CHAPTER - V

TRIAL STAGE
India is a party to many international human rights conventions dealing with different aspects of trial. It has ratified the International Covenant on Civil and Political Rights (ICCPR);\(^1\) the International Covenant on Economic, Social and Cultural Rights;\(^2\) the Convention on the Elimination of All Forms of Racial Discrimination,\(^3\) the Convention on the Elimination of All Forms of Discrimination against Women,\(^4\) and the Convention on the Rights of the Child.\(^5\) The customary international law, formulated to a large extent in the Universal Declaration on Human Rights,\(^6\) is legally binding upon India. The customary rules on the right to a fair trial and the prohibition of torture or cruel, inhuman or degrading treatment or punishment, which is also a peremptory norm of international law, are also relevant.

Apart from the above, there are also international standards of a non-binding nature which illustrate human rights in the administration of justice, and in particular criminal justice. These are declaratory in nature and influence international standards on the right to fair trial as interpreted by national and international human rights bodies and tribunals. On a universal level, there are, in particular: the Basic Principles on the Role of Lawyers,\(^7\) the Guidelines on the Role of Prosecutors,\(^8\) the Basic Principles on the Independence of the Judiciary,\(^9\) the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,\(^10\) the Principles on the Effective Investigation and Documentation of

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\(^1\) U.N.T.S. 171

\(^2\) U.N.T.S. 3

\(^3\) U.N.T.S. 195

\(^4\) U.N.T.S. 13


Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Resolution of the Human Rights Commission on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law. The Basic Principles on the Independence of the Judiciary, adopted at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Principle 5, states that everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals. Principle 6 stipulates that the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

Every criminal trial is a voyage of discovery in which truth is the quest. The operating principles for a fair trial permeate the common law in both civil and criminal contexts. The very basis upon which a judicial process can be rested is reasonableness and fairness in a trial. Under our Constitution, as also the international treaties and conventions, the right to get a fair trial is a basic fundamental human right. Any procedure which comes in the way of a party in getting a fair trial would be violative of Article 14 of the Constitution of India. Right to a fair trial by an independent and impartial Tribunal is part of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. The Supreme Court has declared that ‘Life’

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Adopted by General Assembly resolution 55/89 Annex, 4 December 2000
Commission on Human Rights Resolution 2003/34
Final report of the Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms
more than mere animal existence in *Kharak Singh v. State of UP*\(^{15}\) following *Munn v. People of Illinois*.\(^{16}\)

In the context of Article 21, it has been held in *K. Anbazhagan v. Superintendent of Police*,\(^{17}\) that -

"Free and fair trial is sine qua non of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the mind of the petitioner."

Our courts have recognised that the primary object of criminal procedure is to ensure a fair trial of accused persons.\(^{18}\) The Law Commission has also observed that fair trial relates to character of the court, the venue, the mode of conducting the trial, rights of the accused in relation to defence and other rights.\(^{19}\) The problem of defining a fair trial has been considered by the Supreme Court thus:

"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

\(^{15}\)AIR 1963 SC 1295
\(^{17}\)AIR 1958 SC 376; Iqbal Sodawala v. State of Maharashtra
\(^{18}\)Report of the Law Commission, p. 2, para 8
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 a Nelson’s eye 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.\textsuperscript{20}

The Court went on to observe that these principles have to be applied by
the courts with a delicate judicial balancing of competing interests in a criminal
trial, including the interests of the accused. At the same time interest of the
public, and to a great extent that of the victim, have to be weighed since there is
a public interest involved in the prosecution of persons who commit offences.\textsuperscript{21}

It was of the view that the principle of fair trial now informs and energises many
areas of the law. It is reflected in numerous rules and practices. It is considered
as 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. The
principles of fair trial manifest themselves in virtually every aspect of our
practice and procedure, including the laws of evidence.\textsuperscript{22} Courts have always
been considered to have an overriding 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".

\textsuperscript{2} Id., 182
\textsuperscript{3} Id., 183

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There has been a growing trend of arguing for an inquisitorial system. Although there are a lot of differences between the adversarial and the inquisitorial system, the issue is one more of different instruments and safeguards rather than of basic goals and principles. Both systems strive for the same end: to convict the guilty and to discharge the non-guilty by seeking the truth by fair means.”

In Abdul Nazar Madani v. State of T.N., it was observed in the context of a prayer for transfer of the case, that the purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 CrPC. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any court or even at any place, the appropriate court may transfer the case to another court where it feels that holding of fair and proper trial is conducive. No universal or hard-and-fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case.

In Maneka Sanjay Gandhi v. Rani Jethmalani, it was stressed that 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

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This is the cardinal principle although the circumstances may be myriad and vary from case to case.

The Courts have gone to the extent of declaring that fairness means that there must be sufficient material to frame charges in *Satish Mehra v. Delhi Administration*,26 lest it should be unfair. Similarly, the Court has to give reasons for framing the charges, as was held in the TADA case of *State of Maharashtra v. Som Nath Thapa*.27

The Malimath Committee has recommended some drastic changes to the whole system as evident right from the Preamble recommended by it.28 It states that quest for truth should be the fundamental duty of every court29 and, with that in mind, it has recommended changes to section 482 of Cr.P.C. The committee recommended thus:

"Every Court shall have inherent powers to make such orders as may be necessary to discover truth or to give effect to any order under this Code or to prevent abuse of the process of court or otherwise to secure the ends of justice."30

It has also prescribed summary procedures for a larger number of cases.

Whatever standards are fixed or whatever procedures are prescribed, each has to comply with fair trial standards as provided in Article 14 (3) ICCPR. In principle, international law, and particularly, Article 14 ICCPR allows for fast
procedures, and the Human Rights Committee has even suggested special courts to deal with petty offences where a state system suffers from a great backlog of cases. 31

Presumption of innocence and burden of proof

One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would then be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal. Under the English law also, the defendant has to satisfy only balance of probabilities when the balance is shifted on to him in criminal law. 32


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It has to be noted that the lowering of the standard of proof in criminal justice below "proof beyond reasonable doubt" would constitute a violation of the presumption of innocence, one of the cornerstones of national and international human rights law and criminal justice. The presumption of innocence prohibits the sentencing of a person, unless the state authority has proven his guilt. If a doubt remains, the accused cannot be convicted (in dubio pro reo). The Human Rights Committee has clearly stated that:

"[b]y reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt."

Article 14 (2) does not leave the determination of the standard of proof to the states and any conviction on evidence which does not fulfill the standard of proof beyond reasonable doubt constitutes a violation of India's obligations under the ICCPR.

Similarly, if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the Court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the Court entertains reasonable

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See Article 14 (2) ICCPR.

General Comment 13, Article 14, para. 14, para. 7; Similarly, the Inter-American Court of Human Rights has stated that the principle of presumption of innocence "demands that a person cannot be convicted unless there is clear evidence of his criminal liability. If the evidence presented is incomplete or insufficient, he must be acquitted, not convicted," Cantoral Benavides Case, Inter Am. Court HR, Judgment of August 18, 2000, Series C No. 69, para. 120
But then, the doubt regarding the guilt of the accused should be reasonable. The rule regarding the benefit of doubt does not warrant acquittal of the accused by report to surmises, conjectures or fanciful considerations since a criminal trial is not like a fairy tale wherein one is free to give flight to one’s imagination and fantasy. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court, in its words, has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the testimony of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the Courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures.

Again but, the Courts would not be justified in withholding that benefit of doubt because the acquittal might have an impact upon the law and order situation or create adverse reaction in society or amongst those members of the society who believe the accused to be guilty. The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record.

In *Shivaji Sahabrao Bobade v. State of Maharashtra* Justice Krishna Iyer lamented the undue adherence to the presumption of innocence. He said:

"The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand special emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public
accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community”.

He further said -

“We must observe that even if a witness is not reliable, he need not be false and even if the police have trumped up one witness or two or has embroidered the story to give a credible look to their case that cannot defeat justice if there is clear and unimpeachable evidence making out the guilt of the accused.”

But, Justice Khanna, immediately thereafter, clarified the observations of Pritha Iyer J. in the subsequent decision in Kali Ram v. State of H.P. thus:

“Observations in a recent decision of this Court, Shivaji Sahabrao Bobade v. State of Maharashtra to which reference has been made during arguments were not intended to make a departure from the rule of the presumption of innocence of the accused and his entitlement to the benefit of reasonable doubt in criminal cases. One of the cardinal principles, which has always to be kept in view in our system of administration of justice for criminal cases, is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of

\[1\text{Id.}, \text{1047, paragraph 19}\]
\[2\text{Supra n. 35}\]

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that burden, the courts cannot record a finding of the guilt of the accused. 41

The importance and the rationale of these fundamental principles were dealt with thus:

"Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to this innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. 42

.... It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable". 43

41 Id., 820, paragraph 23
42 Id., 821, paragraph 25
43 Ibid., paragraph 27
The Law Commission has opined that the criticism against the presumption of innocence appears to be more of a criticism of the manner in which this principle and the principle of giving the accused the benefit of doubt, has been applied by weak and incompetent judges.\textsuperscript{44}

The tendency to acquit an accused on fragile grounds in recent times has got the attention of the Supreme Court. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment, presumably to achieve the yardstick of disposal. In the words of the Court:

"Some discrepancy is bound to be there in each and every case which should not weigh with the court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, the court should tread upon it, but if the same are boulders, the court should not make an attempt to jump over the same. These days when crime is looming large and humanity is suffering and the society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing the world over and courts have been compelled to accept that "society suffers by wrong convictions and it equally suffers by wrong acquittals."\textsuperscript{45}

In the case \textit{Inder Singh v. State (Delhi Admn.)}, Krishna Iyer, J. laid down that:

"Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes." \textsuperscript{46}

\textsuperscript{14}\textsuperscript{th} Report of the Law Commission of India, Vol. II, p. 836

\textsuperscript{5}\textit{Krishna Mochi v. State of Bihar}, (2002) 6 SCC 81, 104

\textsuperscript{6}(1978) 4 SCC 161: AIR 1978 SC 1091, SCC 162, paragraph 2
In the case of *State of U.P. v. Anil Singh*, it was held that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform. Similarly, in *State of W.B. v. Orilal Jaiswal*, it was held that justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice, according to law.

The Supreme Court, in *Mohan Singh v. State of M.P.*, held that the courts have to remove the chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, cloud and dust remain, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicions are created. It is the onerous duty of the court, within permissible limit to find out the truth. It means, on one hand no innocent man should be punished but on the other hand no person committing an offence should get scot-free. If in spite of such effort suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused.

Arijit Pasayat J., in a separate but concurring judgment in *Krishna Mochi v. State of Bihar*, reminded us of *Gurcharan Singh v. State of Punjab*, while holding that merely because a person is acquitted, his co-accused need not necessarily be entitled to the same. In his words:

"The doctrine is a dangerous one, specially in India, for if a whole body of the testimony were to be rejected, because the witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help
in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care.”

The Court went on to state that, where it is not feasible to separate the truth from falsehood, because the grain and the chaff are inextricably mixed up, and in the process of separation, an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. The Court had earlier observed in *State of Rajasthan v. Kalki,* that normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party’s case, material discrepancies do so.

The Malimath Committee has observed that there is a third standard of proof which is higher than ‘proof on preponderance of probabilities’ and lower than ‘proof beyond reasonable doubt’ described in different ways, one of the being ‘clear and convincing’ standard. The Committee came to the conclusion

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The standard of proof beyond reasonable doubt presently followed in criminal cases should be done away with and in its place a standard of proof lower than ‘proof beyond reasonable doubt’ and higher than the standard of proof on preponderance of probabilities’. The Committee favoured a mid level standard of proof of ‘courts conviction that it is true’. Accordingly, the Committee has made certain recommendations.\textsuperscript{53}

In this context, it may be sufficient to point out one of the possibilities of problems. As per the law laid down by the Supreme Court, in a matter where there is only circumstantial evidence, the fundamental rule is that the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. There must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.\textsuperscript{54}

It must not be lost sight of the fact that, both the adversarial and the inquisitorial systems require the same standard of proof, namely proof beyond reasonable doubt. In the light of the same, it would have to be seen how far the recommendation of the Malimath Committee can hold water.

\textsuperscript{53} Recommendation 13

of the Judge

The Basic Principles on the Independence of the Judiciary enunciated by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders has covered all the essentials required for ensuring a fair trial.55

Ram Chander v. State of Haryana, Chinnappa Reddy, J., observed thus:

"The adversary system of trial being what it is, there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. 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. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth."56

The Court said so in the context of protecting the weak and the innocent. It was quick to caution that the Court must, of course, not assume the role of a prosecutor in putting questions. The functions of the Counsel, particularly those of the Public Prosecutor, are not to be usurped by the judge, by descending into the arena, as it were. Similarly, any questions put by the Judge must be so as not to frighten, coerce, confuse or intimidate the witnesses.

56 (1981) 3 SCC 191, 192
Lord Justice Denning’s words in Jones v. National Coal Board was quoted with benefit:

“The Judge’s part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of the Judge and assumes the role of an advocate; and the change does not become him well.”57

The Court went further than Lord Denning and said that it is the duty of a judge to discover the truth and for that purpose he may ‘ask any question, in any form, at any time, of any witness, or of the parties, about any fact, relevant or irrelevant’.58 But this he must do, without unduly trespassing upon the functions of the Public Prosecutor and the defence Counsel, without any hint of partisanship and without appearing to frighten or bully witnesses. He must take the prosecution and the defence with him. In words of the Court:

“The court, the prosecution and the defence must work as a team whose goal is justice, a team whose captain is the judge. The Judge, like the conductor of a choir, must, by force of personality, induce his team to work in harmony; subdue the raucous, encourage the timid, conspire with the young, flatter and (sic the) old.”59

It has been held in the context of hijacked trials that the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a

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1957) 2 All. E. R. 155
'Section 165 Evidence Act
'Supra n. 56, 194

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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.  

The Supreme Court found it impossible to justify the model employed by trial judge in *Ram Chander v. State of Haryana* where he tried to compel the witnesses to speak what he thought must be the truth even threatening them with prosecution for perjury. It did not accept any portion of the evidence of the two witnesses recorded by the Sessions Judge.

In spite of these warnings, there have been instances where the courts have been broadening ambits of section 165 of the Code itself. The Kerala High Court in *Vincent v. State of Kerala* through Justice K.T. Thomas (as he then was) declared:

"The contention that the trial Judge cannot be permitted to put questions to fill up the lacuna in the prosecution evidence is equally fallacious because it is the duty of the Judge to put all necessary questions to discover or obtain proof of all relevant facts. Even if it results, sometimes, in filling the lacuna in prosecution evidence, the trial Judge is not inhibited from putting such questions. It is only an exhibition of judicial weakness if a trial Judge points out in his judgment that the cause suffers due to failure of the prosecution of the defence counsel in eliciting proof of relevant facts."

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1. Zahir, 183
2. 1981 SCC (Cri) 683
4. 1984 KLT 950

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Justice Thomas reiterated this view in the Supreme Court as evident from observations in *State of Rajasthan v. Ani*\(^6\) where he observes:

"The said Section 165 was framed by lavishly studding it with the word 'any' which could only have been inspired by the legislative intent to confer unbridled power on the trial court to use the power wherever he deems it necessary to elicit truth. Even if any of such question crosses into irrelevancy the same could not transgress beyond the contours of powers of the court. This is clear from the words relevant or irrelevant in Section 165. Neither of the parties has any right to raise objection to any such question."

According to Justice Thomas, the active role assigned to the trial judge in the process of reasoning, it seems, would embolden him to draw inferences from facts even when the prosecutor fails to cull out information by way of examination or cross-examination. For, in *State of W.B. v. Mohd. Omar*,\(^6\) where the Public Prosecutor had failed to ask the doctor about the nature of the injury and the court did not have the benefit of the view of the doctor to decide the gravity of the offence, it was observed thus:

"No doubt it would have been of advantage to the court if the Public Prosecutor had put the said question to the doctor when he was examined. But mere omission to put that question is not enough for the court to reach wrong conclusion. Though not an expert as PW 30, the Sessions Judge himself would have been an experienced judicial officer. Looking at the injuries he himself could have deduced whether those injuries were sufficient in the ordinary course of nature to cause death."

He suggested the need for a change of outlook on presumption of innocence while observing that:

\(^6\)1997 SCC (Cri) 851
\(^6\)2000 SCC (Cri) 1516
“The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilized doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the about rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offence would be the major beneficiaries and the society would be the casualty.....

In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this."66

In State of U.P. v. Lakshmi,67 the Court, again through KT Thomas J., went to the extent of weaving out a new story not contemplated either by prosecution or defence to give benefit to the accused. It has been argued that the powers that are being discussed here are tremendous. They have been conferred under the presumption that a judicial officer with experience will not abuse these powers. It may also be reminded that the Supreme Court does not have the mandate to change these fundamental principles.68

It has been held by the Supreme Court that while assessing the evidence given by a witness, the magistrate or the judge should express his opinion in temperate language usually associated with and reflecting the impersonal dignity of judicial restraint.69

The Malimath Committee has recommended, in tune with its general theme, a wider role for the judge with the object of discovering the truth in the
The Judge can question the accused at any stage and if the accused remains silent or refuses to answer any question put to him by the court which he is not compelled by law to answer, the court may draw such appropriate inference including adverse inference as it considers proper in the circumstances.

It recommends that on charge being framed the accused should be required to submit a 'Defence Statement' in response to a prosecution statement. And after considering the two, the judge shall arrive at the points to be determined and as to whom the burden of proof lies.  

The Law Commission of India has warned against a curtailing of the right to silence as contrary to Article 20 (3) of the Constitution of India. The right to silence also comprises the right not to comment on allegations of the prosecution, and not thereby concede to them.

The Human Rights Committee considers the drawing of adverse inferences to be in violation of Article 14 (3) (g) ICCPR. It has urged countries where such presumptions exist to ‘reconsider, with a view to repealing it, this aspect of criminal procedure, in order to ensure compliance with the rights guaranteed under Article 14 of the Covenant.’  

The European Court of Human Rights has set strict conditions for the compliance of inferences of guilt with the right to remain silent and the privilege against self-incrimination protected under Article 6 ECHR. It has held that it is self-evident that it is incompatible with the immunities under consideration to use a conviction solely or mainly on the accused’s silence or on a refusal to

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Recommendations 8 and 9
Concluding Observations of the Human Rights Committee: United Kingdom, 6 December 2001, CCPR/CO/73/UKOT, para. 17
answer questions or to give evidence himself. In the opinion of the Court, deference to the detriment of the accused may only be drawn -

"in situations which clearly call for an explanation from him" and only to assess the "persuasiveness of evidence adduced by the prosecution". 73

According to the Court, the question in each particular case is whether the evidence adduced by the prosecution is sufficiently strong to require an answer. The national court cannot conclude that the accused is guilty merely because he chooses to remain silent. Also, the Court considers that the drawing of such inferences can only be compatible with the principle of fair trial if the accused is granted access to a lawyer already at the stage of the police interrogation. Where the accused is tried by jury, the judge must give the jury proper direction on these conditions. 74 In sum, the European Court of Human Rights, while having accepted that each member state is free to adopt the system of criminal justice it chose to, has set strict limits to the possibility of drawing adverse inference; it may never be the only evidence.

Recommendation No 137 of the Malimath Committee suggests that crime units comprising dedicated investigators and prosecutors and Special Courts by way of Federal Courts should be set up to expeditiously deal with the challenges of ‘terrorist and organized’ crimes. The Human Rights Committee has held that Special Courts may only exceptionally try civilians and in full respect of the rights of fair trial. 75

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74 Condon v. The United Kingdom, ECHR, Judgment of 2 May 2000, Reports 2000-V, para. 94.
75 General Comment 13, Article 14, para 4.
Role of Prosecutors

The Guidelines on the Role of Prosecutors adopted in the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders is a useful guide among the international documents. It recognises that the prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime. It requires, in Guideline 1, that persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications. Guideline 3 recognises that Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession. Guideline 4 requires States to ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability. In their role in criminal proceedings, as per Guidance 12, shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system. Guideline 16 prescribes that when prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the

court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

The duty of a prosecutor, keeping in mind that the object of a trial is to get to the truth, is not merely to secure a conviction at any cost. He should place before the court whatever evidence is available with him, whether they are in favour of the accused or against him. The prosecutor is expected to be different to the result of the prosecution. The Law Commission, in its 14th report has observed:

"A Public Prosecutor should be personally indifferent to the result of the case. His duty should consist only in placing all the available evidence irrespective of the fact whether it goes against the accused or helps him, before the court, in order to aid the court in discovering the truth. It would thus be seen that in the machinery of justice a Public Prosecutor has to play a very responsible role; the impartiality of his conduct is as vital as the impartiality of the court itself."

In the context of withdrawal of prosecution under section 321 of the Cr.P.C., the position of the Public Prosecutor was described in Sheonandan Paswan v. State of Bihar, thus:

"Unlike the judge, the Public prosecutor is not an absolutely independent officer. He is an appointee of the Government, ..., appointed for conducting in court any prosecution or other proceedings on behalf of the Government concerned. So there is the relationship of counsel and client between the Public Prosecutor and the Government. A Public Prosecutor cannot act without instructions of the Government; a Public Prosecutor cannot conduct a case absolutely on his own, or contrary to the instruction of his client, namely, the Government."

The Court held that section 321 does not lay any bar on the Public Prosecutor to receive any instruction from the Government before he files an application under that section. On the contrary, the Public Prosecutor cannot file an application for withdrawal of a case on his own without instructions from the Government. This decision was, however, reviewed in the next Sheonandan Singh v. State of Bihar. The Court here held that a Public Prosecutor can withdraw the case at any stage of the prosecution and that the only limitation is the requirement of the consent of the court. On the position of Prosecutors, it observed thus:

"There can be no doubt that this function of the Public Prosecutor relates to a public purpose entrusting him with the responsibility of so acting only in the interests of administration of justice. In the case of Public Prosecutors, this additional public element flowing from the statutory provisions in the Code of Criminal Procedure, undoubtedly, invest the Public Prosecutors with the attribute of holder of a public office which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it."

It has been held that if in such matters the Public Prosecutor does not take an independent decision but blindly follows the instructions from the Government, the result would be disastrous not only for the accused but also for the administration of justice.

(1983) 1 SCC 438
(1987) 1 SCC 279
It is again a cardinal principle of criminal law that a guilty mind should
 accompany a wrong act. *Actus non facit reum nisi mens sit rea* is another facet
 of the principle of fair trial. It is the general rule that a penal statute presupposes
 the presence of a mens rea element. It will be excluded only if the legislature expressly postulates
 otherwise. In *Kartar Singh* case the Supreme Court said thus:

 "... unless a statute either expressly or by necessary implication rules out
 the mens rea in case of this kind, the element of 'mens rea' must be read
 into the provisions of the statute". 80

 *Mens rea* by necessary implication could be excluded from a statute only
 if it is absolutely clear that the implementation of the object of the statute
 would otherwise be defeated. In each case it would be necessary to find out
 whether there are sufficient grounds for inferring that Parliament intended to
 exclude the general rule regarding *mens rea* element. 81 The prominent method
 of understanding the legislative intention is to see whether the substantive
 provisions of the Act require *mens rea* element as a constituent ingredient for an
 offence.

 The legislature in India has resorted to the exclusion of *mens rea* in quite
 a few statutes, generally involving white collar crimes. Recently, however, it
 had to extend the same to offences under TADA and POTA.

 In the context of unauthorised possession under TADA, a Constitution
 bench in *Sanjay Dutt v. State (II)* 82 clearly held that once the prosecution has
data unauthorised conscious possession of any of the specified arms and

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80 (1994) 2 SCR 375, para 115, 645 SCC
81 The prominent method of understanding the legislative intention is to see whether the substantive
 provisions of the Act require *mens rea* element as a constituent ingredient for an offence.
 governing the exclusion or inclusion of *mens rea* element vis-à-vis a given statute

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munition etc. in a notified area by the accused, the offence is complete and
conviction must follow on the strength of the statutory presumption, unless
the accused proves the non-existence of a fact essential to constitute any of the
ingredients of that offence. That is, the presumption, even though statutory in
nature, was held to be rebuttable. In People's Union for Civil Liberties v. Union
of India, challenge to Section 4 of POTA, which provided for punishing a
person who is in 'unauthorised possession' of arms or other weapons on the
basis that the knowledge element is absent, was turned down in the light of the
Brijraj Dutt case that possession here means conscious possession only.

While dealing with meaning of the word 'abets' in the context of POTA,
People's Union for Civil Liberties v. Union of India, it was held that in order
to bring a person abetting the commission of an offence under the provisions of
it is necessary to prove that such person has been connected with those steps
of the transactions that are criminal. 'Mens rea' element is sine qua non for
defences under IPC. The same applies to POTA also since the word 'abet' is not
defined in the Act and, by virtue of 2(1)(i) of POTA, words and expressions not
defined in the Code gets the meaning from the Cr.P.C., which in turn directs us
to the definition in IPC.

The constitutional validity of some of the special provisions in POTA
were upheld on the ground of necessity. It noted that Sections 20, 21 and 22 of
POTA are similar to Sections 11, 12 and 15 of the Terrorism Act, 2000 of the
United Kingdom. Such provisions are found to be quite necessary all over the
world in anti-terrorism efforts. Sections 20, 21 and 22 are penal in nature that
demand strict construction. These provisions are a departure from the ordinary
law since the said law was found to be inadequate and not sufficiently effective
to deal with the threat of terrorism. Moreover, the crime referred to herein under
POTA is aggravated in nature. Hence special provisions are contemplated to
combat the new threat of terrorism. Support, either verbal or monetary, with a
law to nurture terrorism and terrorist activities is causing new challenges. Therefore, Parliament finds that such support to terrorist organisations or terrorist activities needs to be made punishable. In the context of the above discussion by the Court, it held that it cannot be said that these provisions are innoxious. But, it went on to give certain clarifications while upholding the one limiting them only to those activities that have the intent of encouraging or furthering or promoting or facilitating the commission of terrorist activities.

**Ex post facto laws**

Article 20 (1) of the Constitution provides thus:

No person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.

The jurisprudential philosophy of the same was considered in *State v. Giall Singh.* It is a fundamental right of every person that he should not be subjected to greater penalty than what the law prescribes, and no *ex post facto* legislation is permissible for escalating the severity of the punishment. But, if any subsequent legislation would downgrade the harshness of the sentence for the same offence, it would be a salutary principle for administration of criminal justice to suggest that the said legislative benevolence can be extended to the accused who awaits judicial verdict regarding sentence.

In *Rattan Lal v. State of Punjab,* it was unequivocally declared by the Supreme Court that an *ex post facto* criminal law, which only mollifies the rigour of law is not hit by Article 20(1) of the Constitution and that if a

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'id', 606  
'id', 607  
'(1999) 9 SCC 312, 321  
'AIR 1965 SC 444: (1965) 1 Cri LJ 360
particular law makes provision to that effect, though retrospective in operation, it
would still be valid. In *T. Barai v. Henry Ah Hoe*, the view was reiterated and
was emphasised that if an amending Act reduces the punishment for an
 offence, there is no reason why the accused should not have the benefit of such
reduced punishment. It was said:

"The rule of beneficial construction requires that even ex post facto law of
such a type should be applied to mitigate the rigour of the law. The
principle is based both on sound reason and common sense."90

An interesting question arose when the provisions of the NDPS Act, 1985
were amended by the amending Act 9 of 2001, which rationalised the structure
of punishment under the Act by providing graded sentences linked to the
quantity of narcotic drug or psychotropic substance in relation to which the
offence was committed. The application of strict bail provisions was also
restricted only to those offenders who indulged in serious offences. The benefits
of this amendment were made applicable to (a) all cases pending before the
court on 2-10-2001; and (b) all cases under investigation as on that date. The
proviso, however, made an exception and excluded the application of the
rationalised sentencing structure to cases pending in appeal.

It was contended in *Basheer v. State of Kerala*, that the benefit of the
rationalised structure of punishment introduced by the amending Act of 2001
could also be made available to all pending cases (including appeals) in courts
at the date of the amendment coming into force, as otherwise it would be
unreasonable and violative of the equality right guaranteed by Article 14 of the
Constitution, resulting in hostile discrimination. The Court did find that the
amendments (at least the ones rationalising the sentencing structure) are more
beneficial to the accused and amount to mollification of the rigour of the law. It

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90 (1983) 1 SCC 177; AIR 1983 SC 150
91 (2004) 3 SCC 609
consequently that, despite retrospectivity, they ought to be applied to the

Cases pending before the Court or even to cases pending investigation on the

Acts on which the amending Act came into force as such application would not

be hit by Article 20(1) of the Constitution. But, when it came to extending it to

cases, it observed that merely because the classification has not been carried

out with mathematical precision, or that there are some categories distributed

along the dividing line, is hardly a ground for holding that the legislation falls

viol of Article 14, as long as there is broad discernible classification based on

intelligible differentia, which advances the object of the legislation, even if it be

class legislation. As long as the extent of over-inclusiveness or under-

clusiveness of the classification is marginal, the constitutional vice of

fringement of Article 14 would not infect the legislation

It referred to State

P. v. Nallamilli Rami Reddi, where a similar contention, urged to impugn a

statutory provision as infringing Article 14 of the Constitution, was dismissed by

the Court in the following words:

"What Article 14 of the Constitution prohibits is ‘class legislation’ and

not ‘classification for purpose of legislation’. If the legislature reasonably

classifies persons for legislative purposes so as to bring them under a

well-defined class, it is not open to challenge on the ground of denial of
equal treatment that the law does not apply to other persons. The test of

permissible classification is twofold: (i) that the classification must be

founded on intelligible differentia which distinguishes persons grouped

together from others who are left out of the group, and (ii) that differentia

must have a rational connection to the object sought to be achieved.

Article 14 does not insist upon classification, which is scientifically

perfect or logically complete. A classification would be justified unless it

is patently arbitrary. If there is equality and uniformity in each group, the

law will not become discriminatory, though due to some fortuitous

circumstance arising out of (sic) peculiar situation some included in a

class get an advantage over others so long as they are not singled out for

special treatment. In substance, the differentia required is that it must be

real and substantial, bearing some just and reasonable relation to the

object of the legislation.“
Thus, the principle of *ex post facto law* as applied in India also largely satisfy the requirements under the international norms except for the case mentioned above.

**Double jeopardy**

The rule against double jeopardy is stated in the maxim *nemo debet bis evari pro una et eadem causa*. It is a significant basic rule of criminal law that a man shall be put in jeopardy twice for one and the same offence. The rule provides foundation for the pleas of *autrefois acquit* and *autrefois convict*. Article 20(2) of the Constitution provides that no person shall be prosecuted and punished for the same offence more than once. To attract applicability of Article 20(2) there must be a *second prosecution* and punishment for the same offence in which the accused has been prosecuted and punished previously. A subsequent trial or a prosecution and punishment are not barred if the ingredients of the two offences are distinct.

The manifestation of the rule can also be found contained in Section 26 of the General Clauses Act, 1897, Section 300 of the Code of Criminal Procedure, 1973 and Section 71 of the Indian Penal Code.94

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94Section 26 of the General Clauses Act provides: "26. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence." Section 300 CrPC provides, *inter alia*, "300. (1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section 221, or for which he might have been convicted under sub-section (2) thereof." Section 71 IPC provides "71. Where anything which is an offence is made up of parts, any of which parts is itself or themselves constitute an offence, unless it be so expressly provided - Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or; where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence; the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences."
Though Article 20(2) of the Constitution of India embodies a protection against a second trial after a conviction of the same offence, the ambit of the protection is held to be narrower than the protection afforded by Section 300 of the Criminal Procedure Code. It was held by the Supreme Court in *Manipur Admn. v. Thokchom Bira Singh* that ‘if there is no punishment for the offence as a result of the prosecution, Article 20(2) has no application.’ While Article 20(2) embodies the principle of *autrefois convict*, Section 300 of the Criminal Procedure Code is said to combine both *autrefois convict* and *autrefois acquit*. Section 300 has further widened the protective wings by debarring a second trial against the same accused on the same facts even for a different offence if a different charge against him for such offence could have been made under Section 221(1) of the Code, or he could have been convicted for such other offence under Section 221(2) of the Code.

The authority on the rule against double jeopardy with reference to Article 20(2) of the Constitution is the Constitution Bench decision in *Maqbool Hussain v. State of Bombay*, where it was held that if the offences are distinct, there is no question of the rule as to double jeopardy being extended and applied.

In *State of Bombay v. S.L. Apte*, another Constitution Bench held that the trial and conviction of the accused under Section 409 IPC did not bar the trial and conviction for an offence under Section 105 of the Insurance Act because the two were distinct offences constituted or made up of different ingredients though...

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*AIR 1965 SC 87*

Section 221 of the Criminal Procedure Code provides for: "221. Where it is doubtful what offence has been committed.—(1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused shall be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed one of the said offences. (2) If in such a case the accused is charged with one offence, and appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it." *State v. Nalini*, (1999) 5 SCC 253, 344

*AIR 1953 SC 325: 1953 Cri LJ 1432*
*AIR 1961 SC 578: (1961) 1 Cri LJ 725*
allegations in the two complaints made against the accused may be substantially the same.

In *Om Parkash Gupta v. State of U.P.*\(^6\) and *State of M.P. v. Veereshwar Agnihotri*,\(^1\) it was held that prosecution and conviction or acquittal under Section 409 IPC do not debar the accused being tried on a charge under Section 12) of the Prevention of Corruption Act, 1947 because the two offences are not identical in sense, import and content.

An interesting interpretation is found in *Roshan Lal v. State of Punjab*,\(^2\) where the accused had caused disappearance of the evidence of two offences under Sections 330 and 348 IPC and, therefore, he was alleged to have committed two separate offences under Section 201 IPC. It was held that neither Section 71 IPC nor Section 26 of the General Clauses Act came to the rescue of the accused and the accused was liable to be convicted for two sets of offences under Section 201 IPC though it would be appropriate not to pass two separate sentences.

In an interesting question on Article 20(2) in *State of Rajasthan v. Hat Singh*,\(^3\) the accused was charged under two sections viz., Section 5 which punishes the glorification of sati and Section 6 which punishes the contravention of prohibitory order issued by the Collector and District Magistrate. The Supreme Court held that what is punished under Section 5 is the criminal intention for glorification of sati and what is punishable under Section 6 is the criminal intention to violate or defy the prohibitory order issued by the lawful authority. And, therefore, they did not consider that the ingredients of the offences contemplated by Section 5 and Section 6(3) were the same or that they necessarily and in all cases overlap or that prosecution and punishment for the

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\(^6\) AIR 1961 SC 578: (1961) 1 Cri LJ 725

\(^1\) AIR 1957 SC 592: 1957 Cri LJ 892

\(^2\) AIR 1965 SC 1413: (1965) 2 Cri LJ 426. See also the discussion in *Union of India v. P.D. adav*, (2002) 1 SCC 405

offences under Sections 5 and 6(3) both are violative of Article 20(2) of the Constitution or of the rule against double jeopardy.

Again to get the benefit of protection under section 300, it has been held that, the accused should show that he had been tried by 'a court of competent jurisdiction' for an offence. For example it has been held that the adjudication proceedings before the Collector of Customs has been held as not a 'prosecution' and the Collector not a 'court'.

**Witness protection**

The fair trial for a criminal offence is said to consist 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. 'Witnesses' are the eyes and ears of justice. Hence, the Supreme Court has been lately bestowing a great attention to the aspect of witness protection as contemplated under certain enactments. It is important since the quality of trial process depends on it. In the words of the Supreme Court:

"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 clout and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests

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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 a mockery.”

The falling standards of value have been noted by the Supreme Court when it observed that it is a matter of common experience that in recent times there has been a sharp decline of ethical values in public life even in developed countries much less a developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. The court notes that one of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power.

While on the one hand the need for protection to witnesses has been raised, on the other, the legislative provisions making way for such protection have been subject to challenge. The most recent was the challenge to section 30 of POTA which confers discretion to the court concerned to keep the identity of

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1 Zahira, 188
3 Recently, the Supreme Court in State of Maharashtra v. Dr. Praful B. Desai, (2003) 4 SCC 601 in the context of examining a witness through video conferencing has held that the development of science and technology has paved the way to ascertain the genuineness of the deposition and further the presence of an office from the consulate/embassy would ensure such objective (s. 273 Cr.P.C.). See also Maryland v. Santa Ausa Craig, 497 US 836 (1990) and Basavaraj R. Patil v. State of Karnataka, (2000) 8 SCC 740
The court lamented that it cannot shy away from the unpleasant reality that often witnesses do not come forward to depose before court even in serious cases and this precarious situation creates challenges to the criminal justice administration in general and terrorism-related cases in particular. It further observed that witnesses do not volunteer to give evidence mainly due to fear for their lives and ultimately, the non-conviction affects the larger interest of the community, which lies in ensuring that the executors of heinous offences like terrorist acts are effectively prosecuted and punished. They held that legislature drafted Section 30 by taking all these factors into account and has struck a fair balance between the rights and interest of witness, rights of accused and larger public interest. The Court also recognised that the section is also aimed to assist the State in justice administration and encourage others to do the same under the given circumstances. What weighed in the mind of the court was that anonymity of witness is not the general rule under Section 30 and that the identity will be withheld only in exceptional circumstance when the Special Court is satisfied that the life of the witness is in jeopardy. The Court observed thus:

"If such witnesses are not given appropriate protection, they would not come forward to give evidence and there would be no effective prosecution of terrorist offences and the entire object of the enactment may possibly be frustrated. Under compelling circumstances this can be dispensed with by evolving such other mechanism, which complies with natural justice and thus ensures a fair trial."

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1 People's Union for Civil Liberties v. Union of India, (2004) 9 SCC 580. This section is similar to section 16 of TADA, the vires of which were upheld in Kartar Singh case, (1994) 3 SCC 569: 1994 SCC (Cri) 899: (1994) 2 SCR 375 (see pp. 683-89 of SCC).
3 PUCL (2004), 610
The provision has been challenged mainly due to the fact that it takes away the opportunity of the accused to cross-examine the witness which is essential if the trial is to be considered fair in an adversarial system. It is true that reasons for keeping the identity and address of a witness secret are required to be recorded in writing by the Court and such reasons should be weighty. Though the attention of the Court was drawn to the legal position in USA, Canada, New Zealand, Australia and UK as well as the view expressed in the European Court of Human Rights in various decisions, it considered it unnecessary to refer any of them because, according to it, the legal position has been fully set out and explained in *Kartar Singh* and provision of POTA in section 30 sub-section (2) has been modelled on the guidelines set out therein.\(^{111}\)

The Court did caution that the Special Courts will have to exercise utmost care and caution to ensure fair trial. The reason for keeping identity of the witness has to be well substantiated. It said that it is not feasible for the Supreme Court to suggest the procedure that has to be adopted by the Special Courts for keeping the identity of witness a secret and that it shall be appropriate for the courts concerned to take into account all the factual circumstances of individual cases and to forge appropriate methods to ensure the safety of individual witness. More so since keeping secret the identity of witness, though in the larger interest of the public, is a deviation from the usual mode of trial and it is in extraordinary circumstances that this path, which is less traveled, is taken.

The Malimath Committee has, by Recommendation 81, stated that a law should be enacted for giving protection to the witnesses and their family members on the lines of the laws in USA and other countries.

This could be done only after ensuring that the interest of the defence\(^{112}\) and the rights of the accused are not in any way compromised due to this since it

\(^{111}\) Id., 611

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I ...y to cross examine the witnesses. They must be counter-balanced by safeguards to preserve equality of arms at the trial, and be reasoned by the court. The aspect of secrecy may constitute a violation of Article 14 (1) ICCPR, which stipulates that any judgment shall be made public for the narrow exceptions mentioned in the paragraph, and which are not fulfilled in the case of terrorism trials.

In August 2004, the Law Commission of India has made some proposals in their Consultation Paper in this area which are being discussed now.

juvenile justice

Juvenile Justice is one area that stands out on the aspect of direct impact of international efforts for the development of criminal justice administration in India. The United Nations General Assembly, in the Declarations of the Rights of the Child Principles 1959, has laid down that the child shall in all circumstances be protected against all forms of neglect, cruelty and exploitation. The Second United Nations Congress on the Prevention of Crime and Treatment of Offenders, London, 1960 passed a resolution that stated:

"The Congress considers the scope of the problem of juvenile delinquency should not be unnecessarily inflated .... It recommends that the meaning of the term juvenile delinquency should be restricted as far ...
as possible to violations of the criminal laws and that even for protection, specific offences which would penalize small irregularities, or maladjusted behaviour of the minor but for which the adult would not be prosecuted, should not be created."\textsuperscript{117}

Prior to the enactment of the Juvenile Justice Act, 1986 there were several laws prevailing in different States and the need for a uniform legislation for juveniles for the whole of India was expressed regularly. Such uniform legislation was not being enacted on the ground that the subject-matter of such a legislation fell in the State List of the Constitution. The U.N. Standard Minimum Rules for the Administration of Juvenile Justice\textsuperscript{118} enabled Parliament exercising its powers under Article 253 of the Constitution read with Entry 14 of the Union List to make any law for the whole of India to fulfill international obligations.\textsuperscript{119} Now, of course, the Act stands replaced by the Juvenile Justice (Care and Protection of Children) Act 2000. The experience with the Juvenile Justice Act has been largely pleasant except for some areas that have prompted the reenactment of Act with different thrust and a new name.

The Central Children Act 1960 had for the first time attempted a uniform definition of a child which could be adopted for the whole country. It provided for the establishment of Child Welfare Board and Children’s Court.\textsuperscript{120} Though this enactment made some progress in the field, consistency and uniformity were far from achieved.

In Rohtas v. State of Haryana,\textsuperscript{121} the Supreme Court had held that the trial of a young offender accused of an offence punishable with death or life

\textsuperscript{1} 'New Forms of Juvenile Delinquency: Their Origin, Prevention and Treatment', Report prepared by the Secretariat, A/Conference 17 – 7
\textsuperscript{2} Also called the Beijing Rules adopted by the General Assembly 1985
\textsuperscript{3} See Ved Kumari, Treatise on the Juvenile Justice Act, Indian Law Institute, New Delhi, p. 5
\textsuperscript{4} Section 4
\textsuperscript{5} 1979 Cri.L.J. 1365. See also Hiratal Mallick v. State of Bihar, AIR 1979 SC 2236: (1977) 4 SCC 44

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prisonment will be under the provisions of the Children Act and not in accordance with the provisions of the Code of Criminal Procedure.

In Raghbir v. State of Haryana,\textsuperscript{122} the Supreme Court held that the Children Act, State as well as Central, gives exclusive jurisdiction to children’s court while dealing with juvenile accused in respect of all offences and prescribe special procedure in the inquiry and trial of such cases. This was held so in spite of the fact that section 27 of the Cr.P.C., which prescribes offences other than for which punishment of death or life imprisonment can be given are the ones to be tried by special courts.\textsuperscript{123}

The Supreme Court recognised the need for an Act for the whole of the country in Sheela Barse v. Union of India.\textsuperscript{124} It suggested that the enactment should contain not only provisions for investigation and trial of offences but should also contain mandatory provisions for ensuring social, economic and psychological rehabilitation of the children who are either accused of offences or are abandoned or destitute or lost. It was directed in the decision that where a complaint is filed or FIR lodged against a child below 16 years of age for an offence punishable with imprisonment of not more than 7 years, the investigation should be completed within a period of 3 months from the date of filing the complaint or the FIR. In such cases, where a charge sheet is filed within 3 months, the case must be disposed of within further a period of 6 months.\textsuperscript{125}

\textsuperscript{122} (1981) 4 SCC 210
\textsuperscript{123} See also J.P.Sirohi, Criminology and Criminal Administration, 5th edn., Allahabad Law Agency, Faridabad, 2003 for some statistical data and case studies.
\textsuperscript{124} (1986) 3 SCC 632
\textsuperscript{125} See also the right to speedy trial in Hussainara Khatoon II v. State of Bihar, (1980) 1 SCC 91
It is in the light of decisions and other suggestions from various quarters that the Parliament passed the Juvenile Justice Act of 1986. Under the same, Juvenile Welfare Boards and Juvenile Courts were set up. The Act was aimed categorically at bringing the operation of juvenile justice system in the country in conformity with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. Though the Act recognised the time limit of three months for completing the investigation, it did not prescribe the other limit of further six months for completing the trial.

For granting the benefits of the Children Act, the person ought to be a juvenile, and for that it is necessary for us to consider the relevant date with reference to which the age of the person is to be ascertained. For, if the person commits an act while a juvenile and then is apprehended when he is crossed the age of juvenile, the problem arises. In *Santenu Mitra v. State of W.B.*, *Bhola Bhagat v. State of Bihar* and *Gopinath Ghosh v. State of W.B.* the question whether the person, arrayed as the accused-appellant before the Court, was a juvenile or not was decided by taking into consideration the age of the accused on the date of the occurrence or the date of the commission of the offence. The Supreme Court in *Arnit Das v. State of Bihar*, considered the impact of these decisions and held that generally speaking these cases are authorities for the propositions that:

(i) the technicality of the accused having not claimed the benefit of the provisions of the Juvenile Justice Act at the earliest opportunity or before any of the courts below should not, keeping in view the intendment of the

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4 In spite of this certain High Courts held that *Sheela Barse*, being the law of the land, mandates dismissal of the case if trial is not completed within six months – e.g. *Jitender Kumar v. State of Haryana*, AIR 1986 SC 1773
5 (1998) 5 SCC 697
6 (1997) 8 SCC 720
7 AIR 1984 SC 237: 1984 Supp SCC 228
legislation, come in the way of the benefit being extended to the accused-appellant even if the plea was raised for the first time before this Court; (ii) a hypertechnical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases; and (iii) the provisions of the Act are mandatory and while implementing the provisions of the Act, those charged with responsibilities of implementation should show sensitivity and concern for a juvenile. 132

But, it observed that in none of the cases the specific issue - by reference to which date (the date of the offence or the date of production of the person before the competent authority), the court shall determine whether the person was a juvenile or not, was either raised or decided. 133 The Court went on to hold that the date the person is brought before the Court or the authority, as the case may be, shall be the relevant date for determining whether he is a juvenile or not.

In Ramdeo Chauhan v. State of Assam, 134 despite holding that the petitioner was neither a juvenile nor were the provisions of the Act applicable to the case, the Court examined this matter from another angle i.e. to find out as to whether the petitioner was 'near or about' the age of a juvenile for the purposes of ascertaining as to whether the death sentence can be substituted by imprisonment for life. It was done so because the Court felt that the technicalities of law cannot come in the way of dispensing justice in a case where the accused is likely to be given the extreme penalty imposable under law.

133 On the ground that a decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the ratio decidendi. This is the rule of sub silentio, in the technical sense when a particular point of law was not consciously determined. See State of U.P. v. Synthetics & Chemicals Ltd., AIR 1990 SC 1927: (1990) 1 SCC 109, paragraph 41
134 (2001) 5 SCC 714
The defence counsel had sought the court to take notice that the marginal error in age ascertained by radiological examination is two years on either side. The Court, however, came to the conclusion that he was not a juvenile even by these standards.

Speedy Trial

Speedy trial has been adjudged to be integral and essential part of Article 21 in the Hussainara Khatoon series. It referred to the Sixth Amendment to the US Constitution and also Article 3 of the European Convention on Human Rights which provides that:

"Every one arrested or detained . . . shall be entitled to trial within a reasonable time or to release pending trial."

It observed:

"We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in Maneka Gandhi v. Union of India. We have held in that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that article that some semblance of a procedure should be prescribed by law, but that the procedure should be 'reasonable, fair and just.' If a person is

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137 It provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial"
deprived of his liberty under a procedure which is not 'reasonable, fair or just,' such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of liberty cannot be 'reasonable, fair or just' unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.138

In *Hussainara Khatoon IV v. State of Bihar,*139 the Court went on to observe thus:

"The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this Court, as the guardian of the fundamental rights of the people, as a sentinel on the qui vive, to enforce the fundamental right of the accused to speedy trial by issuing necessary directions to the State which may include taking positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the court, appointment of additional judges and other measures calculated to ensure speedy trial."

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But, the question which arises is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21. Would he be entitled to be released unconditionally freed from the charge leveled against him on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right under Article 21?

In “Common Cause”, A Registered Society v. Union of India the Supreme Court prescribed a time limit within which the trial ought to be completed and in Raj Deo Sharma II v. State of Bihar, the court ordered to close the prosecution cases, if the trial had been delayed beyond a certain period in certain specified cases involving serious offences.

In order to avoid delay due to frequent objections raised, by both the prosecution and defence, it was recently observed by the Supreme Court that where the objection is raised during evidence stage of any material or oral evidence, the court can mark the objections tentatively and proceed with the trial and these objections could be considered at the final stage (except where it is one of deficiency of stamp duty on a document). It has been argued that this practice may create complications and delay and may not even be considered at the final stages. In the alternative, it is suggested that the superior courts should be strict in admitting revision and writ petitions during pendency of trials.

\[\text{References:}\]

4 (1996) 4 SCC 33. This was further clarified in Common Cause, A Registered Society v. Union of India, (1996) 6 SCC 775, 776

5 (1998) 7 SCC 507

6 Bipin Shantalal Panchal v. State of Gujarat, (2001) 3 SCC 1 – in this case under NDPS in the Sessions Court there was an undue delay due to the objections raised at the trial and the person was remanded to jail for several years as the court denied him bail

K.N. Goyal J., “Issuing Practice Directions – Need for Review”, (2002) 1 SCC (J) 1. The author also argues for a proper procedure for Practice Directions after due consideration by Full Court or the Administrative Committee or a Special Committee constituted for the purpose as is followed in England instead of piecemeal approach by certain Judges and Benches.
**locus Standi**

It is one thing to confer the rights and at the same time another to ensure that these rights are being enjoyed. In a country like India, litigation awareness part, it is rare that a majority of the population even have an awareness of their rights. A major chunk of the population is a mute sufferer. It is in this context that the concept of *locus standi* got a different colour under the Supreme Court jurisprudence.

In *S.P. Gupta v. Union of India*,\(^{144}\) the law relating to *locus standi* was explained so as to give a wider meaning to the phrase. The Supreme Court laid down that:

"... practising lawyers have undoubtedly a vital interest in the independence of the judiciary; they would certainly be interested in challenging the validity or constitutionality of an action taken by the State or any public authority which has the effect of impairing the independence of the judiciary."\(^{145}\)

The concept of *locus standi* has been diluted to a great extent by the Supreme Court in entertaining matters relating to the pathetic conditions some of the persons involved in the criminal system have to undergo.\(^ {146}\) The right to speedy trial was considered in *Hussainara Khatoon* cases.\(^ {147}\) Law Professors were allowed to bring to light the inhuman conditions prevailing in the protective homes, long pendency of trials, trafficking in women, importation of children for homosexual purposes, non payment of wages to bonded labourers and inhuman conditions of prisoners in jail in *Upendra Baxi (Dr.) v. State of*

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\(^{144}\) AIR 1982 SC 149; 1981 Supp SCC 87

\(^{145}\) Id., paragraph 26

\(^{146}\) AS Anand J., MC Bhandari Memorial Lectures – “Public Interest Litigation as Aid to Protection of Human Rights”, (2001) 7 SCC (J) 1

\(^{147}\) Supra n. 136
Custodial violence to women prisoners in police lock ups in Bombay was raised in *Sheela Barse v. State of Maharashtra*.\(^{149}\)

In the context of public interest litigation, however, the Supreme Court in its various judgments has given the widest amplitude and meaning to the concept of *locus standi*.

In *People's Union for Democratic Rights v. Union of India*,\(^{150}\) it was laid down that public interest litigation could be initiated not only by filing formal petitions in the High Court but even by sending letters and telegrams so as to provide easy access to court. In *Bangalore Medical Trust v. B.S. Muddappa*,\(^{151}\) the Court held that the restricted meaning of aggrieved person and the narrow outlook of a specific injury has yielded in favour of a broad and wide construction in the wake of public interest litigation. The Court further observed that public-spirited citizens having faith in the rule of law are rendering great social and legal service by espousing causes of public nature. They cannot be ignored or overlooked on a technical or conservative yardstick of the rule of *locus standi* or the absence of personal loss or injury. Recently, in *Chairman, Railway Board v. Chandrima Das*,\(^{152}\) the Supreme Court recognised the *locus standi* of a lawyer to seek compensation for the rape of a Bangladeshi national within the railway precincts.

The Malimath Committee recommends that the victim, and if he is dead, his legal representative shall have the right to be impleaded as a party in every criminal proceeding where the offence is punishable with 7 years imprisonment.

\(^{148}\)(1983) 2 SCC 308
\(^{149}\)(1983) 2 SCC 96
\(^{150}\)(1982) 2 SCC 494. See also *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161
\(^{151}\)AIR 1985 SC 910: (1985) 3 SCC 69 on the right to approach the court in the realm of public interest litigation
\(^{152}\)AIR 1991 SC 1902: (1991) 4 SCC 54
\(^{153}\)(2000) 2 SCC 465
He has a right to be represented by an advocate of his choice; provided that an advocate shall be provided at the cost of the State if the victim is not in a position to afford a lawyer. It prescribes that the victim's right to participate in criminal trials shall, *inter alia*, include - a) to produce evidence, oral or documentary, with leave of the Court and/or to seek directions for production of such evidence; b) to ask questions to the witnesses or to suggest to the court questions which may be put to witnesses; c) to know the status of investigation and to move the court to issue directions for further to the investigation on certain matters or to a supervisory officer to ensure effective and proper investigation to assist in the search for truth; d) to be heard in respect of the grant or cancellation of bail; e) to be heard whenever prosecution seeks to withdraw and to offer to continue the prosecution; f) to advance arguments after the prosecutor has submitted arguments; g) to participate in negotiations leading to settlement of compoundable offences.

It seems to be a good suggestion. However, one may be skeptical about the implications of its implementation.

**Conclusion**

On the whole, it may be observed that the concept of fair trial as envisaged in the international norms is largely satisfied. However, the Courts may be required to look into those cases where they have resorted to a hands off policy on the pretext of security of State. If the trend of the day is to be gone by, anything and everything could be brought within the purview of such laws. The courts have to be more vigilant.

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9 Recommendation 14