib Ram Jawaya Kapur v. State of Punjab*** [1955 (2) SCR 225] this Court has explained what is administrative function and has said that ordinarily the executive power connotes the residue of Government functions that remain after legislative/judicial functions are taken away. Every administrative act must be based on application of mind, scrutiny and verification of the facts. No administrative act can ever be a mechanical one. This is the requirement of rule of law. Reference was made to paras 12 and 13 of ***State (Anti-Corruption Branch), Govt. of NCT of Delhi v. Dr. R.C. Anand*** [2004 (4) SCC 615].

50. According to Mr. Naphade, these judgments have not considered the impact of Article 21 on Section 154 of Cr.P.C. After and beginning with ***Maneka Gandhi v. Union of India***[1978 (1) SCC 248] this Court has applied Article 21 to several provisions relating to criminal law. This Court has also said that the expression "law" contained in Article 21 necessarily postulates law which is reasonable and not merely a statutory provision irrespective of its reasonableness or otherwise. In the light of Article 21, provisions of Section 154 of Cr.P.C. must be read down to mean that before registering an FIR, the Station House Officer must have a prima-facie satisfaction that there is commission of cognizable offence as registration of an FIR leads to serious consequences for the person named as accused and for this purpose, the requirement of preliminary enquiry can be spelt out in Section 154 and can be said to be implicit within the provisions of Section 154 of Cr.P.C. Reliance was placed on ***Maneka Gandhi*** and ***S.M.D. Kiran Pasha v. Government of Andhra Pradesh*** [1990 (1) SCC 328].

51. The fact that Sections 154 (3), 156(3), 190, 202 etc. clearly provide for remedies to a person aggrieved by refusal on the part of the SHO to register an FIR, clearly show that the statute contemplates that in certain circumstances the SHO can decline to register an FIR.

52. To require SHO to register an FIR irrespective of his opinion that the allegations are absurd or highly improbable, motivated etc. would cause a serious prejudice to the person named as accused in the complaint and this would violate his rights under Article 21. This Court has recognized the concept of pre- violation protection implicit in Article 21. The said judgments while relying upon the literal interpretation test have not considered the rule of statutory interpretation that in certain situations the expression "shall" does not convey mandatory character of the provisions. For example, proviso to Section 202 (2) has been held using the expression "shall" not to be mandatory but directory. After all, Section 154 of Cr.P.C. is a part of the procedural law and in respect of procedural law, the expression "shall" may not always necessarily convey that the provision is mandatory. Mr. Naphade placed reliance on the following cases - ***P.T. Rajan v. T.P.M. Sahir*** [2003(8) SCC 498], ***Shivjee Singh v. Nagendra*** Tiwary [2010 (7) SCC 578] and ***Sarbananda Sonowal (II) v. Union of India*** [2007 (1) SCC 174]. The said judgments have also not considered the rule of purposive interpretation and also that the statute must be considered as a whole and no provision can be interpreted in isolation.

53. The non-registration of an FIR does not result in crime going unnoticed or

unpunished. The registration of an FIR is only for the purpose of making the information about the cognizable offence available to the police and to the judicial authorities at earliest possible opportunity. The delay in lodging an FIR does not necessarily result in acquittal of the accused. The delay can always be explained.

54. Mr. Naphade also submitted that this Court has also held that registration of an FIR is not a condition precedent for initiating investigation into the commission of a cognizable offence. Section 154 Cr.P.C. clearly imposed a duty on the police officer. When an information is received, the officer in charge of the police station is expected to reach the place of occurrence as early as possible. It is not necessary for him to take steps only on the basis of an FIR. It is the duty of the State to protect the life of an injured as also an endeavour on the part of the responsible police officer to reach the place of occurrence in his implicit duty and responsibility. This has been held in the case of ***Animireddy Venkata Ramana v. Public Prosecutor, High Court of Andhra Pradesh*** [2008 (5) SCC 368].

55. Mr. Naphade further submitted that ordinarily the SHO should record an FIR upon receiving a complaint disclosing the ingredients of a cognizable offence, but in certain situations he should have the discretion of holding a preliminary enquiry and thereafter if he is satisfied, register an FIR.

56. The provisions contained in Section 154 Cr.P.C. of 1973 were also there in the 1898 Cr.P.C. and even the earlier one of 1877. The interpretation that was placed by the High Courts and the Privy Council on these provisions prior to ***Maneka Gandhi*** rested principally on the words used in the Section de-hors the other provisions of the Act and also de-hors the impact of Article 21 of the Constitution on the criminal jurisprudence. In other words, the courts have followed the test of literal interpretation without considering the impact of Article 21.

57. It is a trite proposition that a person who is named in an FIR as an accused, suffers social stigma. If an innocent person is falsely implicated, he not only suffers from loss of reputation but also mental tension and his personal liberty is seriously impaired. After ***Maneka Gandhi's case***, the proposition that the law which deprives a person of his personal liberty must be reasonable, both from the stand point of substantive aspect as well as procedural aspect is now firmly established in our constitutional law. This warrants a fresh look at Section 154 of Cr.P.C. Section 154 Cr.P.C. must be read in conformity with the mandate of Article 21. If it is so interpreted, the only conclusion is that if a Police Officer has doubts about the veracity of the complaint, he can hold preliminary enquiry before deciding to record or not to record an FIR.

58. It is the mandate of Article 21 which requires a Police Officer to protect a citizen from baseless allegations. This, however, does not mean that before registering an FIR the police officer must fully investigate the case. A delicate balance has to be maintained between the interest of the society and protecting the liberty of an individual. Therefore, what should be the precise parameters of a preliminary enquiry cannot be laid down in abstract. The matter must be left open to the discretion of the police officer.

59. A proposition that the moment the complaint discloses ingredients a cognizable offence is

lodged, the police officer must register an FIR without any scrutiny whatsoever, is an extreme proposition and is contrary to the mandate of Article 21. Similarly, the extreme point of view is that the police officer must investigate the case substantially before registering an FIR is also an argument of the other extreme. Both must be rejected and a middle path must be chosen.

60. Mr. Naphade mentioned about ***Maneka Gandhi's case*** and observed that the attempt of the Court should be to expand the reach and ambit of the fundamental rights, rather than to attenuate their meaning and contents by a process of judicial construction. The immediate impact of registration of an FIR on an innocent person is loss of reputation, impairment of personal liberty resulting in mental anguish and, therefore, the act of the police officer in registering an FIR must be informed by reason and it can be so only when there is a prima facie case against the named accused.

61. According to Mr. Naphade, the provisions of Article 14 which are an anti-thesis of arbitrariness and the provisions of Articles 19 and 21 which offer even a pre- violation protection require the police officer to see that an innocent person is not exposed to baseless allegations and, therefore, in appropriate cases he can hold preliminary enquiry. In ***Maneka Gandhi's case*** this Court has specifically laid down that in ***R.C. Cooper's case*** it has been held that all fundamental rights must be read together and that Articles 14, 19 and 21 overlap in their content and scope and that the expression 'personal liberty' is of the widest amplitude and covers a variety of rights which go to constitute personal liberty of a citizen. (Reliance was particularly placed on paras 5, 6 and 7 on pages 278-284).

62. Mr. Naphade further argued that this Court has held that in order to give concrete shape to a right under Article 21, this Court can issue necessary directions in the matter. If directions as regards arrest can be given, there is no reason why guidelines cannot be framed by this Court as regards registration or non-registration of an FIR under Section 154 Cr.P.C.

63. Mr. Naphade also submitted that the importance of the need of the police officer's discretion of holding a preliminary inquiry is well illustrated by the judgment of this Court in the case of ***Uma Shankar Sitani v. Commissioner of Police, Delhi*** [1996 (11) SCC 714]. In that case the complaint was lodged by one Sarvjeet Chauhan against one Uma Shankar relating to alleged cognizable offence. Uma Shankar was arrested and upon investigation it was found that the complainant was a fictitious person. Somebody else had filed the false complaint. The residential address of the fictitious complainant was also fictitious. In the whole process Uma Shankar went through serious mental turmoil as not only the allegation was found to be false, but he was arrested by the police and had to undergo humiliation and loss of reputation. Such incidents can happen and must have happened in scores of cases as filing of false cases due to personal, political, business rivalry, break- down of matrimonial relationship etc. are rampant.

64. Mr. Naphade submitted that Section 498-A of I.P.C. which was meant to be a measure of protection, turned out to be an instrument of oppression. Judicial notice of this has been taken by this Court in the case of ***Preeti Gupta v. State of Jharkhand*** [(2010) 7 SCC

667]. In the said case, this Court has referred to rapid increase in filing of complaints which are not bona fide and are filed with oblique motives. Such false complaints lead to insurmountable harassment, agony and pain to the accused. This Court has observed that the allegations of the complainant in such cases should be scrutinized with great care and circumspection. Is it, therefore, not advisable that before registering an FIR, a preliminary inquiry at least to verify the identity of the complainant and his residential address should be carried out. This case illustrates how on a false complaint, a person's right to life and liberty under Article 21 of the Constitution can be put to serious jeopardy.

65. This Court in its judgment in ***Francis C. Mullin v. Administrator, Union Territory of Delhi*** [1981 (1) SCC 608] [paras 4 and 5) has held that Article 21 requires that no one shall be deprived of his life and personal liberty except by procedure established by law and this procedure must be reasonable, fair and just. If the procedure is not reasonable, fair and just, the Court will immediately spring into action and run to the rescue of the citizen. From this it can be easily deduced that where the police officer has a reasonable doubt about the veracity of the complaint and the motives that prompt the complainant to make the complaint, he can hold a preliminary inquiry. Holding of preliminary inquiry is the mandate of Article 21 in such cases. If the police officer mechanically registers the complaint involving serious allegations, even though he has doubts in the matter, Article 21 would be violated. Therefore, Section 154 must be read in the light of Article 21 and so read preliminary inquiry is implicit in Section 154. In paras 7 and 8 of the said judgment, this Court has made an unequivocal declaration of the law that any act which damages or injures or interferes with use of any limb or faculty of a person, either permanently or even temporarily, would be within the ambit of Article 21.

66. Not only this, every act which offends against and imperils human dignity, would constitute deprivation pro tanto of this right to live and it would have to be in accordance with the reasonable, just and fair procedure established by law which stands the test of other fundamental rights. A baseless allegation is a violation of human dignity and despite the police officer having doubts about the allegation, he being required to register an FIR, would be a clear infringement of Article 21.

67. Mr. Naphade further submitted that it is settled principle of law that no single provision of a statute can be read and interpreted in isolation. The statute must be read as a whole. In the present case, the provisions of Sections 41,57, 156, 157, 159, 167, 190, 200 and 202 of Cr.P.C. must be read together. These provisions constitute the statutory scheme relating to investigation of offences and, therefore, no single provision can be read in isolation. Both, Sections 41 and 154 deal with cognizable offence. Section 41 empowers the police to arrest any person without warrant from the Magistrate if such person is concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or reasonable suspicion exits of such person having been so concerned with the cognizable offence. Section 41 also specifically refers to a cognizable complaint about commission of a cognizable offence.

68. The scheme of the Act is that after the police officer records an FIR under Section 154 Cr.P.C., he has to proceed to investigate under Section 156 Cr.P.C. and while investigating the police officer has power to arrest. What is required to be noted is that for the purpose of

arresting the accused, the police officer must have a reasonable ground to believe that the accused is involved in the commission of a cognizable offence. If Sections 41 and 154 are so read together, it is clear that before registering an FIR under Section 154 the police officer must form an opinion that there is a prima facie case against the accused. If he does not form such an opinion and still proceeds to record an FIR, he would be guilty of an arbitrary action. Every public authority exercising any powers under any statute is under an obligation to exercise that power in a reasonable manner. This principle is well settled and it forms an integral part of the legal system in this country.

69. Mr. Naphade submitted that the provisions of Section 154(3) enable any complainant whose complaint is not registered as an FIR by the SHO to approach the higher police officer for the purpose of getting his complaint registered as an FIR and in such case, the higher police officer has all the powers of recording an FIR and directing investigation into the matter. Apart from this power under Section 36 any police officer senior in rank to an officer in charge of the police station can exercise the same powers as may be exercised by such officer in charge of the police station. Provisions of Section 154 (3) and Section 36 are clear indication that in an appropriate case a police officer can either decline to register the FIR or defer its registration. The provisions of Section 154(3) and Section 36 is a sufficient safeguard against an arbitrary refusal on the part of a police officer to register the FIR. The very fact that a provision has been made in the statute for approaching the higher police officer, is an indication of legislative intent that in appropriate cases, a police officer may decline to register an FIR and/or defer its registration.

70. In addition to the remedy available to the aggrieved person of approaching higher police officer, he can also move the concerned Magistrate either under Section 156(3) for making a complaint under Section 190. If a complaint is lodged, the Magistrate can examine the complainant and issue process against the accused and try the case himself and in case triable by Sessions Court, then he will commit the case to Sessions under Section 209.

71. The Magistrate can also on receipt of a complaint, hold an enquiry or direct the police to investigate. In addition to the above, the Magistrate also has a power to direct investigation under Section 159 Cr.P.C. In the case of ***Mona Panwar v. High Court of Judicature of Allahabad*** [(2011) 3 SCC 496 in paras 17 and 18 on page 503] this Court has, *inter alia*, held that if the complaint relating to a cognizable officer is not registered by the police, then the complainant can go the Magistrate and then the Magistrate has the option of either passing an order under Section 156(3) or proceeding under Section 200/202 of the Code.

72. It was also submitted by Mr. Naphade that an order under Section 156(3) of the Code is in the nature of a pre-emptory reminder or intimation to the police to exercise its plenary power 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 the vital report either under Section 169 or submission of a charge-sheet under Section 173 of the Code. A Magistrate can under Section 190 of the Code before taking cognizance, direct investigation by the police by order under Section 156(3) of the Code.

73. Mr. Naphade also submitted that the very fact that the Legislature has provided adequate remedies against refusal to register an FIR and hold investigation in cognizable offences is indicative of legislative intent that the police officer is not bound to record an FIR merely because the ingredients of cognizable offences are disclosed in the complaint if he has doubt about the veracity of the complaint.

74. In further support of the proposition that a police officer is not bound to register an FIR on mere disclosure of existence of ingredients of cognizable offence, it is submitted that the statute does not contemplate that for the purpose of investigation, recording of an FIR is a condition precedent. Section 156 empowers the police to do so. Similarly, Section 157 clearly lays down that if from information received or otherwise an officer in charge of the police station has reason to suspect the commission of an offence, he can investigate into the same. In Section 157(1) the expression "from information received" obviously refers to complaint under Section 154 Cr.P.C. registered as an FIR. The word "otherwise" in Section 157 Cr.P.C. clearly indicates that recording of an FIR is not a condition precedent to initiation of investigation. The very fact that the police have a power of investigation independent of registration of an FIR is a clear pointer to the legislative intent that a police officer is not bound to register an FIR in each and every case.

75. Mr. Naphade relied on the case of ***Apren Joseph alias current Kunjukunju v. State of Kerala*** [1973 (3) SCC 114] wherein in para 11 this Court has held that recording of an FIR is not a condition precedent for setting in motion criminal investigation. In doing so, this Court has approved the observation of Privy Council made in the case of ***Khwaja Nazim Ahmad*** .

76. Mere recording of an FIR under Section 154 Cr.P.C. is of no consequence unless the alleged offence is investigated into. For the purpose of investigation after registration of the FIR, the police officer must have reason to suspect commission of an offence. Despite registration of the FIR, the police officer may not have a reasonable ground to suspect that an offence has been committed and in that situation he may decline to carry out investigation and may come to the conclusion that there is no sufficient ground for carrying out investigation. If under the proviso (b) to Section 157 Cr.P.C. the police officer has such discretion of not investigating, then it stands to reason that registration of an FIR should not result into an empty formality.

77. The registration of an FIR should be effective and it can be effective only if further investigation is to be carried out and further investigation can be carried out only if the police officer has reasonable ground to suspect that the offence is committed. If, therefore, there is no reasonable ground to suspect the commission of cognizable offence, the police officer will not investigate and if that is a situation, then on the same footing he may decline to register the FIR. This is clearly implicit in the provisions of Section 154(1). It is, submitted that if the provisions of Section 154 are read with Sections 41,57,156,157,159,167,190,200 and 202 Cr.P.C., the only possible conclusion is that a police officer is not bound to register each and every case.

78. Mr. Naphade placed reliance on ***State of Maharashtra v. Sarangdharsingh Shivdassingh Chavan*** [(2011) 1 SCC 577] wherein in paragraphs 29 and 30, this Court

has observed as follows:-

> "29. The legal position is well settled that on information being lodged with the police and if the said information discloses the commission of a cognizable offence, the police shall record the same in accordance with the provisions contained under Section 154 of the Criminal Procedure Code. The police officer's power to investigate in case of a cognizable offence without order of the Magistrate is statutorily recognised under Section 156 of the Code. Thus the police officer in charge of a police station, on the basis of information received or otherwise, can start investigation if he has reasons to suspect the commission of any cognizable offence.
>
> 30. This is subject to provisos (a) and (b) to Section 157 of the Code which leave discretion with the police officer in charge of police station to consider if the information is not of a serious nature, he may depute a subordinate officer to investigate and if it appears to the officer- in-charge that there does not exist sufficient ground, he shall not investigate. This legal framework is a very vital component of the rule of law in order to ensure prompt investigation in cognizable cases and to maintain law and order."

79. He submitted that if the police officer is of the opinion that the complaint is not credible and yet he is required to register the FIR, then he would be justified in not investigating the case. In such a case the FIR would become a useless lumber and a dead letter. The police officer would then submit a closure report to the Magistrate. The Magistrate then would issue notice to the complainant and hear him. If the Magistrate is of the opinion that there is a case, then he may direct police to investigate.

80. Mr. Napahde submitted that the aforesaid analysis of various provisions of Criminal Procedure Code clearly bring out that the statutory provisions clearly maintain a balance between the rights of a complainant and of the Society to have a wrongdoer being brought to book and the rights of the accused against baseless allegations.

81. The provisions have also to be read in the light of the principle of malicious prosecution and the fundamental rights guaranteed under Articles 14, 19 and 21. Every citizen has a right not to be subjected to malicious prosecution and every police officer has an in- built duty under Section 154 to ensure that an innocent person is not falsely implicated in a criminal case. If despite the fact that the police officer is not prima facie satisfied as regards commission of a cognizable offence, and proceeds to register an FIR and carry out investigation and thereby putting the liberty of a citizen in jeopardy, he would expose himself to the charge of malicious prosecution and against the charge of malicious prosecution the doctrine of sovereign immunity will not protect him. There is no law protecting a police officer who takes part in the malicious prosecution.

82. Mr. Naphade also submitted that the word "shall" used in the statute does not always mean absence of any discretion in the matter.

83. The word "shall" does not necessarily lead to provision being imperative or mandatory.

84. The use of word "shall" raises a presumption that the particular provision is

imperative. But, this presumption may be rebutted by other considerations such as, object and scope of the enactment and other consequences flowing from such construction. There are numerous cases where the word "shall" has, therefore, been construed as merely directory.

85. In the case of ***Sainik Motors, Jodhpur v. State of Rajasthan*** [AIR 1961 SC 1480], Hidayatullah, J. has held that the word "shall" is ordinarily mandatory, but it is sometimes not so interpreted if the context of intention otherwise demands.

86. Further, Subba Rao, J. in the case of ***State of Uttar Pradesh v. Babu Ram Upadhya*** [AIR 1961 SC 751], has observed that when the statute uses the word "shall" prima facie it is mandatory, but the Court may ascertain the real intention of the legislature carefully attending to the whole scope of the statute.

87. In the case of ***State of Madhya Pradesh v. M/s Azad Bharat Finance Co.*** [AIR 1967 SC 276] it has been held that the word "shall" does not always mean that the provision is obligatory or mandatory. It depends upon the context in which the word "shall" occur and the other circumstances.

88. In the case of ***Shivjee Singh*** it has been held that the use of word "shall" in proviso to Section 202 (2) of Cr.P.C. prima facie is indicative of mandatory character of the provision contained therein. But, a close and critical analysis thereof along with other provisions show that the same is not mandatory. Further, it has been observed that by its very nomenclature, Cr.P.C. is a compendium of law relating to criminal procedure. The provisions contained therein are required to be interpreted keeping in view the well recognized rule of construction that procedural prescriptions are meant for doing substantial justice. If violation of procedural provisions does not result in denial of a fair hearing or causes prejudice to the party, the same has to be treated as directly notwithstanding the use of the word "shall".

89. In ***P.T. Rajan***, this Court has discussed the principles as to whether a statute is mandatory or directory. The Court has observed that a statute as is well known must be read in the text and context thereof. Whether a statute is directory or mandatory would not be dependent on the use of the word "shall" or "may". Such a question must be posed and answered having regard to the purpose and object it seeks to achieve. It has further been held that a provision in a statute which is procedural in nature although employs the word "shall" may not be held to be mandatory if thereby no prejudice is caused. The analysis of various provisions of Cr.P.C. clearly shows that no prejudice is caused if police officer does not register an FIR. The complainant has effective remedies under Sections 154(3), 156, 190 Cr.P.C. etc.

90. Mr. Naphade, the learned senior counsel submitted that it is impossible to put the provisions of Section 154 Cr.P.C. in any straight jacket formula. However, some guidelines can be framed as regards registration or non-registration of an FIR. According to him, some such guidelines are as follows:-

> 1.Normally in the ordinary course a police officer should record an FIR, if the complaint discloses a cognizable offence. However, in exceptional cases where the police officer has reason to suspect that the complaint is motivated on account of

personal or political rivalry, he may defer recording of the FIR, and take a decision after preliminary enquiry.

2.In case of complaints which are a result of vendetta like complaints under Section 498A Cr.P.C. (IPC), the police officer should be slow in recording an FIR and he should record an FIR only if he finds a prima facie case.

3.The police officer may also defer recording of an FIR if he feels that the complainant is acting under a mistaken belief.

4.The police officer may also defer registering an FIR if he finds that the facts stated in the complaint are complex and complicated, as would be in respect of some offences having financial contents like criminal breach of trust, cheating etc.

91. The aforesaid are only illustrations and not exhaustive of all conditions which may warrant deferment of an FIR.

92. The second aspect of the matter is what test should the police officer take in case he is of the opinion that registration of an FIR should be deferred. He suggested the following measures:-

1. The police officer must record the complaint in the Station/General Diary. This will ensure that there is no scope for manipulation and if subsequently he decides to register an FIR, the entry in Station/General Diary should be considered as the FIR.

2. He should immediately report the matter to the superior police officer and convey him his reasons or apprehensions and take his permission for deferring the registration. A brief note of this should be recorded in the station diary.

3. The police officer should disclose to the complainant that he is deferring registration of the FIR and call upon him to comply with such requisitions the police officer feels necessary to satisfy himself about the prima facie credibility of the complaint. The police officer should record this in the station diary. All this is necessary to avoid any charge as regard to the delay in recording the FIR. It is a settled law that a mere delay in registering an FIR is not harmful if there are adequate reasons to explain the delay in filing an FIR.

93. According to him, in the light of the above discussion in respect of the impact of Article 21 on statutory provisions, it must be held that Section 154 of Cr.P.C. must be interpreted in the light of Article 21. The requirement of Article 21 is that the procedure should be just and fair. If, therefore, the police officer himself has doubts in the matter, it is imperative that he should have the discretion of holding a preliminary inquiry in the matter. If he is debarred from holding such a preliminary inquiry, the procedure would then suffer from the vice of arbitrariness and unreasonableness.

94. Learned counsel appearing for the State of Tamil Nadu adopted the arguments submitted by Mr. Naphade, the learned senior counsel for Maharashtra and submitted that ordinarily a police officer has to register an FIR when a cognizable offence is made out, but in exceptional cases he must have some discretion or latitude of conducting some kind of preliminary inquiry before recording of the FIR.

95. Learned counsel for the parties have drawn our attention to two sets of cases decided by this Court expressing totally divergent judicial opinions. We deem it appropriate to briefly summarise them in the following paragraphs.

96. This Court in the case of ***Bhajan Lal*** , ***Ramesh Kumari***, ***Parkash Singh Badal v. State of Punjab*** [(2007) 1 SCC 1] and ***Aleque Padamsee*** held that if a complaint alleging commission of cognizable offence is received in the Police Station, then the S.H.O. has no option but to register an F.I.R. under Section 154 Cr.P.C..

97. On the other hand, this Court in following cases, namely, ***Rajinder Singh Katoch***, ***P. Sirajuddin v. State of Madras*** [1970 (1) SCC 595], ***Bhagwant Kishore Joshi***, ***Sevi v. State of Tamil Nadu*** [1981 (Suppl.) SCC 43] have taken a contrary view and held that before registering the FIR under Section 154 of Cr.P.C., it is open to the SHO to hold a preliminary enquiry to ascertain whether there is a prima facie case of commission of cognizable offence or not.

98. We deem it appropriate to give a brief ratio of these cases.

99. In ***Bhajan Lal*** , this Court observed as under:-

> "It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information."

100. In ***Ramesh Kumari***, this Court observed that the provision of Section 154 of the Code is mandatory and the officer concerned is duty-bound to register the case on the basis of such an information disclosing cognizable offence.

101. In ***Parkash Singh Badal***, this Court observed as under:-

> "It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information."

102. In ***Aleque Padamsee*** , this Court observed as under :-

> "The correct position in law, therefore, is that the police officials ought to register the FIR whenever facts brought to their notice show that cognizable offence has been made out."

103. There is another set of cases where this Court has taken contrary view.

104. In ***Rajinder Singh Katoch***, this Court observed as under:-

> "We are not oblivious to the decision of this Court in ***Ramesh Kumari v. State (NCT of Delhi)*** wherein such a statutory duty has been found in the police officer. But, as indicated hereinbefore, in an appropriate case, the police officers also have a duty to make a preliminary enquiry so as to find out as to whether allegations made had any substance or not."

105. In ***Bhagwant Kishore Joshi***, Mudholkar, J. in his concurring judgment has observed as under:- "I am of opinion that it is open to a Police Officer to make preliminary enquiries before registering an offence and making a full scale investigation into it."

106. In ***P. Sirajuddin*** , this Court quoted the observations of the High Court as under:

> "(a) substantial information and evidence had been gathered before the so-called first information report was registered".

107. In ***Sevi*** , this Court observed as under:

> "If he was not satisfied with the information given by PW 10 that any cognizable offence had been committed he was quite right in making an entry in the general diary and proceeding to the village to verify the information without registering any FIR."

108. It is quite evident from the ratio laid down in the aforementioned cases that different Benches of this Court have taken divergent views in different cases. In this case also after this Court's notice, the Union of India, the States and the Union Territories have also taken or expressed divergent views about the interpretation of Section 154 Cr.P.C.

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

110. Learned counsel appearing for the Union of India and different States have expressed totally divergent views even before this Court. This Court also carved out a special category in the case of medical doctors in the aforementioned cases of ***Santosh Kumar*** and ***Dr. Suresh Gupta*** where preliminary enquiry had been postulated before registering an FIR.

111. Some counsel also submitted that the CBI Manual also envisages some kind of preliminary enquiry before registering the FIR. The issue which has arisen for consideration in these cases is of great public importance.

112. In view of the divergent opinions in a large number of cases decided by this Court, it has become extremely important to have a clear enunciation of law and adjudication by a larger Bench of this Court for the benefit of all concerned – the courts, the investigating agencies and the citizens.

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

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State of Orissa v. *Sharat Chandra Sahu*

(1996) 6 SCC 435

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

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

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

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

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

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

entitled to take cognizance of the offence irrespective of the person who gave the first information to it.

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

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

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

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

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

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

* * * * *

Madhu Bala v. *Suresh Kumar*

(1997) 8 SCC 476

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

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

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

5. In our considered view, the impugned judgment is wholly unsustainable as it has not only failed to consider the basic provisions of the Code but also failed to notice that the judgments in ***Gopal Das*** and ***Tula Ram*** have no relevance whatsoever to the interpretation or purport of Section 156(3) of the Code. The earlier judgments of the Punjab and Haryana High

Court, which have been followed in the instant case also suffer from the above two infirmities.

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

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

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

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

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

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

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

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

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

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

* * * * *

Sakiri Vasu v. *State of U.P.*

(2008) 2 SCC 409

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

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

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

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

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

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

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

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

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

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

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

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

14. Section 156 (3) states:

> "Any Magistrate empowered under Section 190 may order such an investigation as abovementioned."
>
> The words "as abovementioned" obviously refer to Section 156 (1), which contemplates investigation by the officer in charge of the Police Station.

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

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

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

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

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

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

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

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

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

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

24. In view of the abovementioned legal position, we are of the view that although Section 156(3) is very briefly worded, there is an implied power in the Magistrate under Section 156(3) Cr.P.C. to order registration of a criminal offence and /or to direct the officer in charge of the concerned police station to hold a proper investigation and take all such necessary steps

that may be necessary for ensuring a proper investigation including monitoring the same. Even though these powers have not been expressly mentioned in Section 156(3) Cr.P.C., we are of the opinion that they are implied in the above provision.

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

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

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

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

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

30. It may be further mentioned that in view of Section 36 Cr.P.C. if a person is aggrieved that a proper investigation has not been made by the officer-in-charge of the concerned police

station, such aggrieved person can approach the Superintendent of Police or other police officer superior in rank to the officer-in-charge of the police station and such superior officer can, if he so wishes, do the investigation vide ***CBI* v. *State of Rajasthan*** [(2001) 3 SCC 333] ***R.P. Kapur* v. *Sardar Pratap Singh Kairon*** [AIR 1961 SC 1117]. Also, the State Government is competent to direct the Inspector General, Vigilance to take over the investigation of a cognizable offence registered at a police station vide **State of Bihar v. A.C. Saldanna**.

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

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

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

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

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

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

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

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State v. *Captain Jagjit Singh*

(1962) 3 SCR 622

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

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

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

offence was under Section 3 or Section 5, on the assumption that the case fell under Section 3 of the Act. It should then have taken into account the various considerations, such as, nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with the larger interests of the public or the State, and similar other considerations, which arise when a court is asked for bail in a non-bailable offence. It is true that under Section 498 of the Code of Criminal Procedure, the powers of the High Court in the matter of granting bail are very wide; even so where the offence is non-bailable, various considerations such as those indicated above have to be taken into account before bail is granted in a non-bailable offence. This, the High Court does not seem to have done, for it proceeded as if the offence for which the respondent was being prosecuted might be a bailable one.

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

5. The first question therefore that we have to decide in considering whether the High Court's order should be set aside is whether this is a case which falls *prima facie* under Section 3 of the Act. It is, however, unnecessary now in view of what has transpired since the High Court's order to decide that question. It appears that the respondent has been committed to the Court of Session along with the other two persons under Section 120-B of the Indian Penal Code and under Sections 3 and 5 of the Act read with Section 120-B. *Prima facie* therefore, a case has been found against the respondent under Section 3, which is a non-bailable offence. It is in this background that we have now to consider whether the order of the High Court should be set aside. Among other considerations, which a court has to take into account in deciding whether bail should be granted in a non-bailable offence, is the nature of the offence; and if the offence is of a kind in which bail should not be granted considering its seriousness, the court should refuse bail even though it has very wide powers under Section 498 of the Code of Criminal Procedure. Now Section 3 of the Act erects an offence which is prejudicial to the safety or interests of the State and relates to obtaining, collecting, recording or publishing or communicating to any other person any secret official code or password or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy. Obviously, the offence is of a very serious kind affecting the safety or the interests of the State. Further where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment, or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Government or in relation to any secret official code, it is punishable with fourteen years imprisonment. The case against the respondent is in relation to the military affairs of the Government, and *prima facie*, therefore, the respondent if convicted would be liable upto fourteen years' imprisonment. In these circumstances considering the nature of the offence, it

seems to us that this is not a case where discretion, which undoubtedly vests in the court, under Section 498 of the Code of Criminal Procedure, should have been exercised in favour of the respondent. We advisedly say no more as the case has still to be tried.

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

* * * * *

Moti Ram v. *State of M.P.*

(1978) 4 SCC 47

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "Today, we join to recognize a major development in our system of criminal justice: the reform of the bail system.
>
> This system has endured - archaic, unjust and virtually unexamined - since the Judiciary Act of 1789.
>
> The principal purpose of bail is to ensure that an accused person will return for trial if he is released after arrest.

How is that purpose met under the present system? *The defendant with means can afford to pay bail.* He can afford to buy his freedom. But the *poorer defendant cannot pay the price.* He languishes in jail weeks, months and perhaps even years before trial.

He does not stay in jail because he is guilty.
He does not stay in jail because any sentence has been passed.
He does not stay in jail because he is any more likely to flee before trial.
He stays in jail for one reason only—because he is poor. . . ."(emphasis added)

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

"The bail system, as we see it administered in the criminal courts today, is extremely unsatisfactory and needs drastic change. In the first place it is virtually impossible to translate risk of non-appearance by the accused into precise monetary terms and even its basic premise that risk of financial loss is necessary to prevent the accused from fleeing is of doubtful validity. There are several considerations which deter an accused from running away from justice and risk of financial loss is only one of them and that too not a major one. The experience of enlightened Bail Projects in the United States such as Manhattan Bail Project and D.C. Bail Project shows that even without monetary bail it has been possible to secure the presence of the accused at the trial in quite a large number of cases. Moreover, *the bail system causes discrimination against the poor* since the poor would not be able to furnish bail on account of their poverty while the wealthier persons otherwise similarly situate would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of the bail fixed by the Magistrate is not high, for *a large majority of those who are brought before the Courts in criminal cases are so poor that they would find it difficult to furnish bail even in a small amount."* (emphasis added)

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

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

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

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

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

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

19A. Again:

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

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

21. We have explained later that the power of the Supreme Court to enlarge a person during the pendency of a Special Leave Petition or of an appeal is very wide, as Order 21

Rule 27 of the Supreme Court Rules discloses. In that sense, a consideration of the question as to whether the High Court or the subordinate courts have powers to enlarge a person on his own bond without sureties may not strictly arise. Even so, the guidelines which prevail with the Supreme Court when granting suspension of sentence must, in a broad sense, have relevance to what the Code indicates except where special circumstances call for a different course. Moreover, the advocates who participated—many of them did—covered the wider area of release under the Code, whether with or without sureties, and that is why we consider the relevant provisions of the Code in some detail.

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

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

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

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

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

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

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

> 389(1): Pending any appeal by a convicted person the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

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

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

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

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

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

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

32. It shocks one's conscience to ask a mason like the petitioner to furnish sureties for Rs 10,000. The magistrate must be given the benefit of doubt for not fully appreciating that our

Constitution, enacted by 'We, the People of India', is meant for the butcher, the baker and the candlestick maker - shall we add, the bonded labour and pavement dweller.

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

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

An afterword

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

* * * * *

Gurcharan Singh v. *State (Delhi Admn.)*

(1978) 1 SCC 118 : AIR 1978 SC 179

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

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

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

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

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

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

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

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

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

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

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

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

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

> Considering the nature of the offence, character of the evidence, including the fact that some of the witnesses during preliminary inquiry did not fully support the prosecution case, the reasonable apprehension of witnesses being tampered with and all other factors

> relevant for consideration, while considering the application for grant or refusal of bail in a non-bailable offence punishable with death or imprisonment for life, I have no option but to cancel the bail. I am of the considered view that the learned Sessions Judge did not exercise his judicial discretion on relevant well-recognised principles and factors which ought to have been considered by him.

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

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

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

16. Section 439 of the new Code confers special powers on High Court or Court of Session regarding bail. This was also the position under Section 498, Cr.P.C of the old Code. That is to say, even if a Magistrate refuses to grant bail to an accused person, the High Court or the Court of Session may order for grant of bail in appropriate cases. Similarly under Section 439(2) of the new Code, the High Court or the Court of Session may direct any

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

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

18. Chapter XXXIII of the new Code contains provisions in respect of bail bonds. Section 436, Cr.P.C, with which this Chapter opens makes an invariable rule for bail in case of bailable offences subject to the specified exception under sub-section (2) of that section.

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

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

20. Under the first proviso to Section 167(2) no Magistrate shall authorise the detention of an accused in custody under that section for a total period exceeding 60 days on the expiry of which the accused shall be released on bail if he is prepared to furnish the same. This type of release under the proviso shall be deemed to be a release under the provisions of Chapter XXXIII relating to bail. This proviso is an innovation in the new Code and is intended to speed up investigation by the police so that a person does not have to languish unnecessarily

in prison facing a trial. There is a similar provision under sub-section (6) of Section 437, Cr. P.C which corresponds to Section 497 (3A) of the old Code. This provision is again intended to speed up trial without unnecessarily detaining a person as an undertrial prisoner, unless for reasons to be recorded in writing, the Magistrate otherwise directs. We may also notice in this connection sub-section (7) of Section 437 which provides that if at any time after the conclusion of a trial of any person accused of non-bailable offence and before the judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of such an offence, it shall release the accused, if he is in custody, on the execution of him of a bond without sureties for his appearance to hear the judgment. The principle underlying Section 437 is, therefore, towards granting of bail except in cases where there appear to be reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life and also when there are other valid reasons to justify the refusal of bail.

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

22. In other non-bailable cases the Court will exercise its judicial discretion in favour of granting bail subject to sub-section (3) of Section 437, Cr.P.C if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also

clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437(1), Cr.P.C and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.

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

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

25. The question of cancellation of bail under Section 439(2), Cr.P.C of the new Code is certainly different from admission to bail under Section 439(1), Cr.P.C The decisions of the various High Courts cited before us are mainly with regard to the admission to bail by the High Court under Section 498, Cr.P.C (old). Power of the High Court or of the Sessions Judge to admit persons to bail under Section 498, Cr.P.C (old) was always held to be wide without any express limitations in law. In considering the question of bail justice to both sides governs the judicious exercise of the Court's judicial discretion. The only authority cited

before us where this Court cancelled bail granted by the High Court is that of ***The State* v. *Captain Jagjit Singh*** [AIR 1962 SC 253]. The Captain was prosecuted along with others for conspiracy and also under Sections 3 and 5 of the Indian Official Secrets Act, 1923 for passing on official secrets to a foreign agency. This Court found a basic error in the order of the High Court in treating the case as falling under Section 5 of the Official Secrets Act which is a bailable offence when the High Court ought to have proceeded on the assumption that it was under Section 3 of that Act which is a non-bailable offence. It is because of this basic error into which the High Court felt that this Court interfered with the order of bail granted by the High Court.

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

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

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

accused in a non-bailable offence punishable with death or imprisonment for life, it is necessary for the Court to consider whether the evidence discloses a *prima facie* case to warrant his detention in jail besides the other relevant factors referred to above. As a link in the chain of criminal conspiracy the prosecution is also relying on the conduct of some of the appellants in taking Sunder out of police lockup for making what is called a false discovery and it is but fair that the *Panch* witness in that behalf be not allowed to be got at.

29. We may repeat the two paramount considerations, *viz*. likelihood of the accused fleeing from justice and his tampering with prosecution evidence relate to ensuring a fair trial of the case in a Court of Justice. It is essential that due and proper weight should be bestowed on these two factors apart from others. There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail.

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

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

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

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

32. Before closing, we should, however, make certain things clear. We find that the case is now before the committing Magistrate. We are also informed that all documents have been furnished to the accused under Section 207, Cr.P.C. of the new Code. The Magistrate will, therefore, without loss of further time pass an appropriate order under Section 209, Cr.P.C The Court of Session will, thereafter, commence trial at an early date and examine all the eye-witnesses first and such other material witnesses thereafter as may be produced by the prosecution as early as possible. Trial should proceed *de die in diem* as far as practicable at least so far as the eyewitnesses and the above referred to *Panch* witness are concerned. We

have to make this order as both Mr Mulla and Mr Mukherjee submitted that trial will take a long time as the witnesses cited in the charge-sheet are more than 200 and it will be a punishment to keep the appellants in detention pending the trial. We have, therefore, thought it fit to make the above observation to which the learned Additional Solicitor General had readily and very fairly agreed. After the statements of the eye-witnesses and the said Panch witness have been recorded, it will be open to the accused to move the Sessions Judge for admitting them to bail, pending further hearing. The appeals are dismissed with the above observations. The stay orders stand vacated.

* * * * *

Sanjay Chandra v. *Central Bureau of Investigation*

(2012) 1 SCC 40

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

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

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

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

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

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

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

of clause 8 of UASL guidelines 2005. Accused Vinod Goenka was an associate of accused Shahid Usman Balwa to create false documents including Board Minutes of M/s Giraffe Consultancy (P) Limited fraudulently showing transfer of its shares by the companies of Reliance ADA Group during February 2007 itself. Accused/applicant in conspiracy with accused Shahid Usman Balwa concealed or furnished false information to DoT regarding shareholding pattern of STPL as on the date of application thereby making STPL an eligible company to get licence on the date of application, that is, 02.03.2007. Accused/applicant was an overall beneficiary with accused Shahid Usman Balwa for getting licence and spectrum in 13 telecom circles.

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

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

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

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

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

9. It was further alleged that M/s Swan Telecom Pvt. Ltd. (STPL) was, at the time of

application dated 02.03.2007, an associate of M/s Reliance ADA Group / M/s Reliance Communications Limited / M/s Reliance Telecom Limited, having existing UAS Licences in all telecom circles. Investigations have also disclosed that M/s Tiger Traders Pvt. Ltd., which held majority stake (more than 90%) in M/s Swan Telecom Pvt. Ltd. (STPL), was also an associate company of Reliance ADA Group. Both the companies has not business history and were activated solely for the purpose of applying for UAS Licences in 13 telecom circles, where M/s Reliance Telecom Ltd. did not have GSM spectrum and M/s Reliance Communications Ltd. had already applied for dual technology spectrum for these circles. Investigation has disclosed that the day to day affairs of M/s Swan Telecom Pvt. Ltd. and M/s Tiger Traders Pvt. Ltd. were managed by the said three accused persons either themselves or through other officers/consultants related to the Reliance ADA group. Commercial decisions of M/s Swan Telecom Pvt. Ltd. and M/s Tiger Traders Pvt. Ltd. were also taken by these accused persons of Reliance ADA group. Material inter-company transactions (bank transactions) of M/s Reliance Communications / M/s Reliance Telecommunications Ltd. and M/s Swan Telecom Pvt. Ltd. (STPL) and M/s Tiger Traders Pvt. Ltd. were carried out by same group of persons as per the instructions of said accused Gautam Doshi and Hari Nair.

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

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

> (P) Limited on the date of application, that is, 02.03.2007 was an associate company of Reliance ADA group, that is, M/s Reliance Communications Limited/ M/s Reliance Telecom Limited and therefore, ineligible for UAS licences.
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> 12. Investigation has also disclosed pursuant to TRAI recommendations dated 28.08.2007 when M/s Reliance Communications Ltd. got the GSM spectrum under the Dual Technology policy, accused Gautam Doshi, Hari Nair and Surendra Pipara transferred the control of M/s Swan Telecom Pvt. Ltd., and said structure of holding companies, to accused Shahid Balwa and Vinod Goenka. In this manner they transferred a company which was otherwise ineligible for grant of UAS license on the date of application, to the said two accused persons belonging to Dynamix Balwa (DB) group and thereby facilitated them to cheat the DoT by getting issued UAS Licences despite the ineligibility on the date of application and till 18.10.2007."

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

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

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

Court on its own motion* v. *CBI [2004 I JCC 308] by which the High Court gave directions to Criminal Courts to call upon the accused who is summoned to appear to apply for bail, and then decide on the merits of the bail application. He would state that the High Court has ignored even the CBI Manual before issuing these directions, which provided for bail to be granted to the accused, except in the event of there being commission of heinous crime. The learned senior counsel would also argue that it was an error to have a "rolled up harge", as recognized by the **Griffiths'** case [***R* v. *Griffiths*** (1966) 1 Q.B. 589]. Shri.Jethmalani submitted that there is not even a prima facie case against the accused and would make references to the charge sheet and the statement of several witnesses. He would emphatically submit that none of the ingredients of the offences charged with were stated in the charge sheet. He would further contend that even if, there is a prima facie case, the rule is still bail, and not jail, as per the dicta of this Court in several cases.

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

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

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

10) Shri. Haren P. Raval, the learned Additional Solicitor General, in his reply, would submit

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

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

12) Let us first deal with a minor issue canvassed by Mr. Raval, learned ASG. It is submitted that this Court has refused to entertain the Special Leave Petition filed by one of the co-accused [**Sharad Kumar v. CBI**] and, therefore, there is no reason or change in the

circumstance to take a different view in the case of the appellants who are also charge-sheeted for the same offence. We are not impressed by this argument. In the aforesaid petition, the petitioner was before this Court before framing of charges by the Trial Court. Now the charges are framed and the trial has commenced. We cannot compare the earlier and the present proceedings and conclude that there are no changed circumstances and reject these petitions.

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

14) In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

15) In the instant case, as we have already noticed that the "pointing finger of accusation" against the appellants is 'the seriousness of the charge'. The offences alleged are economic offences which has resulted in loss to the State exchequer. Though, they contend that there is possibility of the appellants tampering witnesses, they have not placed any material in support of the allegation. In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor : The other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Indian Penal Code and Prevention of Corruption Act. Otherwise, if the former is the only test, we would not be balancing the Constitutional Rights

but rather "recalibration of the scales of justice." The provisions of Cr.P.C. confer discretionary jurisdiction on Criminal Courts to grant bail to accused pending trial or in appeal against convictions, since the jurisdiction is discretionary, it has to be exercised with great care and caution by balancing valuable right of liberty of an individual and the interest of the society in general. In our view, the reasoning adopted by the learned District Judge, which is affirmed by the High Court, in our opinion, a denial of the whole basis of our system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognized, then it may lead to chaotic situation and would jeopardize the personal liberty of an individual. This Court, in ***Kalyan Chandra Sarkar* v. *Rajesh Ranjan*** [(2005) 2 SCC 42] observed that "under the criminal laws of this country, a person accused of offences which are non-bailable, is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 of the Constitution, since the same is authorized by law. But even persons accused of non-bailable offences are entitled to bail if the Court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the Court is satisfied by reasons to be recorded that in spite of the existence of prima facie case, there is need to release such accused on bail, where fact situations require it to do so."

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

> "2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the petitioner who seeks enlargement on bail from the Court. We do not intend to be exhaustive but only illustrative.
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> 3. It is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weigh with us when considering the question of jail. So also the heinousness of the crime. Even so, the record of the petitioner in this case is that, while he has been on bail throughout in the trial court and he was released after the judgment of the High Court, there is nothing to suggest that he has abused the trust placed in him by the court; his social circumstances also are not so unfavourable in the sense of his being a desperate character or unsocial element who is likely to betray the confidence that the court may place in him to turn up to take justice at the hands of the court. He is stated to be a young man of 27 years with a family to maintain. The circumstances and the social milieu do not militate against the petitioner being granted bail at this stage. At the same time any possibility of the absconsion or evasion or other abuse can be taken care of by a direction that the petitioner will report himself before the police station at Baren once every fortnight."

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

> "3. What, then, is "judicial discretion" in this bail context? In the elegant words of

Benjamin Cardozo:

"The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains."

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

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

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

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

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

or conviction is confirmed, also bears upon the issue.

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

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

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

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

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

24. Section 439(1) CrPC of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1)

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

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

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

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

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

interests of justice—to the individual involved and society affected.

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

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

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

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

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

"6. "Bail" remains an undefined term in CrPC. Nowhere else has the term been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints. Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression "bail" denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old

> French verb "bailer" which means to "give" or "to deliver", although another view is that its derivation is from the Latin term "baiulare", meaning "to bear a burden". Bail is a conditional liberty. Stroud's Judicial Dictionary (4th Edn., 1971) spells out certain other details. It states:
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> "… when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained of his liberty. And, being by law bailable, offereth surety to those which have authority to bail him, which sureties are bound for him to the King's use in a certain sums of money, or body for body, that he shall appear before the justices of goal delivery at the next sessions, etc. Then upon the bonds of these sureties, as is aforesaid, he is bailed—that is to say, set at liberty until the day appointed for his appearance."
>
> Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice.
>
> 7. Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz. the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have. (See ***A.K. Gopalan* v. *State of Madras***)
>
> 8. The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt."

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

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

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

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

> "The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of the evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

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

> 18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail [see ***Prahlad Singh Bhati v. NCT*** and **Gurcharan Singh v. State**]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in ***Kalyan Chandra Sarkar v. Rajesh Ranjan***
>
> "11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:
>
> (a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.
>
> (b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See Ram **Govind Upadhyay v. Sudarshan Singh** and **Puran v. Rambilas**)"

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

25) Coming back to the facts of the present case, both the Courts have refused the request for grant of bail on two grounds :- The primary ground is that offence alleged against the accused persons is very serious involving deep rooted planning in which, huge financial loss is caused to the State exchequer ; the secondary ground is that the possibility of the accused persons tempering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property, forgery for the purpose of cheating using as genuine a forged document. The punishment of the offence is punishment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration. The grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required. This Court in ***Gurcharan Singh* v. *State*** [AIR 1978 SC 179] observed that two paramount considerations, while considering petition for grant of bail in non-bailable offence, apart from the seriousness of the offence, are the likelihood of the accused fleeing from justice and his tampering with the prosecution witnesses. Both of them relate to ensure of the fair trial of the case. Though, this aspect is dealt by the High Court in its impugned order, in our view, the same is not convincing.

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

of Kerala* v. *Raneef [(2011) 1 SCC 784] has stated :-

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

27) In 'Bihar Fodder Scam', this Court, taking into consideration the seriousness of the charges alleged and the maximum sentence of imprisonment that could be imposed including the fact that the appellants were in jail for a period more than six months as on the date of passing of the order, was of the view that the further detention of the appellants as pre-trial prisoners would not serve any purpose.

28) We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardize the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI.

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

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

> a. The appellants shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts or the case so as to dissuade him to disclose such facts to the Court or to any other authority.
>
> b. They shall remain present before the Court on the dates fixed for hearing of the case. If they want to remain absent, then they shall take prior permission of the court and in case of unavoidable circumstances for remaining absent, they shall immediately give intimation to the appropriate court and also to the Superintendent, CBI and request that they may be permitted to be present through the counsel.
>
> c. They will not dispute their identity as the accused in the case.

d. They shall surrender their passport, if any (if not already surrendered), and in case, they are not a holder of the same, they shall swear to an affidavit. If they have already surrendered before the Ld. Special Judge, CBI, that fact should also be supported by an affidavit.

e. We reserve liberty to the CBI to make an appropriate application for modification/ recalling the order passed by us, if for any reason, the appellants violate any of the conditions imposed by this Court.

31) The appeals are disposed of accordingly.

Shri Gurbaksh Singh Sibbia **v.** *State of Punjab*

(1980) 2 SCC 565 : AIR 1980 SC 1632

Y.V. CHANDRACHUD, C.J. - These appeals by special leave involve a question of great public importance bearing, at once, on personal liberty and the investigational powers of the police. The society has a vital stake in both of these interests, though their relative importance at any given time depends upon the complexion and restraints of political conditions. Our task in these appeals is how best to balance these interest while determining the scope of Section 438 of the Code of Criminal Procedure, 1973 (Act 2 of 1974).

3. Criminal Appeal 335 of 1977 which is the first of the many appeals before us, arises out of a judgement dated September 13, 1977 of a Full Bench of the High Court of Punjab and Haryana [***Gurbaksh Singh Sibbia* v. *State of Punjab***, (AIR 1978 P & H 1]. The appellant therein, Shri Gurbaksh Singh Sibbia, was a Minister of Irrigation and Power in the Congress Ministry of the Government of Punjab. Grave allegations of political corruption were made against him and others whereupon, applications were filed in the High Court of Punjab and Haryana under Section 438, praying that the appellants be directed to be released on bail, in the event of their arrest on the aforesaid charges. Considering the importance of the matter, a learned Single Judge referred the application to a Full Bench, which by its judgment dated September 13, 1977 dismissed them.

4. The Code of Criminal Procedure, 1898 did not contain any specific provision corresponding to the present Section 438. Under the old Code, there was a sharp difference of opinion amongst the various High Courts on the question as to whether courts had the inherent power to pass an order of bail in anticipation of arrest, the preponderance of view being that it did not have such power. The Law Commission of India, in its 41st Report dated September 24, 1969 pointed out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant "anticipatory bail". It observed in paragraph 39.9 of its report (Volume I):

The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.

We considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted. But we found that it may not be practicable to exhaustively enumerate those conditions; and moreover, the laying down of such conditions may be construed as prejudging (partially at any rate) the whole case. Hence

we would leave it to the discretion of the court and prefer not to fetter such discretion in the statutory provision itself. Superior courts will, undoubtedly, exercise their discretion properly, and not make any observations in the order granting anticipatory bail, which will have a tendency to prejudice the fair trial of the accused.

5. The suggestion made by the Law Commission was, in principle, accepted by the Central Government which introduced Clauses 447 in the Draft Bill of the Code of Criminal Procedure, 1970 with a view to conferring as express power on the High Court and the Court of Session to grant anticipatory bail.

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

> The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such power should be exercised.
>
> We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.
>
> It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith.

Clause 447 of the Draft Bill of 1970 was enacted with certain modifications and became Section 438 of the Code of Criminal Procedure, 1973.

7. The facility which Section 438 affords is generally referred to as 'anticipatory bail', an expression which was used by the Law Commission in the 41st Report. Neither the section nor its marginal note so describes it but the expression 'anticipatory bail' is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. Any order of bail can, of course, be effective only from the time of arrest because, to grant bail, as stated in **Wharton's *Law Lexicon***, is to 'set at liberty a person arrested or imprisoned, on security being taken for his appearance'. Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of the arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to take his trial. Personal recognisance, suretyship bonds and such other modalities are the means by which an assurance is secured from the accused that though he has been released on bail, he will present himself at the trial of offence or offences of which he is charged and for which he was arrested. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Police custody is an inevitable concomitant of arrest for non-bailable offences. An order of anticipatory bail constitutes, so to say, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued.

In other words, unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. Section 46(1) of the Code of Criminal Procedure which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest "shall actually touch or confine the body of the person to be arrested, unless there be a submission to custody by word or action". A direction under Section 438 is intended to confer conditional immunity from this 'touch' or confinement.

8. No one can accuse the police of possessing a healing touch nor indeed does anyone have misgivings in regard to constraints consequent upon confinement in police custody. The powerful processes of criminal law can be perverted for achieving extraneous ends. Attendant upon such investigations, when the police are not free agents within their sphere of duty, is a great amount of inconvenience, harassment and humiliation. That can even take the form of the parading of a respectable person in handcuffs, apparently on way to a court of justice. The foul deed is done when an adversary is exposed to social ridicule and obloquy, no matter when and whether a conviction is secured or is at all possible. It is in order to meet such situations, though not limited to these contingencies, that the power to grant anticipatory bail was introduced into the Code of 1973.

9. Are we right in saying that the power conferred by Section 438 to grant anticipatory bail is "not limited to these contingencies"? It is argued by the learned Additional Solicitor-General on behalf of the State Government that the grant of anticipatory bail should at least be conditional upon the applicant showing that he is likely to be arrested for an ulterior motive, that is to say, that the proposed charge or charges are evidently baseless and are actuated by *mala fides*.

10. Shri V. M. Tarkunde, appearing on behalf of some of the appellants, urged that Section 438 is a procedural provision which is concerned with the personal liberty of an individual who has not been convicted of the offence in respect of which he seeks bail and who must therefore be presumed to be innocent. The validity of that section must accordingly be examined by the test of fairness and reasonableness, which is implicit in Article 21. If the legislature itself were to impose an unreasonable restriction on the grant of anticipatory bail, such a restriction could have been struck down as being violative of Article 21. Therefore, while determining the scope of Section 438, the court should not impose any unfair or unreasonable limitation on the individual's right to obtain an order of anticipatory bail. Imposition of an unfair or unreasonable limitation, according to the learned counsel, would be violative of Article 21, irrespective of whether it is imposed by legislation or by judicial decision.

11. The Full Bench of the Punjab and Haryana High Court rejected the appellants' applications for bail after summarising, what according to it is the true legal position, thus:

(1) The power under Section 438, Criminal Procedure Code, is of an extraordinary character and must be exercised sparingly in exceptional cases only;

(2) Neither Section 438 nor any other provision of the Code authorises the grant of blanket anticipatory bail for offences not yet committed or with regard to accusations not so far levelled.

(3) The said power is not unguided or uncanalised but all the limitations imposed in the preceding Section 437, are implicit therein and must be read into Section 438.

(4) In addition to the limitations mentioned in Section 437, the petitioner must make out a special case for the exercise of the power to grant anticipatory bail.

(5) Where a legitimate case for the remand of the offender to the police custody under Section 167(2) can be made out by the investigating agency or a reasonable claim to secure incriminating material from information likely to be received from the offender under Section 27 of the Evidence Act can be made out, the power under Section 438 should not be exercised.

(6) The discretion under Section 438 cannot be exercised with regard to offences punishable with death or imprisonment for life unless the court at that very stage is satisfied that such a charge appears to be false or groundless.

(7) The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under Section 438 of the Code should not be exercised; and

(8) Mere general allegations of *mala fides* in the petition are inadequate. The court must be satisfied on materials before it that the allegations of *mala fides* are substantial and the accusation appears to be false and groundless.

It was urged before the Full Bench that the appellants were men of substance and position who were hardly likely to abscond and would be prepared willingly to face trial. This argument was rejected with the observation that to accord differential treatment to the appellants on account of their status will amount to negation of the concept of equality before the law and that it could hardly be contended that every man of status, who was intended to be charged with serious crimes, including the one under Section 409, IPC which was punishable with life imprisonment, "was entitled to knock at the door of the court for anticipatory bail". The possession of high status, according to the Full Bench, is not only an irrelevant consideration for granting anticipatory bail but is, if anything, an aggravating circumstances.

12. We find ourselves unable to accept, in their totality, the submissions of the learned Additional Solicitor General or the constraints which the Full Bench of the High Court has engrafted on the power conferred by Section 438. Clause (1) of Section 438 is couched in terms, broad and unqualified. By any known canon of construction, words of which and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like to personal freedom and involves the application of a presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence. Though the right to apply for anticipatory bail was conferred for the first time by Section 438, while enacting that provision, the legislature was not writing on a clean slate in the sense of taking an unprecedented step, insofar as the right to apply for bail is concerned. It

had before it two cognate provisions of the Code: Section 437 which deals with the power of courts other than the Court of Session and the High Court to grant bail in non-bailable cases and Section 439 which deals with the "special powers" of the High Court and the Court of Session regarding bail. The whole of Section 437 is riddled and hedged in by restriction on the power of certain courts to grant bail.

Section 439(1)(a) incorporates the conditions mentioned in Section 437(3) if the offence in respect of which the bail is sought is of the nature specified in that sub-section. Section 439 reads thus:

> 439. Special powers of High Court or Court of Session regarding bail. -
>
> (1) A High Court or Court of Session may direct -
>
> (a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;
>
> (b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified;
>
> Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, thought not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.
>
> (2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

The provisions of Sections 437 and 439 furnished a convenient model for the legislature to copy while enacting Section 438. If it has not done so and has departed from a pattern which could easily be adopted with the necessary modifications, it would be wrong to refuse to give the departure its full effect by assuming that it was not intended to serve any particular or specific purpose. The departure, in our opinion, was made advisedly and purposefully.

Advisedly, at least in part, because of the 41st Report of the Law Commission which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant anticipatory bail, said in paragraph 39.9 that it had "considered carefully the question of laying down in the statute certain condition under which alone anticipatory bail could be granted" but had come to the conclusion that the question of granting such bail should be left "to the discretion of the court" and ought not to be fettered by the statutory provision itself, since the discretion was being conferred by upon superior courts which were expected to exercise it judicially. The legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail. That is why, departing from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session "may, if it thinks fit" direct that the applicant be released on bail. Sub-section (2) of Section 438 is a further and cleared manifestation of the same legislative intent to confer a wide discretionary power to grant

anticipatory bail. It provides that the High Court or the Court of Session, while issuing a direction for the grant of anticipatory bail, "may include such conditions in such directions in the light of the facts of the particular case, as it may think fit", including the conditions which are set out in clauses (i) to (iv) of sub-section (2). The proof of legislative intent can best be found in the language which the legislature uses. Ambiguities can undoubtedly be resolved by resort to extraneous aids but words, as wide and explicit as have been used in Section 438, must be given their full effect, especially when to refuse to do so will result in undue impairment of the freedom of the individual and the presumption of innocence. It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non-bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, insofar as one may, and to give full play to the presumption that he is innocent. In fact, the stage, at which anticipatory bail is generally sought, brings about its striking dissimilarity with the situation in which a person who is arrested for the commission of a non-bailable offence asks for bail. In the latter situation, adequate data is available to the court, or can be called for by it, in the light of which it can grant or refuse relief and while granting it, modify it by the imposition of all or any of the conditions mentioned in Section 437.

13. This is not to say that anticipatory bail, if granted, must be granted without the imposition of any conditions. That will be plainly contrary to the very terms of Section 438. Though sub-section (1) of that section says that the court "may, if it thinks fit" issue the necessary direction for bail, sub-section (2) confers on the court the power to include such conditions in the direction as it may think fit in the light of the facts of the particular case, including the conditions mentioned in clauses (i) to (iv) of that sub-section. The controversy therefore is not whether the court has the power to impose conditions while granting anticipatory bail. It clearly and expressly has that power. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think of it while granting anticipatory bail, should be cut down by reading into the statute conditions which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor General. Our answer, clearly, and emphatically, is in the negative. The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such condition as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant under Section 439 of the Code.

14. Generalisations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher

courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges. While dealing with the necessity for preserving judicial discretion unhampered by rules of general application Earl Loreburn, L.C. said in ***Hyman* v. *Rose*** [1912 AC 623]:

> I desire in the first instance to point out that the discretion given by the section is very wide …. Now it seems to me that when the Act is so expressed to provide a wide discretion, … it is not advisable to lay down any rigid rules for guiding that discretion. If it were otherwise, the free discretion given by the statute would be fettered by limitations, which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the court wish it had kept a free hand.

15. Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done it is apt to be overlooked that even judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a 'Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guidelines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail "if it thinks fit". The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the courts by law.

16. A close look at some of the rules in the eight-point code formulated by the High Court will show how difficult it is to apply them in practice. The seventh proposition says:

> The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under Section 438 of the Code should not be exercised.

17. How can the court, even if it had a third eye, assess the blatantness of corruption at the stage of anticipatory bail? And will it be correct to say that blatantness of the accusation will

suffice for rejecting bail, if the applicant's conduct is painted in colours too lurid to be true? The eighth proposition rule framed by the High Court says:

Mere general allegations of *mala fides* in the petition are inadequate. The court must be satisfied on materials before it that the allegations of *mala fides* are substantial and the accusation appears to be false and groundless.

Does this rule mean, and that is the argument of the learned Additional Solicitor-General, that anticipatory bail cannot be granted unless it is alleged (and naturally, also shown, because mere allegation is never enough) that the proposed accusation are *malafide*? It is understandable that if *mala fides* are shown, anticipatory bail should be granted in the generality of cases. But it is not easy to appreciate why an application for anticipatory bail must be rejected unless the accusation is shown to be *malafide*. This, truly, is the risk involved in framing rules by judicial construction. Discretion, therefore, ought to be permitted to remain in the domain of discretion, to be exercised objectively and open to correction by the higher courts. The safety of discretionary power lies in this twin protection which provides a safeguard against its abuse.

18. According to the sixth proposition framed by the High Court, the discretion under Section 438 cannot be exercised in regard to offences punishable with death or imprisonment for life unless, the court at the stage of granting anticipatory bail, is satisfied that such a charge appears to be false or groundless. Now, Section 438 confers on the High Court and the Court of Session the power to grant anticipatory bail if the applicant has reason to believe that he may be arrested on an accusation of having committed "a non-bailable offence". We see no warrant for reading into this provision the conditions subject to which bail can be granted under Section 437(1) of the Code. That section, while conferring the power to grant bail in cases of non-bailable offences, provides by way of an exception that a person accused or suspected of the commission of a non-bailable offence "shall not be so released" if there appear to be reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. *If it was intended that the exception contained in Section 437(1) should govern the grant of relief under Section 438(1), nothing would have been easier for the legislature than to introduce into the latter section a similar provision. We have already pointed out the basic distinction between these two sections. Section 437 applies only after a person, who is alleged to have committed a non-bailable offence, is arrested or detained without warrant or appears or is brought before a court. Section 438 applies before the arrest is made and, in fact, one of the pre-conditions of its application is that the person, who applies for relief under it, must be able to show that he has reason to believe that "he may be arrested", which plainly means that he is not yet arrested. The nexus which this distinction bears with the grant or refusal of bail is that in cases falling under Section 437, there is some concrete data on the basis of which it is possible to show that there appear to be reasonable grounds for believing that the applicant has been guilty of an offence punishable with death or imprisonment for life. In case falling under Section 438 that stage is still to arrive and, in the generality of cases thereunder, it would be premature and indeed difficult to predicate that there are or are not reasonable grounds for so believing. The foundation of the belief spoken of in Section 437(1), by reason of which the court cannot release there applicant on bail is, normally, the credibility of the allegations contained in the first*

information report. In the majority of cases falling under Section 438, that data will be lacking for forming the requisite belief. If at all the conditions mentioned in Section 437 are to be read into the provisions of Section 438, the transplantation shall have to be done without amputation. That is to say, on the reasoning of the High Court, Section 438(1) shall have to be read as containing the clause that the applicant "shall not" be released on bail "if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life". In this process one shall have overlooked that whereas, the power under Section 438(1) can be exercised if the High Court or the Court of Session "thinks fit" to do so, Section 437(1) does not confer the power to grant bail in the same wide terms. The expression "if it thinks fit", which occurs in Section 438(1) in relation to the power of the High Court or the Court of Session, is conspicuously absent in Section 437(1). We see no valid reason for rewriting Section 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court and the Court of Session but, for the purpose of limiting it. Accordingly, we are unable to endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefor is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal.

19. A great deal has been said by the High Court on the fifth proposition framed by it, according to which, *inter alia*, the power under Section 438 should not be exercised if the investigating agency can make a reasonable claim that it can secure incriminating material from information likely to be received from the offender under Section 27 of the Evidence Act. According to the High Court, it is right and the duty of the police to investigate into offences brought to their notice and therefore, courts should be careful not to exercise their powers in a manner, which is calculated to cause interference therewith. It is true that the functions of the judiciary and the police are in a sense complementary and not overlapping. And, as observed by the Privy Council in ***King-Emperor* v. *Khwaja Nazir Ahmed*** [AIR 1945 PC 18]:

> Just as it is essential that every one accused of a crime should have free access to a court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry .... The functions of the judiciary and the police are complementary, not overlapping, and the combination of the individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, . . .

But these remarks, may it be remembered, were made by the Privy Council while rejecting the view of the Lahore High Court that it had inherent jurisdiction under the old Section 561-A, Criminal Procedure Code, to quash all proceedings taken by the police in pursuance of two first information reports made to them. An order quashing such proceedings puts an end to the proceedings with the inevitable result that all investigation into the accusation comes to a halt. Therefore, it was held that the court cannot, in the exercise of its

inherent powers, virtually direct that the police shall not investigate into the charges contained in the FIR. We are concerned here with a situation of an altogether different kind. An order of anticipatory bail does not in any way, directly or indirectly, take away from the police their right to investigate into charges made or to be made against the person released on bail. In fact, two of the usual conditions incorporated in a direction issued under Section 438(1) are those recommended in subsection (2)(i) and (ii) which require the applicant to co-operate with the police and to assure that he shall not tamper with the witnesses during and after the investigation. While granting relief under Section 438(1), appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in ***State of U.P.*** **v.** ***Deoman Upadhyaya*** [AIR 1960 SC 1125] to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed so have surrendered himself to the police. The broad foundation of this rule is stated to be that Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody under Section 167(2) of the Code is made out by the investigating agency.

20. It is unnecessary to consider the third proposition of the High Court in any great details because we have already indicated that there is no justification for reading into Section 438 the limitations mentioned in Section 437. The High Court says that such limitation are implicit in Section 438 but, with respect, no such implication arise or can be read into that section. The plenitude of the section must be given its full play.

21. The High Court says in its fourth proposition that in addition to the limitations mentioned in Section 437, the petitioner must make out a "special case" for exercise of the power to grant anticipatory bail. This, virtually, reduces the salutary power conferred by Section 438 to a dead letter. In its anxiety, otherwise just, to show that the power conferred by Section 438 is not "unguided or uncanalised", the High Court has subjected that power to restraint which will have the effect of making the power utterly unguided. *To say that the applicant must make out a "special case" for the exercise of the power to grant anticipatory bail is really to say nothing. The applicant has undoubtedly to make out a case for the grant of anticipatory bail. But one cannot go further and say that he must make out a "special case". We do not see why the provisions of Section 438 should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable.* A wise exercise of judicial power inevitably takes care of the evil consequences, which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of matter in regard to which it is required to be

exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.

22. By proposition No. 1 the High Court says that the power conferred by Section 438 is "of an extraordinary character and must be exercised sparingly in exceptional cases only." It may perhaps be right to describe the power as of an extraordinary character because ordinarily the bail is applied for under Section 437 or Section 439. These sections deal with the power to grant or refuse bail to a person who is in the custody of the police and that is the ordinary situation in which bail is generally applied for. But this does not justify the conclusion that the power must be exercised in exceptional cases only because it is of an extraordinary character. We will really be saying once too often that all discretion has to be exercised with care and circumspection, depending on circumstances justifying its exercise. It is unnecessary to travel beyond it and subject the wide power conferred by the legislature to a rigorous code of self-imposed limitation.

23. It remains only to consider the second proposition formulated by the High Court, which is the only one with which we are disposed to agree but we will say more about it a little later.

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

> This power of granting 'anticipatory bail' is somewhat extraordinary in character and it is only in exceptional cases where it appears that a person might be falsely implicated, or a frivolous case might be launched against him, or "there are reasonable grounds for holding that a person accused of an offence is not likely to abscond or otherwise misuse his liberty while on bail" that such power is to be exercised.
>
> Fazal Ali, J. who delivered a separate judgment of concurrence also observed that: (SCC pp. 582-83, para 14)
>
> An order for anticipatory bail is an extraordinary remedy available in special cases . . . and proceeded to say:
>
> As Section 438 immediately follows Section 437 which is the main provision for bail in respect of non-bailable offences, it is manifest that the conditions imposed by Section 437(1) are implicitly contained in Section 438 of the Code. Otherwise the result would be that a person who is accused of murder can get away under Section 438 by obtaining an order for anticipatory bail without the necessity of proving that there were reasonable grounds for believing that he was not guilty of offence punishable with death of imprisonment for life. Such a course would render the provisions of Section 437 nugatory and will give a free licence to the accused persons charged with non-bailable offences to get easy bail by approaching the court under Section 438 and bypassing Section 437 of the Code. This, we feel could never have been the intention of the legislature. Section 438 does not contain unguided or uncanalised powers to pass an order for anticipatory bail, but such an order being of an exceptional type can only be passed if, apart from the

> conditions mentioned in Section 437, there is a special case made out for passing the order. The words "for a direction under this section" and "court may if it thinks fit, direct" clearly show that the court has to be guided by a large number of considerations including those mentioned in Section 437 of the Code.

While stating his conclusions Fazal Ali, J. reiterated in conclusion No. 3 that "Section 438 of the Code is an extraordinary remedy and should be resorted only in special cases."

25. We hold the decision in ***Balchand Jain*** in great respect but it is necessary to remember that the question as regards the interpretation of Section 438 did not at all arise in that case. Fazal Ali, J. has stated in paragraph 3 of his judgement that "the only point" which arose for consideration before the court was whether the provisions of Section 438 relating to anticipatory bail stand overruled and repealed by virtue of Rule 184 of the Defence and Internal Security of India Rules, 1971 or whether both the provisions can, by the rule of harmonious interpretation, exist side by side. Bhagwati, J. has also stated in his judgement, after adverting to Section 438 that Rule 184 is what the court was concerned with in the appeal. *The observations made in* ***Balchand Jain*** *regarding the nature of the power conferred by Section 438 and regarding the question whether the conditions mentioned in Section 437 should be read into Section 438 cannot therefore be treated as concluding the points which arise directly for our consideration. We agree, with respect, that the power conferred by Section 438 is of an extraordinarily character in the sense indicated above, namely, that it is not ordinarily resorted to like the power conferred by Section 437 and 439. We also agree that the power to grant anticipatory bail should be exercised with due care and circumspection but beyond that it is not possible to agree with observations made in* ***Balchand Jain*** *altogether different context on an altogether different point.*

26. We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in ***Maneka Gandhi*** [***Maneka Gandhi*** **v.** ***Union of India*** (1978) 1 SCC 248] that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438 in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs to avoid throwing it open to a constitutional challenge by reading words in it which are not to be found therein.

27. It is not necessary to refer to decision, which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in

Nagendra* v. *King-Emperor (AIR 1924 Cal 476) that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as punishment. In two other cases which, significantly, are the 'Meerut Conspiracy cases' observations are to be found regarding the right to bail, which deserve a special mention. In ***K. N. Joglekar* v. *Emperor*** (AIR 1931 All 504) it was observed, while dealing with Section 498 which corresponds to the present Section 439 of the Code, that it conferred upon the Sessions Judge or the High Court wide powers to grant bail which were not handicapped by the restrictions in the preceding Section 497 which corresponds to the present Section 437. It was observed by the court that there was no hard and fast rule and no inflexible principle governing the exercise of the discretion conferred by Section 498 and that the only principle which was established was that the discretion should be exercised judiciously. In ***Emperor* v. *Hutchinson*** (AIR 1931 All 356) it was said that it was very unwise to make an attempt to lay down any particular rules which will bind the High Court, having regard to the fact that the legislature itself left the discretion of the court unfettered. According to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the principle to be deduced from the various sections in the Criminal Procedure Code was that grant of bail is the rule and refusal is the exception. An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.

28. Coming nearer home, it was observed by Krishna Iyer, J., in ***Gudikanti Narasimhulu* v. *Public Prosecutor*** [(1978) 1 SCC 240] that:. . . the issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. . . . After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law. The last four words of Article 21 are the life of that human right.

29. In ***Gurcharan Singh* v. *State (Delhi Administration)*** [(1978) 1 SCC 118] it was observed by Goswami, J., who spoke for the court that:

> There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail.

30. In ***AMERICAN JURISPRUDENCE*** (2d, Volume 8, page 806, para 39), it is stated:

> Where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since the object of the detention or imprisonment of the accused is to secure his appearance and submission to the jurisdiction and the judgement of the court, the primary inquiry is whether a recognizance or bond would effect that end.

> It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.

31. In regard to anticipatory bail if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by *mala fides*; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. The relevance of these considerations was pointed out in ***The State* v. *Captain Jagjit Singh*** (AIR 1962 SC 253), which, though was a case under the old Section 498 which corresponds to the present Section 439 of the Code. It is of paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it is for the egoistic purpose of the individual. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on his freedom, by the acceptance of condition which the court may think fit to impose, in consideration of the assurance that if arrested he shall be enlarged on bail.

32. A word of caution may perhaps be necessary in the evaluation of the consideration whether the applicant is likely to abscond. There can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, any more than there can be a presumption that the former are not likely to commit a crime and the latter are more likely to commit it. In his charge to the grand jury at Salisbury Assizes, 1899 (to which Krishna Iyer, J. has referred in ***Gudikanti*** [(1978) 1 SCC 240], Lord Russel of Killowen said:

> (I)t was the duty of magistrates to admit accused persons to bail, wherever practicable, unless there were strong grounds for supposing that such persons would not appear to take their trial. It was not the poorer classes who did not appear, for their circumstances were such as to tie them to the place where they carried on their work. They had not the golden wings with which to fly from justice.

This, incidentally, will serve to show how no hard and fast rules can be laid down in discretionary matters like the grant or refusal of bail, whether anticipatory or otherwise. No

such rules can be laid down for the simple reason that a circumstance which, in a given case, turns out to be conclusive, may have no more than ordinary signification in another case.

33. We would therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic to take a statute as one finds it on the ground that, after all, "the legislature in its wisdom" has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected.

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

35. Section 438(1) of the Code lays down a condition, which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. *Mere 'fear' is not 'belief', for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1) therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of application for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any or all kinds of accusations, likely or unlikely.*

36. Secondly if an application for anticipatory bail is made to the High Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the Magistrate concerned under Section 437 of the Code, as and when an occasion arises. Such a course will defeat the very object of Section 438.

37. Thirdly, the filing of a first information report is not a condition precedent to the exercise of the power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed.

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

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

40. We have said that there is one proposition formulated by the High Court with which we are inclined to agree. That is proposition (2). We agree that a 'blanket order' of anticipatory bail should not generally be passed. This flows from the very language of the section which, as discussed above, requires the applicant to show that he has "reason to believe" that he may be arrested. *A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. That is why, normally, a direction should not issue under Section 438(1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". That is what is meant by a 'blanket order' of anticipatory bail, an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had. The rationale of a direction under Section 438(1) is the belief of the applicant founded on reasonable grounds that he may be arrested for a non-bailable offence. It is unrealistic to expect the applicant to draw up his application with the meticulousness of a pleading in a civil case and such is not requirement of the section. But specific events and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.*

41. Apart from the fact that the very language of the statute compels this construction, there is an important principle involved in the insistence that facts, on the basis of which a direction under Section 438(1) is sought must be clear and specific, not vague and general. It is only by the observance of that principle that a possible conflict between the right of an individual to his liberty and the right of the police to investigate into crimes reported to them can be avoided. A blanket order of anticipatory bail is bound to cause serious interference with both the right and the duty of the police in the matter of investigation because, regardless of what kind of offence is alleged to have been committed by the applicant and when, an order of bail which comprehends allegedly unlawful activity of any description whatsoever, will prevent the police from arresting the applicant even if he commits, say, a murder in the presence of the public. Such an order can then become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed. Therefore, the court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective. The power should not be exercised in a vacuum.

42. There was some discussion before us on certain minor modalities regarding the passing of bail orders under Section 438(1). Can an order of bail be passed under the section without notice to the Public Prosecutor? It can be. But notice should issue to the Public Prosecutor or the Government Advocate forthwith and the question of bail should be re-

examined in the light of the respective contentions of the parties. The *ad interim* order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed under Section 438(1) be limited in point of time? Not necessarily. The court may, if there are reasons for doing so, limit the operation of the order to a short period unit after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time.

43. During the last couple of years this Court, while dealing with appeals against orders passed by various High Courts, has granted anticipatory bail to many a person by imposing conditions set out in Section 438(2) (i), (ii) and (iii). The court has, in addition, directed in most of those cases that (a) the applicant should surrender himself to the police for a brief period if a discovery is to be made under Section 27 of the Evidence Act or that he should be deemed to have surrendered himself if such a discovery is to be made. In certain exceptional cases, the court has, in view of the material placed before it, directed that the order of anticipatory bail will remain in operation only for a week or so until after the filling of the FIR in respect of matters covered by the order. These orders, on the whole, have worked satisfactorily, causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. The court has attempted through those orders to strike a balance between the individual's right to personal freedom and the investigational rights of the police. The appellants who were refused anticipatory bail by various courts have long since been released by this Court under Section 438(1) of the Code.

44. The various appeals and special leave petitions before us will stand disposed of in terms of this judgment. The judgment of the Full Bench of the Punjab and Haryana High Court, which was treated as the main case under appeal is substantially set aside as indicated during the course of this judgment.

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State (Delhi Administration) v. *Sanjay Gandhi*

(1978) 2 SCC 411

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

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

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

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

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

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

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

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

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

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

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

15. Our task therefore is to determine whether, by the application of the test of probabilities, the prosecution has succeeded in proving its case that the respondent has tampered with its witnesses and that there is a reasonable apprehension that he will continue to indulge in that course of conduct if he is allowed to remain at large. Normally, the High Court's findings are treated by this Court as binding on such issues but, regretfully, we have to depart from that rule since the High Court has rejected incontrovertible evidence on hypertechnical considerations. If two views of the evidence were reasonably possible and the High Court had taken one view, we would have been disinclined to interfere therewith in this appeal under Article 136 of the Constitution. But the evidence points in one direction only,

leaving no manner of doubt that the respondent has misused the facility afforded to him by the High Court by granting anticipatory bail to him.

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

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

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

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

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

be said "what part of the affidavit is true to the knowledge of the deponent and what part thereof is true to the belief of the deponent". This reason has been cited by the learned Judge for rejecting many an incident but then it was open to him to ask for better particulars of verification. The witnesses claim to have seen with their own eyes that Yadav drove away with the respondent. The incident consisted of one single event and there was no possibility of the witnesses' knowledge being mixed up with their belief. We find it impossible to endorse this part of the High Court's reasoning and are inclined to the view that the respondent ultimately succeeded in establishing contact with Yadav. Whether the respondent succeeded in achieving his ultimate object is beyond us to, say except that Yadav turned hostile in the Committing Magistrate's court on February 21.

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

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

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

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

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

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

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

Abdul Karim v. *State of Karnataka*

(2000) 8 SCC 710

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

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

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

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

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

"Demand:

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

Response:

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

Demand:

2. Adequate compensation for Tamil victims of 1991 riots.

Response:

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

Demand:

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

Response:

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

Demand:

4. Unveiling of Tiruvalluvar statue at Bangalore.

Response:

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

Demand:

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

Response:

Karnataka Government will take steps to have the stay vacated.

Demand:

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

Response:

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

Demand:

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

Response:

Will be considered favourably after collecting particulars.

Demand:

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

Response:

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

Demand:

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

Response:

Will be considered favourably.

Demand:

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

Response:

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

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

Demand:

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

Response:

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

Demand:

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

Response:

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

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

It is submitted by the Special Public Prosecutor as follows:

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

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

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

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

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

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

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

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

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

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

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

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

> *2*. The Special Cases Nos. 44 of 1994, 11 of 1997 and 3 of 1998 arise out of a charge-sheet in Crime No. 70 of 1992 of Ramapura Police Station against Veerappan and others for offences under Sections 143 147, 148, 341, 342, 120-B, 326, 307, 302, 396 read with Section 149 IPC, Sections 3, 4 and 5 of the Indian Explosives Act, Sections 3 and 25 of the Arms Act and also under Sections 3, 4 and 5 of the Terrorist and Disruptive Activities (Prevention) Act, alleging that on the afternoon of 14-8-1992, Veerappan and his associates had attacked the then Superintendent of Police, Mysore, Shri Harikrishna and the then Sub-Inspector of Police Shri Shakeel Ahamed and other police personnels, who had been there to nab Veerappan and in the encounter, six police personnel were killed and many of them were injured and vehicles were damaged and the weapons and wireless set belonging to the Police Department were taken away. The charge-sheet had been laid against 168 persons, of them 30 accused are in custody and 45 are on bail and rest of them are shown as absconding.
>
> *3*. The Special Cases Nos. 63 of 1994, 13 of 1997 and 20 of 1998 arise out of a charge-sheet filed in Crime No. 41 of 1992 of Ramapura Police Station against Veerappan and 162 others alleging that on the night of 19/20-5-1992, the accused had attacked Rampura Police Station and caused the death of five police personnel and caused injuries to other police staff, thereby the accused are said to have committed offences punishable under Sections 302, 307, 324, 326, 396 read with Section 149 IPC, Sections 3 and 25 of the Indian Arms Act, Sections 3, 4 and 5 of the Terrorist and Disruptive Activities (Prevention) Act. Of the said accused, 46 accused are on bail and 30 accused are in custody and rest of them have been shown to be absconding.
>
> *4*. The Special Cases Nos. 66 of 1994, 14 of 1997 and 21 of 1998 arise out of a charge-sheet submitted by M.M. Hills Police in Crl. No. 12 of 1993 alleging that the accused had attacked police personnel on 24-5-1993 near Rangaswamy Voddu on M.M Hills-Talabetta Road, near 18/28 S: Curve and in the attack the Superintendent of Police Shri Gopal Hosur and his driver Ravi were injured and six police personnel were killed and four police personnel were injured and thereby the accused are said to have committed offences punishable under Sections 143, 148, 120-B, 341, 353, 395, 302, 109, 114 read with Section 149 IPC, Sections 3, 4 and 5 of the Indian Explosives Act, Sections 3 and 25 of the Indian Arms Act and also under Sections 3, 4 and 5 of the Terrorist and Disruptive Activities (Prevention) Act. The charge-sheet has been submitted against 98 accused persons. Of them, 7 accused are on bail, 26 accused are in custody and others are shown to be absconding.
>
> *5*. The Special Cases Nos. 67 of 1994, 12 of 1997 and 19 of 1998 arise out of a charge-sheet submitted by M.M. Hills Police against 143 accused persons alleging that on 9-4-1993 at Sorekayee Madu the accused had attacked and killed 22 persons belonging to

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

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

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

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

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

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

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

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

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

13. On 14-8-2000 the Government of the State of Tamil Nadu issued a Government Order directing that charges against one Radio Venkatesan in respect of two cases registered against

him under the provisions of the TADA (Prevention) Act be withdrawn "in the public interest". The Inspector General of Police Intelligence, Chennai was directed to take necessary action accordingly. On 16-8-2000 the Special Public Prosecutor before the Designated Court (TADA Act) at Chennai made two applications to that court under the provisions of Section 321 of the Criminal Procedure Code. They stated that Radio Venkatesan was charged before the Designated Court in cases arising under the TADA Act, the Explosive Substances Act, the Indian Penal Code and the Arms Act and the cases were pending for framing charges. The applications added,

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

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

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

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

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

The applications were allowed accordingly.

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

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

his proceedings first read above, under NSA against Thiru Sathyamoorthy @ Sathya @Kandasamy @ Neelan and to release him from detention under NSA.

2. NOW THEREFORE in exercise of the powers conferred by clause (a) of sub-section (1) of Section 14 of the National Security Act, 1980, the Governor of Tamil Nadu hereby revokes the order of detention made by the District Collector and District Magistrate, Erode District, against Thiru Sathyamoorthy @ Sathya @ Kandasamy @ Neelan, s/o Thiru Nataraja Muthiraiyar, in the proceedings first read above and direct that the said Thiru Sathyamoorthy @ Sathya @ Kandasamy @ Neelan, be released from detention under the said Act forthwith. This order applies only in respect of detention under the National Security Act.

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

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

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

19. The law, therefore, is that though the Government may have ordered, directed or asked a Public Prosecutor to withdraw from a prosecution, it is for the Public Prosecutor to apply his mind to all the relevant material and, in good faith, to be satisfied thereon that the

public interest will be served by his withdrawal from the prosecution. In turn, the court has to be satisfied, after considering all that material, that the Public Prosecutor has applied his mind independently thereto, that the Public Prosecutor, acting in good faith, is of the opinion that his withdrawal from the prosecution is in the public interest, and that such withdrawal will not stifle or thwart the process of law or cause manifest injustice.

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

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

which he could have been satisfied that the Special Public Prosecutor had applied his mind thereto and had reached, in good faith, the conclusion that the withdrawal he sought was necessary for the reasons he pleaded. The learned Judge placed on record, as he called it, the decision of this Court in the case of ***Sheonandan Paswan***, referred to above, but he did not appreciate what it required of a Public Prosecutor and of a court in regard of Section 321, and he did not follow it. The order granting consent on the Special Public Prosecutor's application, therefore, does not meet the requirements of Section 321 and is bad in law.

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

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

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

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

24. The affidavit of the Minister for Law states:

> 2. That I have been party to most of the decisions which have been taken in this matter, which has culminated in the issuance of the Government Order dated 8-8-2000 requesting the Special Public Prosecutor, in charge of the TADA cases pending before the Designated Court at Mysore against Veerappan and his associates, to withdraw the charges under TADA.
> 3. I also held a meeting with the Special Public Prosecutor in charge of the cases, on 5-8-2000 in my office in Vidhan Soudha, Bangalore. The discussions held during the meeting and the persons present have already been stated in the affidavit of Shri Ashwini Kumar Joshi which I confirm.
> 4. Prior to this meeting, the problems arising out of the abduction of Dr Rajkumar, the options available to the State Government to deal with this crisis and the responses of the Government publicly announced to Veerappan's demands, have all been discussed at

various levels including in informal meetings held between me, the Home Minister and the Chief Minister as well as the Cabinet meetings which have been held frequently during the period 1-8-2000 to 8-8-2000.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. Given that the Government of the States of Karnataka and Tamil Nadu had not for 10 years apprehended Veerappan and brought him to justice, was this a ploy adopted by them to keep Veerappan out of the clutches of the law?

26. The affidavit of the Special Public Prosecutor states:

6. On 5-8-2000, I was called by the Office of the Hon'ble Law Minister for a meeting in his chamber in Vidhan Soudha, Bangalore.

7. When I went to the meeting, the Special Secretary (Law) and the Director of Prosecutions as well as the Additional Director General of Police (Intelligence) were present. We discussed the matter relating to withdrawal of TADA charges against these 51 accused at considerable length for over 2 hours. In the course of the discussion, I recall that I was informed, inter alia, that the negotiations had reached a point where it was felt that withdrawal of TADA charges against these 51 accused would secure the release of Dr Rajkumar. I was informed that the Government had intelligence reports and that if any harm were to be caused to Dr Rajkumar, it would lead to problems between the two linguistic communities in the State. I was informed that apprehending trouble, schools and colleges had been declared closed immediately in the whole State and they were closed up to 5-8-2000. I was informed of the incidents, which had occurred in Bangalore City on 31-7-2000 as an aftermath of this incident of kidnapping also showed that the abduction was being construed by the people as an issue between two communities. The character of the incident showed that these people were ready to indulge in acts of violence. I was also informed that acting on intelligence reports, the Government had taken steps to arrange for deployment of central forces, such as the Rapid Action Force, Armed Reserve Police, and Paramilitary Force from the neighbouring States and some steps had already been taken and others were likely to be taken.

8. I was informed by the Hon'ble Law Minister that the Cabinet had also informally discussed this matter in its urgent meeting held on 3-8-2000 and that a decision had been taken to take appropriate steps and on that basis the Government would formally request me to take appropriate steps to withdraw TADA charges.

9. On 8-8-2000 the GO issued by the Government along with its covering letter was duly forwarded to me through the Law Department. A copy of the said GO and the connected documents are collectively annexed hereto and marked as Annexure A.

10. Based on my understanding of the situation, which in turn, was based on the aforesaid material, and the information which had been given to me which I believed to be true, I decided that it would be in the interest of public peace and maintenance of law and order in the State to withdraw the charges against the 51 TADA detenus.

> 11. I respectfully submit that the information which had been provided to me by the Additional Director General of Police (Intelligence), the Hon'ble Law Minister and others present in the meeting as well as my own knowledge of local events (being a resident of Mysore for 27 years and having witnessed the problems which had resulted after the Cauvery riots), I felt there was substance in the Government's request that any such step which could secure the release of Dr Rajkumar would be a step to protect public peace. I felt that if withdrawal of TADA charges which would enable the accused to file necessary bail applications and their consequent release on bail could preserve amity between the two communities, it would outweigh the likely problems which would arise on the release of these 51. In arriving at this decision that I was influenced by the fact that the 73 co-accused who had already been enlarged on bail (by the court) had complied with the bail conditions which suggested that they had not gone back to their old ways. There were 12 women, 3 old persons of 70 years age and 3 persons aged between 55-60 amongst TADA accused. I also considered the facts that they had been in the jail for six to seven years.
>
> 12. I was also informed in the course of the aforesaid meetings that in other districts also some incidents have been reported. I believed the statement as I had no reason to doubt its credibility. I have subsequently ascertained the particulars of the cases which are hereto annexed and marked as Annexure C.

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

28. The affidavit of the Special Public Prosecutor speaks of "withdrawal of TADA charges which would enable the accused to file necessary bail applications and their consequent release on bail …." It is, thus, clear that what was envisaged by the Government of the State of Karnataka and the Special Public Prosecutor was a package which comprised of the withdrawal of TADA charges against the respondents-accused and their release on bail on applications filed by them. This indicates complicity with the respondents-accused. It will have been noticed that stress was laid by the Special Public Prosecutor in his application under Section 321 on the fact that the prosecutions against the respondents-accused on charges other than under the TADA Act would continue, and this was noted in the order of the Designated Court. The Designated Court was not told either in the application or thereafter that the Government of the State of Karnataka and the Special Public Prosecutor

had in mind that the respondents-accused would file bail applications subsequent to the order under Section 321 which would not be opposed. There can, in the circumstances, be little doubt that after their release on bail the respondents-accused were not expected to attend the court to answer the remaining charges against them and that the stress laid as aforesaid was intended to mislead the Designated Court. We deprecate the conduct of the Government of the State of Karnataka and the Special Public Prosecutor in this behalf. We deem it appropriate, in the facts and circumstances, to set aside the orders granting bail to the respondents-accused.

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

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

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

32. The Government of the State of Tamil Nadu had been apprised that Rajkumar faced the risk of being kidnapped by Veerappan when he visited his farmhouse at Gajanoor. It knew that Rajkumar was unlikely to give advance intimation of his visits: he had visited Gajanoor

for the house-warming ceremony of his new farmhouse in June 2000 without prior notice. To put it mildly, it would have been prudent, in the circumstances, to post round the clock at Rajkumar's farmhouse in Gajanoor one or two policemen who could inform their local station house of his arrival there and thus ensure his safety.

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

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

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

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

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

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

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

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

(C) Veerappan and his gang members hatched a conspiracy to kill Superintendent of Police, Mysore District, Shri Harikrishna and Sub-Inspector of Police of M.M. Hills Shri Shakeel Ahamed and other police personnel who had been there to nab Veerappan with a view to terrorise the police force and to put fear of death into the minds of policemen who were performing duty in attempting to arrest the wanted persons. Various charges relating to murder, ambush, attempt to overawe the Government of Karnataka, killing of

elephants, smuggling of sandalwood etc. from the forest, possession of arms and ammunition, opening of fire on task force personnel, have been framed against accused who are said to be the associates of Veerappan. Cases filed against them are under the provisions of Terrorist and Disruptive Activities (Prevention) Act (TADA) and other penal provisions, i.e., Indian Penal Code, Arms Act and Explosive Substances Act.

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

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

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

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

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

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

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

40. The application filed under Section 321 has been reproduced in extenso in the judgment of Justice Bharucha. The application makes no reference whatsoever to any such arrangement as mentioned at (*I*) above. The main ground stated in the application is that in order to restore the peace and normalcy in the border area and among the people living in the border area and to maintain peace among the public in general and inhabitants of the particular village, the Prosecutor has decided to withdraw from the prosecution against the accused charged of the offences punishable under Sections 3, 4 and 5 of TADA. Abdul Karim, father of Shakeel Ahamed, opposed the application on various grounds, inter alia, stating in the objection petition that if the cases against the hard core criminals are withdrawn or if they are released on bail that may expose the families of the victims to terror unleashed by the TADA detenus, who may unleash terror and jeopardise public order and cause detriment to the general public interest. In reply to the said objections, instead of admitting that TADA charges are being withdrawn to facilitate grant of bail, the stand taken by the

Public Prosecutor, inter alia, is that Veerappan and his associates will not be let out freely as they will be facing prosecution for other offences and, therefore, the submission that the State Government has yielded to blackmail tactics of outlaw Veerappan is not correct.

41. The Public Prosecutor has to be straight, forthright and honest and has to admit the arrangement and inform the court that the real arrangement is to ultimately facilitate the release of these accused from judicial custody by not opposing the bail applications after the withdrawal of TADA charges. The arrangement as set out above has neither been disputed nor is it capable of being disputed. It is well established that the real purpose for withdrawal of TADA charges was to facilitate the grant of bail to the accused. In such circumstances, why the camouflage? Why is it not so stated in the application filed under Section 321? In fact, it is a deceit. These are the questions for which there is no plausible answer. No court of law can be a party to such a camouflage and deceit in judicial proceedings. The answer to these basic questions cannot be that the Judge knew about it from the very nature of the case. Under these circumstances, it cannot be said that the application was made in good faith.

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

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

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

45. The application and order under Section 321 is a result of panic reaction by overzealous persons without proper understanding of the problem and consideration of the relevant material, though they may not have any personal motive. It does not appear that anybody considered that if democratically-elected governments give an impression to the citizens of this country of being lawbreakers, would it not breed contempt for law; would it not invite citizens to become a law onto themselves. It may lead to anarchy. The Governments

have to consider and balance the choice between maintenance of law and order and anarchy. It does not appear that anyone considered this aspect. It yielded to the pressure tactics of those who according to the Government are out to terrorise the police force and to overawe the elected Governments. It does not appear that anyone considered that with their action people may lose faith in the democratic process, when they see public authority flouted and the helplessness of the Government. The aspect of paralysing and discrediting the democratic authority had to be taken into consideration. It is the executive function to decide in the public interest to withdraw from prosecution as claimed, but it is also for the Government to maintain its existence. The self-preservation is the most pervasive aspect of sovereignty. To preserve its independence and territories is the highest duty of every nation and to attain these ends nearly all other considerations are to be subordinated. Of course, it is for the State to consider these aspects and take a conscious decision. In the present case, without consideration of these aspects the decision was taken to withdraw TADA charges. It is evident from material now placed on record before this Court that Veerappan was acting in consultation with secessionist organisations/groups which had the object of liberation of Tamil from India. There is no serious challenge to this aspect. None of the aforesaid aspects were considered by the Government or the Public Prosecutors before having recourse to Section 321 Cr.P.C.

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

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Zahira Habibulla H. Sheikh v. *State of Gujarat*

(2004) 4 SCC 158

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

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

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

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

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

5. Zahira appeared before National Human Rights Commission (in short the 'NHRC') stating that she was threatened by powerful politicians not to depose against the accused persons. On 7.8.2003 an appeal not up to the mark and neither in conformity with the required care, appears to have been filed by the State against the judgment of acquittal before the Gujarat High Court. NHRC moved this Court and its Special leave petition has been treated

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

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

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

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

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

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

10. x x x x x x x x x

21. Section 391 of the Code is intended to sub-serve the ends of justice by arriving at the truth and there is no question of filling of any lacuna in the case on hand. The provision though a discretionary one is hedged with the condition about the requirement to record reasons. All these aspects have been lost sight of and the judgment, therefore, is indefensible. It was submitted that this is a fit case where the prayer for retrial as a sequel to acceptance of additional evidence should be directed. Though, the re-trial is not the only result flowing from acceptance of additional evidence, in view of the peculiar circumstances of the case, the proper

course would be to direct acceptance of additional evidence and in the fitness of things also order for a re-trial on the basis of the additional evidence.

x x x x x x x x x x x

29. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operating principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involve a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

30. In 1846, in a judgment which Lord Chancellor Selborne would later describe as "one of the ablest judgments of one of the ablest judges who ever sat in this court". Vice-Chancellor Knight Bruce said:

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

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

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

> It is the merit of the common law that it decides the case first and determines the principle afterwards ... It is only after a series of determination on the same subject-matter, that it becomes necessary to "reconcile the cases", as it s called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it at every step.

32. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies

of the situation - peculiar at times and related to the nature of crime, persons involved - directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system.

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

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

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

35. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be

correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

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

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

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

judicial trial, the situation may be said to have deteriorated to such an extent as to warrant transfer. In a decision cited by the counsel for the petitioner, Bose, J., observed :

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

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

7. Nevertheless, we cannot view with unconcern the potentiality of a flare up and the challenge to a fair trial, in the sense of a satisfactory participation by the accused in the proceedings against her. Mob action may throw out of gear the wheels of the judicial process. Engineered fury may paralyse a party's ability to present his case or participate in the trial. If the justice system grinds to a halt through physical manoeuvres or sound and fury of the senseless populace the rule of law runs aground. Even the most hated human anathema has a right to be heard without the rage of ruffians or huff of toughs being turned against him to unnerve him as party or witness or advocate. Physical violence to a party, actual or imminent, is reprehensible when he seeks justice before a tribunal. Manageable solutions must not sweep this Court off its feet into granting an easy transfer but uncontrollable or perilous deterioration will surely persuade us to shift the venue. It depends. The frequency of mobbing manoeuvres in court precincts is a bad

omen for social justice in its wider connotation. We, therefore, think it necessary to make a few cautionary observations which will be sufficient, as we see at present, to protect the petitioner and ensure for her a fair trial.

37. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny.

38. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.

39. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

40. "Witnesses" as Bentham said: “are the eyes and ears of justice”. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smoother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for

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

41. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the society. On the contrary, the efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance if not more, as the interests of the individual accused. In this courts have a vital role to play.

42. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

43. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Court to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In ***Mohan Lal* v. *Union of India*** [1991 Supp (1) SCC 271] this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, 'any Court' 'at any stage', or 'any enquiry or trial or other proceedings' 'any person' and 'any such person' clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that here is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

44. It is not that in every case where the witness who had given evidence before Court wants to change his mind and is prepared to speak differently, that the Court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate Court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the Court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the Court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The Court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in.

45. Ultimately, as noted above, ad nauseam the duty of the Court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer any party any right to examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by Courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.

46. Section 391 of the Code is another salutary provision which clothes the Courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose it is open to the appellate Court to call for further evidence before the appeal is disposed of. The appellate Court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the Court to direct that the accused persons may also be given a chance of adducing further evidence. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, especially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of Section 391 is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the Court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under Section 391 is desirable.

47. The legislative intent in enacting Section 391 appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper findings, it would be justified in taking action under Section 391.

48. There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the Section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of the discretion of the appellate Court. As re-iterated supra the ends of justice are not satisfied only when the accused in a criminal case is acquitted. The

community acting through the State and the public prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions.

49. In ***Rambhau* v. *State of Maharashtra*** [2001 (4) SCC 759] it was held that the object of Section 391 is not to fill in lacuna, but to subserve the ends of justice. The Court has to keep these salutary principle in view. Though wide discretion is conferred on the Court, the same has to be exercised judicially and the Legislature had put the safety valve by requiring recording of reasons.

50. Need for circumspection was dealt with by this Court in ***Mohanlal Shamji Soni's*** case (*supra*) and ***Ram Chander* v. *State of Haryana*** [1981 (3) SCC 191]which dealt with the corresponding Section 540 of Code of Criminal Procedure, 1898 (in short the 'Old Code') and also in ***Jamatraj's*** case. While dealing with Section 311 this Court in ***Rajendra Prasad* v. *Narcotic Cell through Its officer in Charge, Delhi*** [1999 (6) SCC 110] held as follows:

> 7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the court could not "fill the lacuna in the prosecution case". A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.
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> 8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

51. Whether a retrial under Section 386 or taking up of additional evidence under Section 391 is the proper procedure will depend on the facts and circumstances of each case for which no straight-jacket formula of universal and invariable application can be formulated.

52. In the ultimate analysis whether it is a case covered by Section 386 or Section 391 of the Code the underlying object which the Court must keep in view is the very reasons for which the Courts exist i.e. to find out the truth and dispense justice impartially and ensure also that the very process of Courts are not employed or utilized in a manner which give room to unfairness or lend themselves to be used as instruments of oppression and injustice.

53. Though justice is depicted to be blind-folded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administer justice and not to ignore or turn the mind/attention of the Court away from the truth of the cause or lis before it, in disregard of its duty to prevent miscarriage of justice. When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of Courts and erode in stages faith inbuilt in judicial system ultimately destroying the very justice delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings.

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67. If one even cursorily glances through the records of the case, one gets a feeling that the justice delivery system was being taken for a ride and literally allowed to be abused, misused and mutilated by subterfuge. The investigation appears to be perfunctory and anything but impartial without any definite object of finding out the truth and bringing to book those who were responsible for the crime. The public prosecutor appears to have acted more as a defence counsel than one whose duty was to present the truth before the Court. The Court in turn appeared to be a silent spectator, mute to the manipulations and preferred to be indifferent to sacrilege being committed to justice. The role of the State Government also leaves much to be desired. One gets a feeling that there was really no seriousness in the State's approach in assailing the Trial Court's judgment. This is clearly indicated by the fact that the first memorandum of appeal filed was an apology for the grounds. A second amendment was done, that too after this Court expressed its unhappiness over the perfunctory manner in which the appeal was presented and challenge made. That also was not the end of the matter. There was a subsequent petition for amendment. All this sadly reflects on the quality of determination exhibited by the State and the nature of seriousness shown to pursue the appeal. Criminal trials should not be reduced to be the mock trials or shadow boxing or fixed trials. Judicial Criminal Administration System must be kept clean and beyond the reach of whimsical political wills or agendas and properly insulated from discriminatory standards or yardsticks of the type prohibited by the mandate of the Constitution.

68. Those who are responsible for protecting life and properties and ensuring that investigation is fair and proper seem to have shown no real anxiety. Large number of people had lost their lives. Whether the accused persons were really assailants or not could have been established by a fair and impartial investigation. The modern day 'Neros' were looking elsewhere when Best Bakery and innocent children and helpless women were burning, and were probably deliberating how the perpetrators of the crime can be saved or protected. Law and justice become flies in the hands of these "wanton boys". When fences start to swallow the crops,

no scope will be left for survival of law and order or truth and justice. Public order, as well as public interest, become martyrs and monuments.

69. In the background of principles underlying Section 311 and Section 391 of the Code and Section 165 of the Evidence Act it has to be seen as to whether the High Court's approach is correct and whether it had acted justly, reasonably and fairly in placing premiums on the serious lapses of grave magnitude by the prosecuting agencies and the Trial Court, as well. There are several infirmities which are tell- tale even to the naked eye of even an ordinary common man. The High Court has come to a definite conclusion that the investigation carried out by the police was dishonest and faulty. That was and should have been per se sufficient justification to direct a re-trial of the case. There was no reason for the High Court to come to the further conclusion of its own about false implication without concrete basis and that too merely on conjectures. On the other hand, the possibility of the investigating agency trying to shield the accused persons keeping in view the methodology adopted and outturn of events can equally be not ruled out. When the investigation is dishonest and faulty, it cannot be only with the purpose of false implication. It may also be noted at this stage that the High Court has even gone to the extent of holding that the FIR was manipulated. There was no basis for such a presumptive remark or arbitrary conclusion.

70. The High Court has come to a conclusion that Zahira seems to have unfortunately for some reasons after the pronouncement of the judgment fallen into the hands of some who prefer to remain behind the curtain to come out with the affidavit alleging threat during trial. It has rejected the application for adducing additional evidence on the basis of the affidavit, but has found fault with the affidavit and hastened to conclude unjustifiably that they are far from truth by condemning those who were obviously victims. The question whether they were worthy of credence, and whether the subsequent stand of the witnesses was correct needed to be assessed, and adjudged judiciously on objective standards which are the hallmark of a judicial pronouncement. Such observations if at all could have been only made after accepting the prayer for additional evidence. The disclosed purpose in the State Government's prayer with reference to the affidavits was to bring to High Court's notice the situation which prevailed during trial and the reasons as to why the witnesses gave the version as noted by the Trial Court. Whether the witness had told the truth before the Trial Court or as stated in the affidavit, were matters for assessment of evidence when admitted and tendered and when the affidavit itself was not tendered as evidence, the question of analysing it to find fault was not the proper course to be adopted. The affidavits were filed to emphasise the need for permitting additional evidence to be taken and for being considered as the evidence itself. The High Court has also found that some persons were not present and, therefore, question of their statement being recorded by the police did not arise. For coming to this conclusion, the High Court noted that the statements under Section 161 of the Code were recorded in Gujarati language though the witnesses did not know Gujarati. The

reasoning is erroneous for more reasons than one. There was no material before the High Court for coming to a finding that the persons did not know Gujarati since there may be a person who could converse fluently in a language though not a literate to read and write. Additionally, it is not a requirement in law that the statement under Section 161 of the Code has to be recorded in the language known to the person giving the statement. As a matter of fact, the person giving the statement is not required to sign the statement as is mandated in Section 162 of the Code. Sub-section (1) of Section 161 of the Code provides that the competent police officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case. Requirement is the examination by the concerned police officer. Sub-section (3) is relevant, and it requires the police officer to reduce into writing any statement made to him in the course of an examination under this Section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records. Statement made by a witness to the police officer during investigation may be reduced to writing. It is not obligatory on the part of the police officer to record any statement made to him. He may do so if he feels it necessary. What is enjoined by the Section is a truthful disclosure by the person who is examined. In the above circumstance the conclusion of the High Court holding that the persons were not present is untenable. The reasons indicated by the High Court to justify non-examination of the eye-witnesses is also not sustainable. In respect of one it has been said that whereabouts of the witness may not be known. There is nothing on record to show that the efforts were made by the prosecution to produce the witness for tendering evidence and yet the net result was 'untraceable'. In other words, the evidence which should have been brought before the Court was not done with any meticulous care or seriousness. It is true that the prosecution is not bound to examine each and every person who has been named as witness. A person named as a witness may be given up when there is material to show that he has been gained over or that there is no likelihood of the witness speaking the truth in the Court. There was no such material brought to the notice of the Courts below to justify non-examination. The materials on record are totally silent on this aspect. Another aspect which has been lightly brushed aside by the High Court is that one person who was to be examined on a particular date was examined earlier than the date fixed. This unusual conduct by the prosecutor should have been seriously taken note of by the Trial Court and also by the High Court. It is to be noted that the High Court has found fault with DCP Shri Piyush Patel and has gone to the extent of saying that he has miserably failed to discharge his duties; while finding at the same time that police inspector Baria had acted fairly. The criticism according to us is uncalled for. Role of Public Prosecutor was also not in line with what is expected of him. Though a Public Prosecutor is not supposed to be a persecutor, yet the minimum that was required to be done to fairly present the case of the prosecution was not done. Time and again, this Court stressed upon the need of the investigating officer being present during trial unless compelling reasons exist for a departure. In the

instant case, this does not appear to have been done, and there is no explanation whatsoever why it was not done. Even Public Prosecutor does not appear to have taken note of this desirability. In ***Shailendra Kumar*** v. ***State of Bihar*** [(2002)1 SCC 655] it was observed as under:

> 9. In our view, in a murder trial it is sordid and repulsive matter that without informing the police station officer-in-charge, the matters are proceeded by the court and by the APP and tried to be disposed of as if the prosecution has not led any evidence. From the facts stated above, it appears that accused wants to frustrate the prosecution by unjustified means and it appears that by one way or the other the Addl. Sessions Judge as well as the APP have not taken any interest in discharge of their duties. It was the duty of the sessions judge to issue summons to the investigating officer if he failed to remain present at the time of trial of the case. The presence of investigating officer at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on part of any witness to remain present, it is the duty of the court to take appropriate action including issuance of bailable/non-bailable warrants as the case may be. It should be well understood that prosecution can not be frustrated by such methods and victims of the crime cannot be left in lurch.

72. A somewhat an unusual mode in contrast to the lapse committed by non-examining victims and injured witnesses adopted by the investigating agency and the prosecutor was examination of six relatives of accused persons. They have expectedly given a clean chit to the accused and labeled them as saviors. This unusual procedure was highlighted before the High Court. But the same was not considered relevant as there is no legal bar. When we asked Mr. Rohtagi, learned counsel for the State of Gujarat as to whether this does not reflect badly on the conduct of investigating agency and the prosecutor, he submitted that this was done to show the manner in which the incident had happened. This is a strange answer. Witnesses are examined by prosecution to show primarily who is the accused. In this case it was nobody's stand that the incident did not take place. That the conduct of investigating agency and the prosecutor was not *bona fide*, is apparent and patent.

73. So far as non-examination of some injured relatives are concerned, the High Court has held that in the absence of any medical report, it appears that they were not present and, therefore, held that the prosecutor might have decided not to examine Yasminbanu because there was no injury. This is nothing but a wishful conclusion based on presumption. It is true that merely because the affidavit has been filed stating that the witnesses were threatened, as a matter of routine, additional evidence should not be permitted. But when the circumstances as in this case clearly indicate that there is some truth or prima facie substance in the grievance made, having regard to background of events as happened the appropriate course for the Courts would be to admit additional evidence for final adjudication so that the acceptability or otherwise of evidence tendered by way of additional evidence can be tested properly and legally tested in the context of probative value of the two versions. There cannot be straight-jacket formula or rule of universal application when alone it can be done and when, not. As the provisions under Section 391 of the Code are by way of an exception, the Court has to carefully consider the need for and desirability to accept additional evidence. We do not think it necessary to highlight all the infirmities in the judgment of the High Court or the approach

of the Trial Court lest nothing credible or worth mentioning would remain in the process. This appears to be a case where the truth has become a casualty in the trial. We are satisfied that it is fit and proper case, in the background of the nature of additional evidence sought to be adduced and the perfunctory manner of trial conducted on the basis of tainted investigation a re-trial is a must and essentially called for in order to save and preserve the justice delivery system unsullied and unscathed by vested interests. We should not be understood to have held that whenever additional evidence is accepted, re-trial is a necessary corollary. The case on hand is without parallel and comparison to any of the cases where even such grievances were sought to be made. It stands on its own as an exemplary one, special of its kind, necessary to prevent its recurrence. It is normally for the Appellate Court to decide whether the adjudication itself by taking into account the additional evidence would be proper or it would be appropriate to direct a fresh trial, though, on the facts of this case, the direction for re-trial becomes inevitable.

74. Prayer was made by learned counsel for the appellant that the trial should be conducted outside the State so that the unhealthy atmosphere which led to failure of miscarriage of justice is not repeated. This prayer has to be considered in the background and keeping in view the spirit of Section 406 of the Code. It is one of the salutory principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case or that general allegations of a surcharged atmosphere against a particular community alone does not suffice. The Court has to see whether the apprehension is reasonable or not. The state of mind of the person who entertains apprehension, no doubt is a relevant factor but not the only determinative or concluding factor. But the Court must be fully satisfied about the existence of such conditions which would render inevitably impossible the holding of a fair and impartial trial, uninfluenced by extraneous considerations that may ultimately undermine the confidence of reasonable and right thinking citizen, in the justice delivery system. The apprehension must appear to the Court to be a reasonable one. This position has been highlighted in ***Gurcharan Das Chadha* v. *State of Rajasthan*** [1966 (2) SCR 678] and ***K. Ambazhagan* v. *The Superintendent of Police*** [(2004)3 SCC 767].

75. Keeping in view the peculiar circumstances of the case, and the ample evidence on record, glaringly demonstrating subversion of justice delivery system with no congeal and conducive atmosphere still prevailing, we direct that the re-trial shall be done by a Court under the jurisdiction of Bombay High Court. The Chief Justice of the said High Court is requested to fix up a Court of Competent jurisdiction.

76. We direct the State Government to appoint another Public Prosecutor and it shall be open to the affected persons to suggest any name which may also be taken into account in the decision to so appoint. Though the witnesses or the victims do not have any choice in the normal course to have a say in the matter of appointment of a Public Prosecutor, in view of the unusual factors noticed in this case, to accord such liberties to the complainants party, would be appropriate.

77. The fees and all other expenses of the public prosecutor who shall be entitled to assistance of one lawyer of his choice shall initially be paid by the State of Maharashtra, who will thereafter be entitled to get the same reimbursed from the State of Gujarat. The State of

Gujarat shall ensure that all the documents and records are forthwith transferred to the Court nominated by the Chief Justice of the Bombay High Court. The State of Gujarat shall also ensure that the witnesses are produced before the concerned Court whenever they are required to attend that Court. Necessary protection shall be afforded to them so that they can depose freely without any apprehension of threat or coercion from any person. In case, any witness asks for protection, the State of Maharashtra shall also provide such protection as deemed necessary, in addition to the protection to be provided for by the State of Gujarat. All expenses necessary for the trial shall be initially borne by the State of Maharashtra, to be reimbursed by the State of Gujarat.

78. Since we have directed re-trial it would be desirable to the investigating agency or those supervising the investigation, to act in terms of Section 173(8) of the Code, as the circumstances seem to or may so warrant. The Director General of Police, Gujarat is directed to monitor re-investigation, if any, to be taken up with the urgency and utmost sincerity, as the circumstances warrant.

79. Sub-section (8) of Section 173 of the Code permits further investigation, and even de hors any direction from the Court as such, it is open to the police to conduct proper investigation, even after the Court took cognizance of any offence on the strength of a police report earlier submitted.

80. Before we part with the case it would be appropriate to note some disturbing factors. The High Court after hearing the appeal directed its dismissal on 26.12.2003 indicating in the order that the reasons were to be subsequently given, because the Court was closing for winter holidays. This course was adopted "due to paucity of time". We see no perceivable reason for the hurry. The accused were not in custody. Even if they were in custody, the course adopted was not permissible. This Court has in several cases deprecated the practice adopted by the High Court in the present case.

81. About two decades back this Court in ***State of Punjab* v. *Jagdev Singh Talwandi*** [(1984) 1 SCC 596] had *inter alia* observed as follows :

> 30. We would like to take this opportunity to point out that serious difficulties arise on account of the practice increasingly adopted by the High Courts of pronouncing the final order without a reasoned judgment. It is desirable that the final order which the High Court intends to pass should not be announced until a reasoned judgment is ready for pronouncement. Suppose, for example, that a final order without a reasoned judgment is announced by the High Court that a house shall be demolished, or that the custody of a child shall be handed over to one parent as against the other, or that a person accused of a serious charge is acquitted, or that a statute is unconstitutional or, as in the instant case, that a detenu be released from detention. If the object of passing such orders is to ensure speedy compliance with them, that object is more often defeated by the aggrieved party filing a special leave petition in this Court against the order passed by the High Court. That places this Court in a predicament because, without the benefit of the reasoning of the High Court, it is difficult for this Court to allow the bare order to be implemented. The result inevitably is that the operation of the order passed by the High Court has to be stayed pending delivery of the reasoned judgment.

82. It may be thought that such orders are passed by this Court and, therefore, there is no reason why the High Courts should not do the same. We would like to point out that the orders passed by this Court are final and no further appeal lies against them. The Supreme Court is the final Court in the hierarchy of our Courts. Orders passed by the High Court are subject to the appellate jurisdiction of this Court under Article 136 of the Constitution and other provisions of the concerned statutes. We thought it necessary to make these observations so that a practice which is not a very desirable one and which achieves no useful purpose may not grow out of and beyond its present infancy. What is still more baffling is that written arguments of the State were filed on 29.12.2003 and by the accused persons on 1.1.2004. A grievance is made that when the petitioner in Criminal Revision No.583 of 2003 wanted to file notes of arguments that were not accepted making a departure from the cases of the State and the accused. If the written arguments were to be on record, it is not known as to why the High Court dismissed the appeal. If it had already arrived at a particular view there was no question of filing written arguments.

83. The High Court appears to have miserably failed to maintain the required judicial balance and sobriety in making unwarranted references to personalities and their legitimate moves before competent courts - the highest court of the nation, despite knowing fully well that it could not deal with such aspects or matters. Irresponsible allegations, suggestions and challenges may be made by parties, though not permissible or pursued defiantly during course of arguments at times with the blessings or veiled support of the Presiding Officers of Court. But, such besmirching tacts, meant as innuendos or serve as surrogacy ought not to be made or allowed to be made, to become part of solemn judgments, of at any rate by High Courts, which are created as Court of record as well. Decency, decorum and judicial discipline should never be made casualties by adopting such intemperate attitudes of judicial obstinacy. The High Court also made some observations and remarks about persons/constitutional bodies like NHRC who were not before it. We had an occasion to deal with this aspect to certain extent in the appeal relating to SLP (Crl.) Nos. 530-532/2004. The move adopted and manner of references made, in para no. 3 of the judgment except the last limb (sub-para) is not in good taste or decorous. It may be noted that certain reference is made therein or grievances purportedly made before the High Court about role of NHRC. When we asked Mr. Sushil Kumar who purportedly made the submissions before the High Court, during the course of hearing, he stated that he had not made any such submission as reflected in the judgment. This is certainly intriguing. Proceedings of the court normally reflect the true state of affairs. Even if it is accepted that any such submission was made, it was not proper or necessary for the High Court to refer to them in the judgment, to finally state that no serious note was taken of the submissions. Avoidance of such manoeuvres would have augured well with the judicial discipline. We order the expunging and deletion of the contents of para 3 of the judgment except the last limb of the sub-para therein and it shall be always read to have not formed part of the judgment.

84. A plea which was emphasised by Mr. Tulsi relates to the desirability of restraint in publication/exhibition of details relating to sensitive cases, more particularly description of alleged accused persons in the print/electronic/broadcast medias. According to him, "media trial" causes indelible prejudice to the accused persons. This is sensitive and complex issue,

which we do not think it proper to deal in detail in these appeals. The same may be left open for an appropriate case where the media is also duly and effectively represented.

85. If the accused persons were not on bail at the time of conclusion of the trial, they shall go back to custody, if on the other hand they were on bail that order shall continue unless modified by the concerned Court. Since we are directing a re-trial, it would be appropriate if same is taken up on day-to-day basis keeping in view the mandate of Section 309 of the Code and completed by the end of December 2004.

86. The appeals are allowed on the terms and to the extent indicated above.

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154th Report of the Law Commission on The Criminal Procedure Code

CHAPTER XIII

PLEA BARGAINING

1. The arrears of criminal cases awaiting trial are assuming menacing proportions. Grievances have been vented in public that the disposal of criminal trials in the courts takes considerable time and that in many cases trials do not commence for as long a period as three to four years after the accused was remitted to judicial custody. Large number of persons accused of criminal offences have not been able to secure bail for one reason or the other and have to languish in jails as undertrial prisoners for years. It is also a matter of common knowledge that majority of the cases ultimately end in acquittal. The accused have to undergo mental torture and also have to spend considerable amount by way of legal expenses and the public exchequer has to bear the resultant economic burden. During the course of detention as undertrial prisoners the accused persons are exposed to the influence of hardcore criminals. Quite apart from this the accused have to remain in a state of uncertainty and are unable to settle down in life for a number of years awaiting the completion of trial. Huge arrears of criminal cases are a common feature in almost all the criminal courts. It is in this background the Law Commission felt that some remedial legislative measures to reduce the delays in the disposal of criminal trials and appeals and also to alleviate the suffering of undertrial prisoners. The Law Commission in its ***142nd Report on Concessional Treatment of Offenders*** who on their own initiative choose to plead guilty without any bargaining (1991) considered the question of introduction of the concept of concessional treatment for those *who* choose to plead guilty by way of plea-bargaining.

2. The justification for introducing, plea-bargaining cannot be expressed any better than what the Twelfth Law Commission in its ***142nd Report*** had already done as below:

(1) It is not just and fair that an accused who feels contrite and wants to make amends or an accused who is honest and candid enough to plead guilty in the hope that the community will enable him to pay the penalty for the crime with a degree of compassion and consideration should be treated on par with an accused who claims to be tried at considerable time-cost and money-cost to the community.

(2) It is desirable to infuse life in the reformative provisions embodied in section 360 of the Criminal Procedure Code and in the Probation of Offenders Act which remain practically unutilized as of now.

(3) It will help the accused who have to remain as undertrial prisoners awaiting the trial as also other accused on whom the sword of Damocles of an impending trial remains hanging for years to obtain speedy trial with attendant benefits such as-

(a) end of uncertainty.

(b) saving in litigation-cost.

(c) saving in anxiety-cost.

(d) being able to know his or her fate and to start of fresh life without fear of having to

undergo a possible prison sentence at a future date disrupting his life or career.

(e) saving avoidable visits to lawyer's office and to court on every date or adjournment.

(4) It will, without detriment to public interest, reduce the back-breaking burden of the court cases which have already assumed menacing proportions.

(5) It will reduce congestion in jails.

(6) In the USA nearly 75% of the total convictions are secured as a result of plea-bargaining.

(7) Under the present system 75% to 90% of the criminal cases if not more, result in acquittals.

3. The concept of plea bargaining has not been recognized so far by the criminal jurisprudence of India. However, plea bargaining is considered to be one of the alternatives to deal with the huge arrears of criminal cases. Plea-bargaining in its most traditional and general sense refers to pre-trial negotiations between the accused usually conducted by the counsel and the prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecutor. It has two facets. One is “charge bargaining" which refers to a promise by the prosecutor to reduce or dismiss some of the charges brought against the accused in exchange for guilty plea. The second one is "sentence bargaining" which refers to a promise by the prosecutor to recommend a specific sentence or to refrain from making any sentence recommendation in exchange for a guilty plea.

4. The practice of plea bargaining in USA dates back to a century or more. The Prosecuting Agency has a leading role in this process in that it has the discretion to reduce or dismiss some of the charges against the accused and also to make recommendations to the Court about the sentences in exchange for a guilty plea. The Supreme Court of USA in ***Brady* v. *United States*** [297 US 742-25 L.Ed. 2d 747] and ***Santobello* v. *New York*** [404 US 257 (1971); ***Hutto* v. *Ross*** [50 L.Ed. 2d 876]; ***Chaffin* v. *Stynchcombe*** [412 US 17 (1973)]; ***Blackledge* v. *Allison*** [52 L.Ed. 2d 136]; ***Weatherford* v. *Bursey*** [429 US 545 (1977)] upheld the constitutional validity and the significant role the concept of the plea bargaining plays in the disposal of criminal cases. It has approved this practice mainly on the premise that the accused who are convicted on the basis of negotiated pleas of guilt would ordinarily have been convicted had they been subjected to trial processes. One of the main arguments advanced in favour of plea bargaining is that it helps the disposal of accumulated cases and will expedite delivery of criminal justice.

5. The Supreme Court of India has examined the concept of plea bargaining in ***Murlidhar Meghraj Loya* v. *State of Maharashtra*** [AIR 1976 SC 1929] and ***Kasambhai* v. *State of Gujarat*** [AIR 1980 SC 854]. The Court did not approve of the procedure of plea bargaining on the basis of informal inducement. In Kasambhai's case the Court squarely observed that conviction based on the plea of guilty entered by the accused as a result of plea bargaining could not be sustained and that it was opposed to public policy to convict the accused by inducing him to confess to a plea of guilty "on allurement being held out to him that if he enters a plea of guilty he will be let off very lightly".

6. The Law Commission in its ***142nd Report***, having considered the concept as is being

practiced in other countries, recommended that the scheme for concessional treatment to offenders who plead guilty on their own volition in lieu of a promise to reduce the charge, to drop some of the charges or getting lesser punishment be statutorily introduced by adding a Chapter in the Code of Criminal Procedure. In making such a recommendation, however, the Law Commission considered the views in favour of the concept as well as against it.

7. We have examined the cases decided in USA as well as by the Supreme Court of India in respect of this concept and the ***142nd Report*** of the Law Commission. [Law Commission, ***One Hundred Forty Second Report***, Chapter IX, paras 9.1-9.40 pp 24-34 (1991)] We are of the view that plea bargaining can be made an essential component of administration of criminal justice provided it is properly administered. For that purpose, certain guidelines and procedure have to be incorporated in the Code of Criminal Procedure.

8. Having given our earnest consideration, we recommend that this concept may be made applicable as an experimental measure, to offences which are liable for punishment with imprisonment of less than seven years and/or fine including the offences covered by section 320 of the Criminal Procedure Code. Plea bargaining can also be in respect of the nature and gravity of offences and the quantum of punishment.

9. However, plea bargaining should not be available to habitual offenders, those who are accused of socio-economic offences of a grave nature and offences against women and children.

9.1, The process of plea bargaining shall be set in motion after issue of process and when the accused appears, either on a written application by the accused to the Court or *suo motu* by the Court to ascertain the willingness of the accused. On ascertainment of the willingness of the accused, the Court shall require him to make an application accordingly.

9.2. On the date so fixed for the hearing the court shall ascertain from the accused whether the application was made by him voluntarily without any inducement or pressure from any quarters, particularly from Public Prosecutors or Police. The Court shall ensure that neither the public prosecutor nor police is present at the time of making the preliminary examination of the accused.

9.3 Once the Court is satisfied about the voluntary nature of the application, the Court shall fix a date for hearing the public prosecutor and the aggrieved party and the accused applicant for final hearing and passing of final order. If the Court finds that the application has been made under duress or pressure, or that the applicant after realizing the consequences is not prepared to proceed with the application, the Court may reject the application.

9.4 Such an application may be rejected either at the initia1 stage or after hearing the public prosecutor and the aggrieved party. If the Court finds that, having regard to the gravity of the offence or any other circumstances which may be brought to its notice by the public prosecutor or the aggrieved party, the case is not a fit one for exercise of its powers of plea-bargaining, the Court may reject the application supported by reasons therefor.

9.5 The order passed by the Court on the application of the accused applicant shall be confidential and will be given only to the accused if he so desires. The making of such application by the accused shall not create any prejudice against the accused at the ensuing

trial.

9.6 We are of the view that such a plea bargaining can be availed of by the accused in the categories of offences mentioned above before the Court at any stage after the charge sheet is filed by the investigating agency in police cases and in respect of private complaints at any stage after the cognizance is taken. An order passed by the court on such a plea shall be final and no appeal shall lie against such an order passed by the Court accepting the plea.

9.7 In cases where the provisions of Probation of Offenders Act, 1958 and/or section 360 of Cr. P.C. are applicable to an accused applicant, he would be entitled to make an application that he is desirous of pleading guilty along with a prayer for availing of the benefit under the legislative provisions referred to above. In such cases, the Court after hearing the public prosecutor and the aggrieved party, may pass appropriate order conferring the benefit of those legislative provisions. The Court may be empowered to dispense with the necessity of calling a report from the probation officer in appropriate cases. The provision regarding confidentiality of the making of application and the consequence of rejection outlined in paragraph 9.5 will be applicable if the application is rejected by the Court.

9.8 If an accused enters a plea of guilty in respect of an offence for which minimum sentence is provided for the Court may instead of rejecting the application *in limine*, after hearing the public prosecutor and the aggrieved party accept the plea of guilty and pass an order of conviction and sentence to the tune of one/half of the minimum sentence provided.

9.9 The Court shall on such a plea of guilty being taken explain to the accused that it may record a conviction for such an offence and it may after hearing the accused proceed to hear the Public Prosecutor or the aggrieved person as the case may be:

(i) impose a suspended sentence and release him on probation;

(ii) order him to pay compensation to the aggrieved party; or

(iii) impose a sentence which commensurate with the plea bargaining, or

(iv) convict him for an offence of lesser gravity than that for which the accused has been charged if permissible in the facts and circumstances of the case.

10**.** We recommend that a separate Chapter XXIA on Plea Bargaining be incorporated in the Code of Criminal Procedure on the lines indicated above.

Mrs. Neelam Katara v. *Union of India*

ILR (2003) II Del 377

PRADEEP NANDRAJOG. J. 1. The unfortunate mother Ms.Neelam Katara filed the present petition pertaining to the tragic homocidal death of her son, Nitish who had gone to attend the marriage of his friend at Diamond Palace, Industrial Area New Kavi Nagar. Ghaziabad U.P. on the night intervening 16/17 February 2002.

Respondent No.6, the son of a sitting Member of the Rajva Sabha came to be a suspect in the homocidal death of Nitish Katara. The petitioner sought various reliefs. From time to time various directions and orders were passed in the present petition resulting in the petition, as far as the petition was concerned as having become infructuous. However, one aspect of the matter of genera public importance survives and counsel for the parties
stated that in public interest certain directions pertaining to witness protection need to be issued.

2. The edifice of administration of justice is based upon witness coming forward and deposing without fear or favour, without intimidation or allurement in Courts of Law. If
witnesses are deposing under fear or intimidation or for favour or allurement, the foundation of administration of justice not only gets weakened, but in cases it may even gets obliterated. The dockets in Courts today are overflowing to the brim and especially in criminal delivery system no shorthand essay is possible; the accused must get a fair, proper and just hearing in the adversarial system of Administration of Justice which we
have adopted. Delay results. This leads to the possibility of the witness being harassed or intimidated at the hands of the accused or his accomplices.

3. Has the time ripened to provide for safeguards for the witnesses that they come forwards and depose without fear, without intimidation, without favour or allurement of the accused? Has prevention of accused person from suborning witnesses and turning them hostile to the case of the prosecution become an urgent necessity?

4. Counsel for the petitioner Shri Arvind Nigam contended that there are a large number of reports and in particular the report of the Vohra Committee which have come to a finding that criminalisation has struck at the very foundation of the Indian polity and there is urgent need to deal with this criminalisation on a war footing to prevent the polity
from further degenerating. Counsel commended us to take judicial notice that case after case of the prosecution was collapsing, owing to the material witnesses turning hostile to the case of the prosecution. Why was this happening in case after case questioned the counsel? He volunteered the answer himself, "fear of the accused person".

5. Counsel for the petitioner drew our attention to the various Reports of the Law Commission of India and in particular the 154th and 178th Reports which dealt with the menace of prosecution witnesses turning hostile.

6. Counsel for the State submitted that these Reports are being processed in consultation with the State Government as Criminal Law and Criminal Procedure are on the concurrent list of 7th Schedule to the Constitution. Counsel for the State informed us that the Government is aware of the plight of the witnesses appearing as prosecution witnesses and the Government intends to frame a Scheme for protection of witnesses as the Government was awake to the reality that in the administration of justice, witness deposition forms an important bedrock. Ms. Mukta Gupta stated that the Government had set up a Committee under the Chairmanship of Justice V.S. Malimath, Former Chief Justice of Karnataka and Kerala High Courts to consider and recommends measures for
revamping the Criminal Justice System in the country. She however, fairly conceded that it was uncertain as to when the suggestions would be incorporated legislatively on the statute book. We are, therefore, of the opinion that since this area is an unoccupied field, till the legislature legislates thereon, it would be appropriate for the Court to lay down guidelines in respect of protection to be granted to the witnesses.

7. The Hon'ble Supreme Court in its judgment reported as 1998(1) SCC 226 Vineet Narain Vs. Union of India in para 58 had directed that steps should be taken immediately for the constitution of an able and impartial agency comprising persons of unimpeachable integrity to form functions akin to those of the Director of Prosecutions in United Kingdom.

8. In the United Kingdom, the Director of Prosecutions was created in 1879. He is appointed by the Attorney General from amongst the Members of the Bar. He discharges the functions under the Superintendence of Attorney Generals. The Director of Prosecutions plays a direct role in the prosecution system. He even administers "Witness Protection Programmes". Legislations have been enacted in Australia, Canada and the
United States of America.

9. In the United States of America the Witness Protection and Reallocation Programme is regulated by the Attorney-General for Protection of Witnesses in the Federal Government
or State Government in official proceedings concerning an organised criminal activities or other serious offences. The Attorney General under the Programme is entitled to:
(a) provide suitable documents to enable the witness to establish a new identify;
(b) provide housing for the witness:
(c) provide transportation to the witness.
(d) provide payment to meet basic living expenses;
(e) provide help in obtaining employment;
(f) provide services necessary to assist the person becoming self-sustaining:
(g) regulate the disclosure of the identity of the person having regard to the danger such a disclosure would pose to the person;
(h) protect the confidentiality and identity of the person.

In Canada, the Witness Protection Act, 1996 lays down the factors which the Attorney General has to consider while deciding whether a witness should be admitted to the Program. They are as under:
(a) the nature of the risk to the security of the witness;

(b) the danger to the community if the witness is admitted to the Program:
(c) the nature of the inquiry, investigation or prosecution involving the witness and the importance of the witness in the matter;
(d) the value of the information or evidence given or agreed to be given or of the participation by the witness;
(e) the likelihood of the witness being able to adjust to the Program, having regard to the witness's maturity, judgment and other personal characteristics and the family relationships of the witness;
(f) the cost of maintaining the witness in the Program;
(g) alternate methods of protecting the witness without admitting the witness to the Program, and
(h) such other factors as the Commissioner deems relevant."

10. In Australia, the Witness Protection Act, 1994 was enacted. A Commissioner was designated to monitor the National Witness Protection Program. The legislative guideline to determine as to which witness should be included in the National Witness Protection Program, is as under:-

Selection for inclusion in the NWPP

(1) The Commissioner has the sole responsibility of deciding whether to include a witness in the NWPP. including cases where an approved authority has requested that a witness be included m the NWPP.

(2) A witness may be included in the NWPP only if:

(a) the Commissioner has decided that the witness be included;

(b) the witness agrees to be included; and

(c) the witness signs a memorandum of understanding in accordance .with section 9 or;

(i) if the witness is under 18 years - a parent or guardian of the witness signs such a memorandum; or

(ii)if the witness otherwise lacks legal capacity to sign the memorandum - a guardian or other person who is usually responsible for the care and control of the witness signs such a memorandum.

(2) The Commissioner must, in deciding whether to include a witness in the NWPP have regard to:

(a) whether the witness has a criminal record particularly in respect of crimes of violence, and whether that record indicates a risk to the public if the witness is included in the NWPP;

(b) if a psychological or psychiatric examination of the witness has been conducted to determine the witness's suitability for inclusion in the NWPP--that examination or evaluation; and

(c) the seriousness of the offence to which any relevant evidence or statement relates; and

(d) the nature and importance of any relevant evidence or statement; and

(e) the nature of the perceived danger to the witness; and

(f) the nature of the witness s relationship to other witnesses being assessed for inclusion in the NWPP;

(3) may have regard to such other matters as the Commissioner considers relevant.

(a) a parent or guardian of a witness signs a memorandum of understanding because the witness was under 18 years;

(b) the witness is included in the NWPP and remains a participant until after he or she turns 18; the Commissioner may require the participant to sign another memorandum of understanding.

11. The Hon'ble Supreme Court in the judgment Vishaka Vs. State of Rajasthan reported as 1997(6) SCC 241 observed that in the absence of domestic law occupying the field, an International Convention not inconsistent with the fundamental rights and the harmony with its spirit may be read into the municipal law.

12. In the judgment reported as 2002(5) SCC 294 it was observed that if need be, Courts have the necessary power, by issuing directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role.

13. Given the financial constraints which we have in this country, it may not be possible to have a Witness Protection Program on the extended scale at which it is being implemented in the United States of America, Canada, Australia or for that matter in the United Kingdom. But a beginning has to be made.

14 Society has an interest in the administration of justice and it may be true that let a 100 accused escape but let not an innocent be punished, but this cannot be stretched to mean an escape route should be provided to the accused to hijack administration of justice and secure his innocence, not as a result of a fair adversarial litigation but as a result of ‘might being right.' At least, in two categories of cases, namely, organised crime and a crime punishable with the capital sentence or imprisonment for life, witness protection is required. It has been coming to the notice of this court that in heinous crimes the witnesses and sometimes the victim turn hostile. There is strong material from which it can be guessed that cause is fear and compulsion.

15. Till a suitable Legislation is brought on the Statute book, we direct that following guidelines shall operate for protection of the witnesses.

16. These guidelines shall be known as ""Witness Protection Guidelines":
"Witness" means a person whose statement has been recorded by the Investigating Officer under Section 161 Cr.P.C. pertaining to a crime punishable with death or life imprisonment.
"Accused" means a person charged with or suspected with the commission of a crime punishable with death or life imprisonment.
"Competent Authority" means the Member Secretary, Delhi legal Services Authority.

ADMISSION TO PROTECTION:

The Competent Authority, on receipt of a request from a witness shall determine whether the witness requires police protection, to what extent and for what duration.

FACTORS TO BE CONSIDERED:
In determining whether or not a witness should be provided police protection, Competent Authority shall take into account the following factors:
i) The nature of the risk to the security of the witness which may emanate from the accused or his associates.
ii) The nature of the investigation or the criminal case.
iii) The importance of the witness in the matter and the value of the information or evidence given or agreed to be given by the witness.
iv) The cost of providing police protection to the witness.

OBLIGATION OF THE POLICE:
(1) While recording statement of the witness under Section 161 Cr.P.C., it will be the duty of the Investigating Officer to make the witness aware of the "Witness Protection Guidelines'" and also the fact that in case of any threat he can approach the Competent Authority. This the Investigating Officer will inform in writing duly acknowledged by the witness.
(2) It shall be the duty of the Commissioner of Police to provide security to a witness in respect of whom an order has been passed by the Competent Authority directing police protection.

17. We further direct that the respondent State shall give due publicity to the guidelines framed. We make it clear that the guidelines framed by us would not be in derogation of the powers of the concerned criminal court, if it forms an opinion that a witness requires police protection to so direct.

T H E E N D