CHAPTER VI

THE METHODOLOGY OF WORK AND FUNCTIONING IN THE ADMINISTRATION OF CRIMINAL JUSTICE

Introduction:

The prosecutor has to maintain the Role of law and also strengthen the Rule of Law. When he maintains the role of the Law, it means the protection of legitimate interest of the individual especially for his personal liberty. It indicates that no man is Punishable in Criminal Trial or lawfully made to suffer in body or good except for the distinct breach of the law, established in the ordinary manner. The Role of Law involves the doctrine that all men are equal before law and the acts of the officials in carrying out Government orders are cognizable for ordinary Court of Law.

Meaning of the Trial:

So also this chapter is concerned with Trial Process. As per Ramnatha Iyar's Law Lexicon trial means: proceeding, which commences when a case is called on by the Magistrate on the board, the accused in the dock and the representative of the Prosecution and the defence before the Court. The prosecutor represents the State in such trial and in charge of the case may be civil or criminal before a Judge who has a jurisdiction over it and tried it as per the rule of law of the land. It means offences involved criminal law are those construed as being against the State.

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169 The New Encyclopaedia Britannica (Editorial Advice of the Faculties of the University of Chicago, Volume No.3, 15th edition 1989) P. 738
Adversary System of Criminal Trial:

Our nation has adopted Adversary System of criminal jurisprudence. Therefore, any dispute as to the criminal responsibility of a person is to be resolved by the criminal Court after giving fair and adequate opportunity to the accused to place before the Court their respective case/s. The Court's function is more or less as the seekers of truth and not to take side or show any favour or disfavour to any side out of two parties. Prosecution has to put the case plainly and firmly having no chance of vacillation of mind. Court can only interfere in examination in chief or cross examination to explain the question to search out the truth and to decide which party has succeeded in proving the case according to the rule of law. Adversary system of trial enables an impartial and competent Court to have a proper perspective of the case. This system is a better device to discover the truth in fair manner.

Criminal Procedure Code 1973 (Act No. 2 of 1974) provides a mechanism for the enforcement of criminal law. Without procedural law, the substantive criminal law, which defines offences and provides punishment, would be worthless. Empty threats do not deter and without deterrent effect, the law of crimes will have hardly any meaning. If thieves and murderers are not detected, prosecuted and punished in such events there will be no use of defining theft and murder and prescribing “deterrent” punishment for them (i.e. defaulter, delinquent or accused).

Representation of the accused through lawyers:

Under Article 22 (1) of the constitution of India In Hussainara Khatoon V/s Home Secretary Bihar191. It has been held that it is a constitutional mandate of every accused person who is unable to engage a lawyer and secure legal services on account of some reasons such as poverty, indigent or incommunicado situation, to have free legal services provided to him by the State. If free legal aid services are not provided the trial itself may be vitiated as contravening Article 22 (1) of the constitution of India inter alia provides that "no person who is arrested shall be denied

191 All India Reporter 1989 Supreme Court, P.1369.
the right to consult and to be defended by the legal practitioner of his choice so also in section 303 of the Code 1973.

At present Assistant Public Prosecutor has to work in the Court of Chief Judicial Magistrate or in the Court of Judicial Magistrate First Class to conduct the police cases. However, with the permission of the Collector, criminal cases of other department, which tried by Chief Judicial Magistrate or Judicial Magistrate First Class can be conducted by Assistant Public Prosecutor and can be tried by the Court, which has been shown as per the first Schedule of the Code. Under the head classification of offences -1. Offences under the Indian Penal Code 1860 in column No. 6 which shows that by which Court the case shall be triable. That particular Court can try the cases submitted to it by particular police station, which has a jurisdiction to submit it. Classification II about offences against other Acts i.e. where the punishment is death or life imprisonment can be tried by the Session Judge only. Where punishment is up to ten years can be tried by the Assistant Session Judge, and others i.e. less than seven year punishment can be tried by the Chief Judicial Magistrate and where the punishment is up to three years can be tried by the Judicial Magistrate First Class or as shown by the special Act. So also the Code has devised four types of Trial Procedures. 1) Trial before the Court of Sessions, 2) Trial of Warrant cases by Magistrate, 3) Trial by summons cases by Magistrate and 4) Summary trials by Judicial Magistrate First class. The Code provides different types of Criminal Trials for different kinds of criminal offences. Higher offence will prevail. However, criminal cases are of two main types of trial. 1) First two types of trial have been conducted as Sessions triable cases and Warrant trialable cases 2) and the remaining two include - (i) Summons Triable and (ii) Summary triable cases, conducted by summary trial procedures. It depends upon the gravity of the offence. Out of which serious offences where the punishment exceeds more than two years are the warrant triable cases. But Court of Session can try any offence. However, where the offence is more serious and the punishment is more than 10 years, the said can be tried by the Assistant Sessions Judge or as mentioned in the schedule - I. The warrant triable
cases have been defined in section 2 (x) of the Code i.e. a case relating to an offence punishable with death, imprisonment for life, or imprisonment for the term exceeding two years. The summons triable cases have been defined in section 2(w) means a case relating to an offence and not being a warrant case. It is for the Code to prescribe the type of trial procedure, which should be adopted. The trial for warrant cases is much more elaborate than provided in summons cases. Moreover, summary trial has been adopted in respect of some specified warrant cases with a view to attend functional efficiency without risking the interest of justice and fair trial.

1) Language of the Court:

Under section 277 (b) of the Code, If the witness gives evidence in other language, except regional or Court language it may, if practicable be taken down in that language and if not practicable, then true translation of the evidence in the language of the Court shall be prepared as the examination of the witness proceeds, the deposition of witnesses signed by the Magistrate or the Judge in both the Courts, i.e. Sessions Court or Judicial Magistrate / Chief Judicial Magistrate.

2) Court can summons any witness:

Both the Courts i.e. Sessions Court or Judicial Magistrate and Chief Judicial Magistrate Court can issue summon to any witness in section 311 of the Code even his name has not been cited as a witness in witness list of charge sheet submitted by the police at the stage of examination of prosecution witness. A witness examined by the Court in section 311 of the Code as the Court witness can be cross-examined by both the prosecution and the defence. It will not be improper to exercise the powers by the Court to summon a witness under this section merely because his evidence supports the case for the prosecution.
3) The Payment of diet money to the Prosecution Witnesses:

It is the Court to order payment of reasonable expenses of all prosecution witnesses so also of complainants under section 312 of the Code. As per the rules framed by Government of Maharashtra, it is called as "Maharashtra Payment of Government, Expenses over complainants and witnesses attending criminal Courts, Rules 1980". The Court may refuse to pay such expenses: a) When complainant or witnesses has been declared to be false or frivolous, i.e. hostile b) To any witness whose evidence the Court does not consider to be substantially true, c) If presence is secured by coercive process. However it is held in Swaran Singh V/s State of Panjab. Appropriate diet money must be paid immediately, not only when he is examined but for every adjourned hearing to the witnesses.

4) Commission for Examination of witness/es:

On application of prosecutor, Court can appoint commission to examine material witnesses and attendance of witness/es dispense with in section 284 (1) of the Code, when attendance of witnesses cannot be procured without an amount of delay.

5) No formal proof of certain documents in section 294 Criminal Procedure Code 1973:-

If Public Prosecutor or Assistant Public Prosecutor or accused called upon to admit the genuineness of each such document/s so also in section 58 of the Evidence Act 1872. Where genuineness not disputed may be read in evidence.

6) Previous conviction:

Proof of previous conviction for the enhancement of punishment in section 75 of the Indian Penal Code – and Procedure is laid down in the Code of Criminal Procedure: -


i) by duly certified copy of sentence or order of it.

ii) certificate issued by the officer incharge of the jail under which the punishment was under gone or by production of warrant of commitment under which the punishment was suffered.

7) Record of evidence in absence of accused in section 299 of the Code:

If the accused has absconded. And no immediate prospects of arresting him the Court can examine the witness produced by Prosecution.

8) Local inspection:

If the prosecutions need it, can apply for the local inspection of spot in section 310 of the Code.

9) Power to require attendance of prisoner:

If the prosecutor feels that any material witness is confined to prison, on Public Prosecutors or Assistant Public Prosecutors application Court can call under section 267 of the Code or can issue commission for examination that witness in prison.

10) Power to proceed against other person appearing to be guilty:

Under section 319 of the Code if the evidence is occurred against any person in the Course of any Trial of an offence that any person not being the accused - has committed any offence for which such person should be tried together but if not tried along with other accused, in such event, on the application of Public Prosecutor / Assistant Public Prosecutor or the Court can suo-moto take action and made him accused and try together with the accused. It has been held in Rakesh V/s State of Hariyana\textsuperscript{194}, that before the cross-examination. The question of testing the evidence by cross-examination would arise only after addition of the accused.

\textsuperscript{194} A.I.R. 2001 Supreme Court, P. 2521.
11) Arguments in section 314 of the Code:

The Public Prosecutor / Assistant Public Prosecutor can address his oral or submit written argument before the Court in support of his case and the written argument will be the part of the record.

12) Speedy Trial :

Proceeding to be held expeditiously and not to be adjourned without Special reason under section 309 of the Code of Criminal Procedure.

13) Summary procedure to deal with certain cases of perjury :

Under section 193 of the Indian Penal Code (in section 191-definition). Even on oath though legally bound by law to state truth, makes any statement before the Court which is false and knows or believes to be false or does not believe to be true is said to give the false evidence, can be tried by the Court as summary trial under section 344(2) of the Code. Fabricating the false evidence can be dealt with in section 195, 340, 343 of the Code. If the Court so feels at the time of delivering judgment, It can punish him after following due procedure of law. Why not following the Sec.340 (3) (b) mentioned in Swaran Singh V/s State of Panjab\(^5\).

14) Issuance of summons or warrants :

The Trial Procedure prescribed for a warrant case is much more elaborate than provided in summons cases. When prosecutor is appointed by the State is not available, then the Magistrate while trying the case, may permit prosecution to be conducted by any person who is not a police officer below the rank of Inspector and who has not taken part in investigation. This classification also assumes importance at the stage of issuing process to the accused. In summons case, at first instance summons shall be issued and in Warrant case, a warrant may be issued in section 204 of the Code. There are some mandatory provisions in the Criminal Procedure Code, 1973 in which the mandatory rights are given to

\(^{5}\) 2000 Criminal Law Journal, P. 2780
the accused unless and until that has been fulfilled, there cannot be a fair trial.

**Starting Point of Prosecutor in Criminal Trial:**

The work of the prosecutor starts from the time of bail or police remand and thereafter conduction of the criminal case at the time of trial. However, a person arrested without a warrant in cognizable case cannot be detained by the police more than 24 hours except journey period, fixed by Section 57 of the Code of 73. If the Police Officers consider it necessary to detain such person for a longer period for not more than 15 days for the purpose of investigation, he can only do so after obtaining a special order of the Magistrate in section 167 of the Code (i.e. Procedure when investigation cannot be completed in twenty four hours), if the accusation is well founded at this Juncture and whether the police officer seeks help of Assistant Public Prosecutor, he can take help of Assistant Public Prosecutor in the interest of justice to obtain police custody for the recovery of property i.e. recovery on Memorandum, in section 27 of Evidence Act so as to obtain police custody remand of accused not more than 15 days as a whole that too with discretion of Magistrate. The nature of custody can be altered from judicial custody to police custody and vice versa during the first period of 15 days from arrest provided under section 167(2) of the Code. It has been held in *Central Bureau Investigation cell I, New Delhi v/s Anupam J. Kulkarni*¹⁹⁶. Thereafter Magisterial Custody or bail. As per this case accused produce before the Magistrate to decide Judicially whether remand is necessary and can hear the accused on this point.

Moreover, in adversary system, parties to be represented in the Court of law by competent lawyers adequately representing the parties, independent judges and Magistrates for securing fair trial. Therefore, prosecutor representing the State to assist the Court so as to bring the truth before the Court and if Court satisfied through evidence then punish the accused according to law, having committed the crime by way of suitable

¹⁹⁶ 1992 Criminal Law Journal P.2768 (Supreme Court)
evidence. Prosecutor has to conduct the case by way of evidence and argument.

For the fair trial:

Trial must be in presence of the accuse under section 273 of the Code

1) Venue of the Trial:

It must be seen by the accused that evidence must be taken in his presence or his personal attendance is dispensed with then in presence of his pleader. If the Court of Judicial Magistrate has a jurisdiction, then Magistrate can try the case else it will void-ab-initio. The Jurisdiction falls in section 177 to 189 of the Code. Whether sanction in section 197 of the Code is required? Without it, the Court cannot try the case. So also as per section 182 of the Code, if letters commits the offence or by telecommunication massage then it can only be tried by the Court where that massage was sent or received. When there is prima facie evidence, the case is made out against the accused, he should not be treated in trial with skin gloves. No shelter can be given under section 462 i.e. proceeding in a wrong place unless occasioned a failure of justice.

2) Burden of proof for the guilt of accused:

The burden of proof is upon the prosecution and to prove the case as per actus non facit reum nisi mens sit rea is on prosecution mens rea is attitude of mind which accompanies and directs the conduct which result in actus reus. However, it has been observed that the cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our Criminal Law should not be unrealistic approach when crime is looming large and not only society but also humanity is suffering.

3) Copies on which prosecution rely must be given to the accused:

It must be submitted to the Court in section 173 of the Code as per the sub-clauses 1 to 8, including supplementary investigation and the copies must be given to the accused under section 207 of the Code free of
cost i.e. copy of police report, First Information Report in section 154, Statement of witnesses in section 161(3) of the Code. Whom prosecution proposes to examine as its witnesses excluding that part of statement with a request to the Magistrate such exclusion has been made by police Officer in section 173 (6) of the Code of some part from the statement and appended a note requesting the Magistrate to exclude that part from the copies to be granted to the accused with reasons in section 173 of the Code. Confessional statement if any recorded under section 164 of the Code be given to accused and any other document or relevant document/extracts forwarded to Magistrate in section 173 (5) of the Code should be given to accused.

However, if the Magistrate is satisfied that any document referred to in clause 5 is voluminous the Court will order inspection of the documents personally by the accused or through his pleader.

In warrant triable cases proceeding to be held expeditiously and not to be adjourned without special reasons. The Magistrate of the Court at the commencement of the trial first of all satisfy himself that whether there is a compliance of Sec. 238 of the Code (compliance of documents in section 207 or 208 of the Code).

Regarding the preparation of copies of police report and furnishing it to the accused has agreed to continue the existing practice as an interim arrangement till the appointment of necessary staff by the High Court. (Vide Government letter, Home Department No.P.R.O.-0774, 27694-VII-P dt.5th Feb.,1977)¹⁹⁷

Copies of First information report, registration of offence, spot panchnama, Seizure and its panchanama, Statement of witnesses, Medical Report, copies of confessional statement of the accused or of witnesses if demanded and other relevant extracts must be given to the accused. This is applicable to all trials for fair trial.

Charge:

After satisfying from the Police papers, charge will be framed by the Court who will try the case against the accused in warrant trial cases or Sessions Triable cases or who will try the case and particulars has been explained in summons trial cases under section 211 and 251 of the Code respectively. It contains time, place of the alleged offence and the person against whom or the thing in respect of which it was committed. It is a notice of the matter with which accused is charged will be in the language of the Court. Moreover, under section 216 of the Code the Public Prosecutor / Assistant Public Prosecutor can prefer application to the Court to alter or add to any charge at any time before Judgment is pronounced and can recall witnesses and examine with reference to such charge in section 217 the Code of Criminal Procedure. If Presence not required can dispense with such presence. If Court feels that the Prosecution and the accuse have no objection or cause vexation or delay or for defeating the ends of justice, even call any material witness if the Court thinks so. There will be a separate charge for distinct offence and shall be tried together.

As stated supra, the charge notice is to be given to the accused of the matter charged with. That there is no effect of errors unless it has occasioned a failure of justice under section 215 of the Code.

2) Trial process:-

Record of evidence :

1) As the examination of the witness starts his evidence shall be taken down in writing by a Judge himself or by their dictation in the open Court.

2) Such evidence shall ordinarily be taken in the narrative form. Any part of such evidence may if the Judge so desires can be taken down in the form of question and answer.
3) If the witnesses will adduce evidence in the language of the Court, it shall be taken down in that language. If the witness gives evidence in any other language, it may, if practicable be taken down in that language, and if not, a true translation of the evidence in the language of the Court. If he adduce evidence in any other language, which practically can be taken down in that language, however, if it is not practicable to do so a true translation in the language of the Court, shall be prepared at the time of examination of witness. Where the evidence is taken in the language other than the Court language, a true translation in the Court’s language shall be prepared and signed by the Judge and form the part of the record. But if the evidence is taken down in English and translation thereof in the language of the Court is not required by the parties, the Court may dispense with such translation as per section 277 of the Code. e.g. where the witness deposes in Marathi which is the language of the Court that evidence is read over to the witness admitted by him to be correct and the memorandum of evidence was made by the Judge in English, in such case when question arises as to what exactly the witness had stated in his evidence, it is the Marathi deposition of the witness, that has to be taken in account and not the memorandum in English prepared by Judge as held in *State of Maharashtra V/s Bhaurao*.

4) Evidence of each witness must be read over to him after completion of his evidence, and if necessary be corrected. If a witness denies corrections of any part of evidence, the Judge may instead of correcting the evidence make a memorandum thereof the objection made to it by the witness and can add remark as he thinks necessary.

5) If such language is different from which it has been given and the witness does not understand the language, the record shall be

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interpreted to him. It shall be signed by the Judge and shall form part of the record.

6) When Judge is recording the evidence of witnesses he shall also record such remark in respect of demeanour of such witness whilst under examination, under section 280 of the Code. It will help the appellate Court in estimating the value of the evidence, as the evidence under law shall taken in the presence of the accused except Sections 317(1), 293, 299, all evidence be taken in the course of trial before the accused or if personal attendance dispense with then in presence of his pleader under section 273 of the Code, but if the evidence is given in the language not understood by the accused, it shall be interpreted in open Court.

Thereafter, there will be argument by prosecution and then by defence, that can be oral or written. If the oral argument is not concise or relevant then the Court regulate it under section 314(1) and (4) of the Code. Even written memorandum of argument from the part of the record and the copy of it should be given to the opposite party (Section 314(1) and (2) of the Code 73.

However, if the previous conviction is charged in section 211(7) of the Code but the accused does not admit such previous conviction, then after conviction in the said offence prosecution should take evidence in respect of the alleged previous conviction and record a finding thereon. But no such charge shall be read over to the accused by Magistrate or referred in any manner by prosecution unless the accused has been convicted in the said case in which his trial is going on in section 248(2) of the Code (hearing of accused on the point of sentence). Thereafter, Magistrate can pass sentence and previous conviction in section 248(3) i.e. if accused does not admit previous conviction the Magistrate may after he has convicted the said accused, take evidence of alleged previous conviction and shall record the finding thereon.
Common features for securing evidence in all four trials:

1) Best possible evidence should be given:

It is necessary that the best possible evidence must be secured so that ends of justice are satisfactorily met to enable the Court/s to decide the cases. Section 59 to 60 of the Evidence Act deals with these provisions i.e. section 59 says all facts except the contents of documents may be proved by oral evidence and section 60 says Oral evidence must be in all cases whatever be direct except opinion of experts and if author is dead or cannot he found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expenses which the Court regards as unreasonable or oral evidence refers to the existence of any material thing other than document, Court may require the production of such material thing for its inspection.

Section 61 of the Evidence Act says proof of contents of documents may be proved by primary or by secondary evidence. Section 62 of the Evidence Act, says that primary evidence means the documents itself produced for the inspection of the Court. Section 63 says that - Secondary evidence means and includes - i) Certified copies given under the provisions hereinafter contained ii) copies made from original by mechanical process, which in themselves ensures the accuracy of the copy and compared with original copies iii) copies made from or compare with the original by mechanical process or compared with the original iv) counter parts of the documents v) Oral accounts of the contents of the document given by some person who has himself seen it.

2) Prosecution has to prove its case:

Burden of proof lies on prosecution i.e. one who asserts must prove that those facts exist in section 101 of Evidence Act.
3) General Exceptions under Indian Penal Code:

Only in section 105 of the Evidence Act says that the burden of proving that case of accused comes within the general exceptions of Indian Penal Code: - When accused of any offence, the burden of proving the existence of certain circumstances bringing the case within any of the general exceptions of Indian Penal Code or within any special exception or proviso contained in any other part of the same Code or any other law defining the offence is upon the accused and the Court shall presume the absence of such circumstances of ignorance of accused.

4) Facts within the knowledge:

Under section 106 of the Evidence Act, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him i.e. A is charged with traveling on a railway without a ticket, the burden of proving that he had a ticket is on him.

5) The mode of examination of witness under section 137 of Evidence Act:

1) Examination in Chief by parties, who call the witness and not allowed to put leading questions,

2) Cross examination i.e. examination of witness by adverse party can put leading question. (to know the truthfulness of witness).

3) Re-examination of the witness Subsequent to cross-examination by the party who called him. Therefore, Section 138 of the Evidence Act says that:-

Witness shall be first examined in chief, thereafter cross examined, then reexamined only for the matters referred in cross examination, i.e. explanation if ambiguity arises and if new matter entertained, adverse party can cross examine the said witness.

As per the provisions of Section 135 of the Evidence Act, which is order of production of witness for examination -?
i) Regulation of evidence should be according to law and practice, which for the time being in force relating to civil and criminal procedure;

ii) and in absence of any such law, by the discretion of the Court Mutaties mutandies. The Judges have right to expect assistance from the counsel and more particularly from the Counsel of the Crown.\(^\text{200}\)

But the general practice in criminal Court is that the evidence is taken in the order in which it is produced by the prosecution as per section 242 (3) and even in section 244 (1) of the Code "as may be produced" therefore the Court will not interfere with the said order as burden lies on the prosecution and the prosecution can choose and devise ways and means of proving its case. If the Court starts dictating a change in the order, it may lead to serious miscarriage of justice as reported in Prithivi Nath Vs. R.C. Kau.\(^\text{201}\) In the said authority it has been held that the discretion remains with the prosecutor to examine the witness in order he likes.

Exclusion of witness from Court room while other witnesses are being examined:

Court may in its discretion direct the exclusion of the witnesses from the Courtroom while the testimony of the other witnesses is being given when it appears essential for the elucidation of truth. When Prosecution or defence call its witnesses in Court for adducing evidence the evidence of party is given his witness must be kept out of Court room. They should be examined one by one. When witness one examined and other witnesses yet to be examined must not remain in the Court room. After saying so in precinct of the Court even though present, his examination cannot be


\(^{201}\) AIR 1959 Supreme Court P. 1012
refused. Only a note is to made as he was present in Court room when another witnesses were being examined\textsuperscript{202}.

Witnesses require security:

For attendance before the Court for evidence of eyewitnesses and others at the State expenses if the accused is hardened criminal. There it is the bounden duty of the police authority to provide security for the witnesses held in \textit{Lalita Prasad Dubey Vs D.G.P. Lucknow}\textsuperscript{203}.

Hostile witnesses:

However, if the prosecution witness is not stating in the Court as per his statement to the police or unwilling to adduce the evidence, then the prosecution can obtain permission from the Court to declare him hostile in section 154 of the Evidence Act. The Magistrate may in his discretion allow for him the rule to be relaxed and grant permission to the party producing the witness to put such questions as may be put in the cross examination to lower down his credibility or some time it will be surprised that the witness unexpectedly turns hostile in such cases, the party producing him should be given permission to test his veracity and to impeach his credit in the manner laid down under section 145 of Evidence Act by way of cross examination as to the previous statement in writing. This section lays down that a witness may be cross examined as to his previous statement made in writing or reduced into writing and may be contradicted by his previous statement as may be relevant to the matter in issue which is different from his previous statement without such writing shown to him. But if the calling party is intended to contradict him by the writing, his attention must be drawn to it. Moreover, a witness may be cross-examined as to his previous


\textsuperscript{203} 2001 Criminal Law Journal, P. 1112 (Allahabad).
statement without showing him the writing if it is relevant to the matter in issue. *Tahsidlar Singh V/s State of Uttar Pradesh*

Section 142 deals in two part, i.e. first part to enable the adverse party to cross examine a witness as to previous statement made by him in writing or reduced to writing without such writing being shown to him. The second part is the cross examination by way of contradiction only.

In all trial evidence to be given from witness- box:

All witnesses should give their evidence from the witness box. A witness should normally be standing when adducing evidence, but a chair should be provided in the witness box up on which any witness may sit on receiving the permission from Presiding Magistrate. This permission should be on the valid grounds, i.e. health or witness, evidence will be continuing for a long time.

Proof of statements in section 161 Criminal Procedure Code 1973:

1) How to prove the statement of hostile witness when a witness resiles from his own statement recorded under section 161 of the Code is used in the manner indicated in section 162 of the Code. The passage which has been specifically put to the witness in order to contradict him should first be marked for identification and exhibited after it is proved. Proving it is to question the police officer who had recorded the statement.

2) The method of proving is to question the police officer who had recorded the statement of witnesses whether the passage mark is a true extract from the statement recorded by him.

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3) When it is used to contradict the witness the specific part of statement put to the witness should be set out accurately in the record of the deposition of witnesses.

4) The omission in the statement recorded in section 161 if denied by witness be proved by questioning the Police Officer, whether the witness had made a statement which he said he had.

The charge has been framed against the accused under Indian Penal Code and if admitted, no trial against the accused else if it has been denied and claim to be tried the same against him, in such event trial ensues in the Court of Law mentioned in as per schedule I of the Code. II Classification of offences about offences under other Acts by which Court the offence will be triable mentioned in column No. 4. Form of charge has been mentioned in Schedule II. In the form No.32 Part-I charges with one head. In second part it can be of two or more heads and charge of previous conviction mentioned in part III of above form.

Even Sessions Court cannot take direct cognizance, only Competent Magistrate may take cognizance of such offences and commit the case to the Court of Sessions after verifying all concerned documents.

I. Cases Triable by the Court of Sessions:

Certain offences are exclusively triable by this Court of Sessions which can ascertain by Section 26 read with Schedule - I in column no. 6 of the Code 1973, i.e. Serious Warrant Trial Cases. Such Court cannot directly take the cognizance of the offences. It can deal with such cases. Only when committed to it by the Magistrate taking cognizance of the offence on police report and other documents. Necessary procedure is prescribed under section 209 by examining Police report and other documents referred and the facts stated in the report make out an offence.

exclusively triable by the Court of Sessions and commit the case to the said Court. In this Court, the prosecution shall be conducted by the public prosecutor in section 225 of the Code i.e. a person appointed by the State Government to conduct prosecution under section 24 of the Code as such and include any person acting under him. However, the qualification and experience for the Public Prosecutor is as per section 24 of the Code 1973. No permission is required to conduct the Prosecution cases in the Sessions Court under section 301 (1) of the Code So also in the Court of Magistrate in section 302 (1) of the Code. The effect is that the Prosecutor can intervene and assume the charge of prosecution even in cases initiated on a private complaint.

a) Moreover, under section 208 of the Code accused must be supplied with the copies of police investigation for his perusal. He may avail of necessary copies of the documents like the police report, First Information Report, Statements of the witnesses recorded by the police, seizure panchanama, spot panchnamas etc.

b) Subject to provisions of bail, remand of the accused, to custody until charge sheet is filed or if no bail remand up to the conclusion of the trial.

c) To send record of the case i.e. documents and articles which has to be produced at the time of evidence.

d) Notify to Public Prosecutor for the commitment of the case to the Sessions Court and not to hold enquiry.

Description of the Charge:

Thereafter, the case will open for prosecution by Public Prosecutor by describing the charge brought against the accused and State by evidence he proposes to prove the guilt of the accused. To place before the
Court whatever evidence is in his possession to prove the guilt of accused in section 226 of the Code opening case for the prosecution.

No elaborate committal proceedings by the Magistrate is necessary as held in Hukumsingh and others V/s State of Rajasthan observed that the Public Prosecutor has to state by what evidence he proposes to prove the guilt of the accused. However, if he knew at that stage certain persons cited by the Investigation Officers from the police agency as a prosecution witness might not support the prosecution case, he is at liberty to state before the Court that fact. Alternatively, he can wait further and obtain direct information about the version, which any particular might speak in the Court. If the version is not in support of the prosecution case, it would be unreasonable to insist on a Public Prosecutor to examine those persons as witnesses for prosecution.

Evidence for prosecution under section 231 of the Code of criminal procedure:

The Sessions Judge is obliged "to take all such evidence as may be produced in support of prosecution. Therefore, it is clear that Public Prosecutor is expected to produce evidence" in support of the prosecution and not in derogation of prosecution case. The Public Prosecutor would be in a position to take a decision that which among the witnesses cited are to be examined. If too many witnesses are examined on the same point, slight change of versions create complications. But the Public Prosecutor is at liberty to pick and choose two or some witnesses inter alia. So that the time of the Court can be saved, from repetition in depositions. This principles applies when if too many witnesses sustained injuries. In such cases, the Public Prosecutor is not obliged to examine all the injured prosecution witnesses. If he is satisfied by examining any two or three of them, it is open to him to inform the Court that he does not propose to examine the remaining witnesses of the same category. It will not help the

2001 Criminal Law Journal, P. 511 (Supreme Court).
Public Prosecutor and relieving of the strain of addition of repeatedly evidence on the same point but also helps the Court considerably in lessening the work load.

**Categories of Witnesses:**

Where there are two categories of witnesses to the occurrence, one consisting of persons closely related or interested to the victim and the others who have no such relations, i.e. independent witness. The duty of the Public Prosecutor for the Court may require him to produce the witnesses from the latter category also subject to his discretion to limit to one or two among them *inter alia*. However, if the Public Prosecutor got the reliable information that any one among above category would not support the prosecution version, he is free to state in the Court in this respect and skip that witness from examination. But it is open to the defence to cite skip witnesses and examine them as the defence witnesses. The decision has to be taken by the Public Prosecutor in fair manner. He can talk with the witnesses before hand to enable him to know well in advance the stand, which that particular witness is adopting.

Section 114 (g) of the Evidence Act came into play. In case, the Court finds that the prosecution had not examined witnesses for the reasons not tenable or proper, then it would be justified to draw inference (adverse) against the prosecution as held in *Bava Haji Hamsa V/s State of Kerala*.

In case of *Shri Shivaji Saheb Rao Bobade V/s State of Maharashtra* Justice V. R. K. Iyer speaking for three Judges Bench had struck a note of caution that while the Public Prosecutor has the freedom to pick and choose the witnesses, he should be fair to the Court and to the

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207 A.I.R. 1973 Supreme Court, P. 902.
208 A.I.R. 1973 Supreme Court, P. 2622.
truth. The Supreme Court reiterated the same in the case *Delbir Kaur V/s State of Panjab*.209

However, after considering the record of the case and document/s submitted therewith and after hearing submission of the accused and prosecutor if the Court comes to the conclusion that there is no sufficient ground for proceeding against the accused, he will record the reasons for such discharge of the accused in section 227 of the Code. In *R.S. Nayak V/s A.R.Antule*, it has been held that at the beginning and initial stage of the trial, the truth, veracity, and effect of evidence which the Public Prosecutor proposes to adduce are not to be meticulously judged. Whether the material on record, if unrebutted, is such on which a conviction can be said to be reasonably possible. If yes, the charge will be framed.

In the case *State by Central Bureau of Investigation New Delhi V/s R. Suri Prabhu and another*,211 As per para no.3 of the Judgment, the trial Court heard the accused and the prosecution. Passed the order holding that the evidence produced by the prosecution is not sufficient to frame the charge against the accused persons. This order of the Special Judge was challenged by the respondents in these appeals, i.e. accused nos. 3 and 6 (Bangarappa Chief Minister of Karnataka and accused no. 6 Shri. Suribabu was his private Secretary) before the Hon’ble High Court of Karnataka both revisions were heard together. The learned Single Judge discharge those accused and directed to be proceeded as against the remaining four accused persons.

Therefore, there was an appeal in the Supreme Court preferred by the Central Bureau of Investigation challenging the order of Single Judge of the Karnataka High Court by which two accused out of the total six were discharged from the trial. In the Apex Court both the parties argued. The Hon’ble Supreme Court came to the conclusion in the light of the said submission that the revision petition filed before the High Court by

209 1976 (4. Supreme Court Cases) P. 158
210 1986 Criminal Law Journal. P. 1922 (Supreme Court)
211 2001 Criminal Law Journal, P. 132 (Supreme Court)
respondents would stand withdrawn. The impugned order stand erased. If the Trial Court is to decide any question, which has been dealt with impugned Judgment, the same shall be decided as though the High Court has not pronounced any opinion on such question. The Trial Court will now frame charge against respondents along with other accused and proceed to take evidence and conclude the trial and dispose it of as expeditiously as possible.

So also, in the case of State of Madhya Pradesh Appellant Vs S. B. Johar\textsuperscript{212}, Justice Thomas and M. B. Shaha. It has been held that instead of considering the \textit{prima facie} case, the High Court in Criminal revision cannot appreciate and weigh the material on record for coming to the conclusion that the charge against the accused could not have been framed. It is the settled law that at the stage of framing the charge, the Court has \textit{prima facie} to consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the police papers and arrive at conclusion or to frame a charge against the accused. If the Court is satisfied that the case is made out for proceeding further, in such event charge has to be framed.

So also in the State of Madhya Pradesh Vs Mohanlal Soni\textsuperscript{213}, J.J. Rajendra Babu and Shivraj Patil, held that the High Court by its order in earlier revision petition directed the trial Court that the documents made available by the accused during investigation be produced and taken into consideration by the Court while framing the charge. The said order became final as not challenged. In this situation, parties and the trial Court were bound by the said directions. Its failure to follow the directions resulted in framing charges against the respondents accused ignoring the documents which supported the respondents. Consequently the order framing the charge against accused would be liable to be set aside.

However, once charge has been framed, there is no provision for dropping of the charge in Nandkishor R. Lohiya and others Vs State of

\textsuperscript{212} 2000 Criminal Law Journal, P. 944 (Supreme Court).

\textsuperscript{213} 2000 Criminal Law Journal, P. 3504 (Supreme Court).
Hon'ble Justice B. B. Bagyani held that once charge was framed in warrant case instituted either on complaint or police report, the Magistrate has no power to pass order of discharge after framing a charge under section 228, there was no provision of dropping of charges.

Under Section 228 - Framing of Charge: runs as follows:

1) If after such consideration and hearing as aforesaid the Sessions Judge is of the opinion that there is ground for presuming that the accused has committed an offence which –

   a) is not exclusively triable by the Court of Sessions, he may frame a charge against the accused and by an order, transfer the case for trial to Chief Judicial Magistrate and there upon Chief Judicial Magistrate shall try it in accordance with the procedure for the trial of warrant cases instituted on police report;

   b) if exclusively triable by the Court of Sessions, he shall frame a charge in writing against the accused in section 228(1) of the Code. Form of charges has been mention in chapter XVI in section 211 to 214 and joinder of charges has been mention in form B in section 218 to 220 and where the charge/s is doubtful then in section 211 of the Code.

2) Where the Judge frames any charge under clause (b) of sub-section (1) of section 228 of the Code the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence, charged or claim to be tried.

However, at the initial stage of trial, the truth, veracity and effect of evidence which the Public Prosecutor proposes to submit are not to be judged, meticulously for determining whether there is a sufficient ground to proceed against the accused and conviction is said to be reasonably
possible. But after hearing both the parties, i.e. Prosecutor and the
defence, there is ground for presumption that the accused has committed
an offence appear from record itself. The Court has a wide discretion to
determine the question whether the material on record if unrebutted and is
as such on which conviction can be said to be reasonably possible.

1) On hearing as above, if the Sessions Judge forms an opinion that
there is a ground for presuming that the accused has committed an
offence is not 1) triable by this Court he may frame charge against
the accused and transfer the case to Chief Judicial Magistrate and
Chief Judicial Magistrate will try the offence as per the procedure of
warrant trial cases on police report.

2) If it is exclusively triable by Sessions Court, he shall frame a charge
in writing against the accused. It read over and explained to
accused and accused shall be asked whether he pleads guilty of the
offence charged or claims to be tried in section 228 (2) of the Code

The Court has power to shift and weigh the material for limited
propose whether prima facie material against the accused. The test is
dependent upon the facts of each case and it is difficult to lay down the rule
of universal application.\textsuperscript{215}

\textit{Smt. Om Wattu and another Vs State of Delhi Administration and
other}\textsuperscript{216}. Their Lordships held that the accused (A) charged in section 302
of the Indian Penal Code for inflicting the injuries on the person of
deceased, which resulted in his death. Observations and opinion
incorporated in post-mortem report cannot be the ground to deprive
prosecution from proving that the accused was guilty of an offence. Order
discharging the accused on that basis for the offence in section 302 of
Indian Penal Code is illegal. (B) in section 228 of the Code framing of
charges against the accused, the High Court should not interfere at initial
stage of framing of charges merely on the hypothesis, imagination and far

\textsuperscript{215} Kelkar R.V. - Lectures on Criminal Procedure (Eastern Book Company Lucknow Publication 3rd
\textsuperscript{216} 2001 Criminal Law Journal, P. 1723 (Supreme Court).
fetching reasons, as held in Sudhir and others V/s State of Madhya Pradesh\textsuperscript{17} that in Criminal Procedure Code in section 228, 26, case and counter case relating the same incident committed to the Session Court in one of the case, involve the offences not exclusively triable by the Sessions Court. After hearing the preliminary arguments, the Sessions Judge felt that one case is not triable by the Court of Sessions whereas in other case, the charge of an offence is triable by the Court of Sessions, and the order passed accordingly. However, the Apex Court held that in such a situation, it is not necessary that the Sessions Court should transfer the former case to the Court of Chief Judicial Magistrate for trial as envisaged in section 228(1) of the Code. The Sessions Judge has a power to try any offence under Indian Penal Code. The employment of the word ‘may’ at one place and “shall” at the another place in the same Sub-section (1)(a) of 228 of the Code unmistakably indicates that when the Offence is not exclusively triable by the Court of Sessions, it is not mandatory that he should order transfer of the case to the Chief Judicial Magistrate after framing charge. Such cross cases shall be tried by the same Court\textsuperscript{18} in Daud Usman Kumbhare V/s Usman Ahmad Juneja\textsuperscript{19} it has been held that in cross cases triable by Session Court must be tried together. And judgment should be delivered simultaneously on the same day can be summarized thus:

1) It saves off the danger of the accused being convicted as both the cases are before the Court.

2) It deters conflicting Judgments being delivered upon the similar facts.

3) The case and the counter case are with intent and purpose are different from conflicting versions of the same incident, as held in the case State of Maharashtra V/s Somnath Thapa\textsuperscript{20}, that the Standard

\textsuperscript{17} 2001 All Maharashtra Law Reporter (Criminal) P. 459 (Supreme Court).
\textsuperscript{19} 2004 Criminal Law Journal, P. 3175 (Gujarat High Court).
\textsuperscript{20} A.I.R. 1996 Supreme Court, P. 1744.
test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at this stage of discharge i.e. in section 227 of the Code or framing of charge under section 228 of the Code. Even the material on record showing a very strong suspicion which lead to the Court to form a presumptive opinion as to the existence of the factual ingredients, constituting the offence alleged, may justify in framing of charge against an accused in respect of commission of an offence. Therefore, he shall be asked whether he pleads guilty to the charge or claim to be tried. Non-compliance with the provision of this section, in the absence of proof of any prejudice cause to the accused will not vitiate the trial in view of Section 464 of the Code.

After framing the charge under section 229 of the Code, if the accused pleads guilty, the Judge shall record his plea and may in his discretion, convict accused thereon. However, the Court should not act upon the plea of guilty in serious offences but should proceed to take the evidence, as held in Ramkumar Vs State of Uttar Pradesh221, Allahabad High Court held that the Court as if the plea had been one of not guilty and should decide the case upon the whole evidence including the plea of the accused.

Similar view has been taken in the case State of Maharashtra Vs Priya Sharan Maharaj222 that in this case Hema and Meera were kidnapped by Krupalu Maharaj. The case was registered under section 363, 366 of Indian Penal Code Maharaj enticed girls and have a sexual intercourse with both the girls against their will impressing upon the young girl that it is as if is the incarnation of Lord Shrikrushna. Hence, the police have registered an offence under section 376 of Indian Penal Code. The Additional Sessions Judge framed a charge in section 376 of Indian Penal Code against the accused. Accused moved the Hon'ble High Court in section 482 of the Code for quashing the criminal proceeding. The Hon'ble High Court on

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222 A.I.R. 1997 Supreme Court, P. 2041.
consideration of the documents, material collected in the investigation and after hearing both the sides quashed the proceeding. However, on appeal to Supreme Court, the Apex Court enunciated the principle that at the stage of framing of the charge, the Court has to consider the material that if there is a ground for presuming that the accused has committed an offence or that there is not a sufficient ground for proceeding against him and not for the purposes of arriving at the conclusion that the materials are not likely to lead the conviction at the end of trial.

It is mandatory to read out the charge framed against the accused and explain it to him, sufficiently to enable him to understand the nature of the charge to which he is called upon to plead\textsuperscript{223}, as it clarifies in the case of Pavan Kumar \textit{v/s} State of Haryana\textsuperscript{224} that if an accused who has not been confronted with the substance of allegations against him, pleads guilty to the charge, the plea is not valid.

1) Prosecution evidence:

However, if the accused claimed to be tried in such events in section 230 of the Code the Court shall fix the date for examination of the Prosecution witnesses and may on the application of the prosecution, issue any process for compelling the attendance of any witness/s or production of any document/s or other thing. It is a new section and analogous to Section 251 A (6) of Old Code 1898, which related to the trial of warrant cases\textsuperscript{225}. The pleas that arise in criminal trial are four in number: (1) Autrefois acquit (2) Autrefois Convict both are in section 300 of the Code (3) Pardon in section 306 of the Code and (4) not guilty. The first three are the special pleas and must be proved by the accused the fourth is the general issue and must be disproved by the prosecution.

\textsuperscript{224} 1996 S.C.C. (Criminal), P. 583.
If the Court ordered acquittal in section 232 of the Code for non production of witnesses since the informant was injured witness could not be produced, acquittal is illegal as held in Shivsharan Yadav V/s State of Bihar226.

While taking evidence for the prosecution under section 231 of the Code the Judge or Magistrate will take all such evidence by way of (1) examination in chief, cross examination by adverse party and reexamination as may be produced in support of the prosecution if needed. The witness should be examined orally. The evidence taken in one Criminal trial cannot be treated as evidence in Criminal Case before the same Judge and involving the same accused. The only legitimate object is to secure not only conviction but to see that justice must be done. The prosecution should lay before the Court all material evidence available to unfold its case but unsound to lay down that every witness must be examined even though his evidence is not material or known to be won over or terrorized. If the prosecution has given up the material witnesses on the ground of close relationship with the accused and being won over, his non-examination cannot destroy the fabric of prosecution case which is proved by the evidence of other eye witnesses, as held in Somabhai V/s State of Gujrat227.

2) Deferred cross-examination:

The Judge can permit cross-examination of any witness to be deferred. However, the cross examination of a witness should not be deferred for more than 2 to 3 days as held in Ambika Prasad V/s State of Delhi Administration228. There is no right to the accused to defer the cross examination of any witness without any reason. It can only exercise by the Court by proper way of Judicial discretion.

226 1990 (2) Crimes, P. 54 (Patna).
227 A.I.R. 1975 Supreme Court, P. 1453.
228 2000 Criminal Law Journal, P. 810 (Supreme Court).
3) Sessions cases not to be tried piecemeal:

Section 309(1) of the Code 1973 provides that "in every enquiry or trial, the proceeding shall be held as expeditiously as possible and in particular, when the examination of the witnesses once begun the same shall be continued from day-to-day until all the witnesses attended have been examined. Unless the Court finds the adjournment of the same beyond the following day to be necessary, the reasons to be recorded. Day to day hearing should be strictly followed except insistences on it would defeat the ends of justice or is required by the law. Under second proviso, special reasons to be recorded in writing."

The reasons for not hearing a part heard case and the adjournment where the witnesses are attending the Court should be recorded by the Magistrate.

4) Adjournments:

No ground for adjournment that witness summoned are not present.

It should not ordinarily exceed seven (7) days when the accused is in custody and 15 days when the accused is on bail. Convenience of lawyer shall not ordinarily be regarded as the good ground for adjournment in case. It should not be adjourned for personal convenience of the Assistant Public Prosecutor Frequent absence of Assistant Public Prosecutor should be reported by the Magistrate to the Sessions Judge unless it is beyond the control of the Court. There is also no right to the accused to ask the Trial Court to defer the cross examination of any witness without any reason. The Trial judge can exercise by proper way of Judicial discretion as held in Ramas and Suresh Gumansing V/ Is State of Madras.

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5) Expedition of trial:

So also as held in the case of Bipin Shantilal Panchal V/s State of Gujarat. It is a landmark Judgment to expedite the trial that under sections 231, 242, 244 of the Code in criminal trial during the evidence collection stage practice is first to decide any objection raised to admissibility of the evidence and then proceed further with trial. It impedes steady and swift progress of the trial, the proceeding must be recasted or remould to give way for better substitute which would help to acceleration of trial proceedings, when so recasted, the practice which can be better substitute is this - whenever an objection is raised during the evidence taking stage, the trial Court should make note of objection and mark objective documents tentatively as exhibited and decide objection at last final stage in Judgment. If the Court finds at the final stage objection so raised is sustainable, the Trial Court can keep such evidence excluded from consideration. It is not an illegality.

The Court however made it clear that if the objection relates to deficiency of stamp duty of document, the Court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.

However, under section 232 of the Code after taking the evidence of the prosecution i.e. examination in chief, cross examination and if requires re-examination or the Court question to each Prosecution Witnesses, if necessary and thereafter examination of the accused in section 313 of the Code. If the accused want to file written statement, the judge shall file it with the record and thereafter on the point of argument i.e. on hearing the prosecution and the defence, both on the point of law about evidence, if at all the Judge considers that there is no evidence, i.e. not satisfactory, not trustworthy or not convincing evidence that the accused had committed the offence, the Judge shall record an order of acquittal. But if not, then the accused shall be called upon to enter into his defence in section 233 of the

231 2001 Criminal Law Journal, P. 1254 (Supreme Court).
Code and can adduce the evidence in his support. If the accused needs for issue of process for compelling the attendance of any witness or production of document or thing, the Judge shall issue such process unless he considers for reasons to be recorded, it is for vexation or delay or for defeating the ends of justice, then the case can be fixed for argument of both the parties.

6) Power of the Court to summon any material witness or to examine the person presents as a Court witness:

As mentioned earlier in warrant trial cases, The Court may on the application of the prosecution or defence or Court of its own, can examine any person as it thinks proper as a Court Witness which can be cross examined by both the prosecution and defence: "The Court can issue summons at any stage of enquiry or trial to any person as a Court witness or can be examined any person present in the Court, though not summoned as the prosecution witnesses or recall or reexamine any person who has already been examined as if his evidence appears to be essential for the just decision of the case in section 311 of the Code.232 Even if the case stands closed Court may permit examination of witnesses, which are considered essential for the just decision of the case. As held in the case Narayan Ganpati Warambe V/s State of Maharashtra233. Decided by Bombay High Court, Nagpur Bench D. B. Hon'ble Justice R. K. Batta and Brahme.

7) Termination of witnesses:

Prosecution already led evidence and thereafter case stands closed on account of direction in terms of decision of Supreme Court in the case of Raideo Sharma V/s State of Bihar234, the resort can be had to lead

234 1999 Criminal Law Journal P. 4541 (Supreme Court).
evidence of Prosecution Witnesses. in section 311 of the Code, the Court may permit examination of witnesses which are considered essential for the just decision of the case. In this case, majority view is taken by K.T. Thomas and M. Shrinivasan J. J. and minority view has been taken by M. B. Shah J. lamented that it would not be just or fair, equitable or reasonable to prescribe time limit and give benefit to the accused against whom serious charges are leveled, solely on the ground of delay in trial, it will affect the society, law and constitution.

8) Recalling of witnesses on pretext:

However, in the alternate, if it causes unnecessary delay and prolong the trial, then straight way application for recalling or summon can be rejected decided by J. Pratibha Upasani in the case of D.B. Goel V/s Ibrahim Haji Hasan Sanghani and others.236

All prosecution witnesses, examined and the statement of the accused recorded in section 313 of the Code the witness sought to be re-examined and to be allowed to produce certain documents. No explanation as to why those documents were not produced earlier during recording of his evidence. The trial going on for over four years. Allowing such an application at a belated stage would tantamount to allow prosecution to fill up lacunae - Rejection of application for recalling of witness by trial Court proper.

In the case Popatlal Jethabai Shah V/s State of Maharashtra236, the Hon'ble Justice held that the recalling of witness for cross-examination on the ground that some material contradictions not brought on record which resulted in serious prejudice to accused - held not permissible as lacking bonafides.

However, the Apex Court in Shailendra Kumar V/s State of Bihar237 and others Apex Court held that in criminal trial, closure of

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237 2002 Criminal law journal, P. 794.
237 2002 Criminal law journal, P. 568.
prosecution evidence without informing the Investigating Officer merely on the
ground that the Public Prosecutor has not sought time to examine
further witnesses held not proper. From the facts it appears that the
accused wants to frustrate the prosecution by unjustified means. Additional
Sessions Judge and Additional Public Prosecutor have not taken any
interest in discharge of their duties. It was the duty of the Sessions Judge
to issue summons to Investigating Officer if he failed to remain present at
the time of trial as it is his duty to keep the witnesses present. Prosecution
cannot be frustrated by such methods and victims of the crime cannot be
left in lurch. Appropriate action including bailable and non bailable warrant
can be issued or as the case may be.

From the above cases, it can be summarized that it depends on the
situation of the trial.

9) Argument :

Thereafter, the case will be fixed for arguments of both the parties
under section 234 of the Code.

After recording of defence evidence if any, the Prosecution shall
start his argument and puts merits of the case in his favour and open his
cards in respect of prosecution side. The accused or his pleader shall be
entitled to reply to it provided if any law point is raised by defence;
prosecution may be allowed to make his submission with regard to such
point of law. In Criminal trials, it is of prime importance for the accused to
know as to what the exact prosecution case is? If the point of the
prosecution is not accepted, a new prosecution case cannot be made to
imperil defence as held in Bhagirath Vs State of Madhya Pradesh. In S.
D. Soni Vs State of Gujrat it has been held that prosecution must stand
or fall on its own legs and prosecution cannot derived any strength from the
weakness of the defence. It is not the law that where there is any infirmity
or lacuna in it prosecution case cannot be cured or supplied by false

238 1975 S.C.C. (Criminal) P. 742.
239 A.I.R. 1991 Supreme Court, P. 917.
evidence or plea. That cannot be accepted by the Court. So also in *Ramnarayana Poply V/s Central Bureau of Investigation*[^240^] In criminal trial – prosecution case introduce new story. It adversely affects the prosecution case. Therefore, it not only creates doubt with regard to that part of prosecution version but occasions cast doubt about the motive. Accused becomes entitled to benefit of doubt.

10) **At last the stage comes to the judgment:**

After hearing the arguments and points of law of both the parties i.e. prosecution on whom preliminary burden lies and thereafter the defence. Then Court shall deliver a Judgment in the concerned case in section 235 (1) of the Code 1973. If the accused is convicted, the Judge shall unless he proceeds according to section 360 of the Code (Viz. order to release on probation of good conduct or after admonition), hear the accused on the question of sentence (such as he is a bread earner in his family, small children, first offender etc.), and then pass the sentence on him according to law. Section 235 (2) of the Code is totally a new provision in the Code of 1973. According to new trend in penology after a Court held a person guilty, it must consider the question of sentence, viz. prior criminal record of offender, his age, employment, education, social adjustment, home life, sobriety, emotional and mental condition and the prospects to return to normal path. For this purpose, the accused as well as the prosecution should be given an opportunity to argue on the point of punishment to accused. It is mandatory else the appellate Court remand the case for retrial, on this point. In *Sattam alise Satyendra and others V/s State of Uttar Pradesh*[^241^], A case in section 120 (B), 300 of Indian Penal Code. Death sentence awarded to the accused but not heard before awarding death sentence matter remitted.

His lordship considered case of *Allauddin Mian V/s State of Bihar*[^242^] in which the Apex Court explained the importance of this right of accused

[^240^]: 2003 *Criminal Law Journal*, P. 4801, (Supreme Court)
[^241^]: 2001 *Criminal Law Journal*, P. 676 (Allahabad)
[^242^]: A.I.R. 1989 Supreme Court, P. 1456
enshrined in Section 235 (2) of the Code. 1) To satisfy the rule of natural justice and 2) fundamental requirement of fair play as it is a mandatory and it must be strictly followed. It is mandatory only after giving the weight to the mitigating as well as aggravating circumstances placed before it to pronounce the sentence and placed reliance on the following terms. 'We think as a general rule' the trial Court should after recording the conviction, adjourned the matter and call prosecution and the defence to place the relevant matter on the question of sentence and thereafter pronounce the sentence to be imposed on the offender.

The provision is salutary and must be strictly followed.

In the above present case the death penalty has been awarded to the appellants by the Hon'ble Bihar High Court Patna but the Apex Court was unable to find either from the Judgment or from the record that there has been due compliance of Section 235 (2) of the Code. The Judgment reserved. The Death Sentence should be reserved for rarest of rare type of cases. Murder of infant daughter at escape of target, i.e. father's motive for crime obscure, killing not for gain, mere fact of killing an infant does not bring the case within the category of "rarest of rare" cases. Death sentence converted to life imprisonment.

In other case when the accused convicted by Supreme Court the accused No. 1, 4 and 7 were heard on the point of sentence as held in Suryamurti V/s Govindaswami243 in section 235 (2) of the Code 1973.

In the case of Ramdeo Chauhan alias Rajnath Chouhan V/s State of Assam244, decision by J.J. K.T. Thomas, R. P. Sethi, S. N. Fukan: Majority view. As per R. P. Sethi and S. N. Phukan J.J.

If the conviction is recorded by the Court of Sessions or the Special Courts, even if he is on bail he should be taken into custody and kept in jail till sentence is decided. After the sentence is awarded the convict is to undergo such sentence unless the operation of the sentence awarded is

243 A.I.R. 1989 Supreme Court, P.1410.
244 2001 Criminal Law Journal, P. 2902 (Supreme Court).
stayed or suspended by the Competent Court and in consonance with spirit of law. A person granted bail has no right to insist or remain at liberty (Justice Phukan is agreed with his learned brother Mr. Justice R. P. Sethi) order recording conviction and sentence on the same day not illegal in section 309 (2) of the Code. However, Court in its discretion would grant adjournment in case where death sentence is proposed for 235 (2) hearing if adjourned convict to be kept in Jail till sentence is passed.

As per Justice K. T. Thomas - the Minority view:

1) Two alternative sentences are permitted for the imposition for in section 302 Indian Penal Code. (1) Imprisonment for life or (2) Death Sentence. The Normal Punishment is life imprisonment and the death penalty is rare rest in the rare cases and when the lesser alternative is foreclosed, the requirement contained in section 235 (2) of the Code is intended to achieve purpose. The legislative provision is for the benefit to convict person in the matter of sentence. The legal position regarding the necessity to afford opportunity for hearing on the question of sentence will be:- 1) When conviction in section 302 of Indian Penal Code and if the Sessions Judge does not proposes to impose the death penalty it is unnecessary to proceed to hear the accused in section 235 (2) of the Code will not be Violated if the sentence of life imprisonment is awarded for the offence without hearing the accused on the point of sentence.

2) In all other cases, the accused must be given sufficient opportunity of hearing on the question of sentence.

3) Normal rule is after pronouncement of verdict of guilty, the hearing should be made on the same day and sentence shall be pronounced on the same day.

4) If the Judge feels or the accused demand more time for hearing on the question of sentence (in death penalty) the proviso to Section 309(2) is no bar for affording such time.
5) For any other reason, the Court is indicted for adjourning the case after pronouncing the verdict guilty in grave offences, the convicted person shall be committed to jail till the verdict on the sentence is pronounced. Further detention will depend upon the process of law. Justice Thomas dissent from the conclusion that there is no scope to alter the death penalty, even if not heard on the point of sentence. 235 (2) of the Code.

Previous Conviction Under Section 236 of the Code of Criminal Procedure:

In case, where the previous conviction is charged in section 211(7) and 248 (3) of the Code. The effect together is that the accused is to be charged with previous conviction at the same time he is charged with subsequent offence and after proving the cause the accused does not admit such previous conviction the Judge may after he has convicted the said accused in section 229 or 235 (2) of the Code and take evidence in respect of the previous conviction earlier and shall record the finding thereon. This provision is meant for determining liability of the accused to enhance punishment as a consequences of previous conviction. If the accused was acquitted, in that event, no use of it\textsuperscript{245}. It is not necessary that the sentence should be in force, previous conviction outside India cannot be taken into account in section 237 of the Code\textsuperscript{246}.

The cognizance of an offence of defamation against high dignitaries of the union or the State and Public Servants employed in connection with the affairs of the Union or the State acting in discharge of their Official functions can be taken into the consideration by the Sessions Judge. The Court of Sessions may take cognizance of this offence without the case being committed to it, upon a complaint in writing made by public prosecutor. The Session Judge may take cognizance of the case, try the case in accordance with the procedure. For the trial of warrant cases in

\textsuperscript{246} Ibid. P. 2763.
accordance with the procedure. For the trial of warrant cases in accordance with the cases instituted otherwise than on the police report before the Court of Judicial Magistrate in section 244 to 247 of the Code of 73. inclusive otherwise directs in writing be examined.

Compensation for Accusation without reasonable cause:

Under Section 250 of the Code:

If the case results in the discharge or acquittal of the accused, a show cause notice for grant of compensation to the accused may be issued to a person or persons who are alleged to have defamed, provided that the Court is of the opinion that there is no reasonable cause for making the accusation. After considering the cause shown, the Court can award a compensation not exceeding of Rs. 1000/- to the accused or each or any of them. The compensation so awarded shall be recovered as if it were a fine imposed by a Magistrate, but cannot be exempted from the Civil or Criminal liability in respect of the complaint made under this section. Provided any amount paid to the accused shall take into account in awarding the compensation to such persons in any subsequent civil suit relating to the same matter. The right of appeal provided against this order relating to the payment of compensation is the High Court. But the compensation will not be paid until the period of appeal has elapsed, if further appeal, then as per that order. This will be applicable to warrant trial cases.

II Trial of warrant cases by Magistrate on police report:

In this trial charge/s will be framed by Judicial Magistrate in section 240 of the Code and form of charges has been given in section 211 to 213 under form No. 32 I and joinder of charges has been given in from II in section 218 to 221.
Evidence for prosecution:

First of all the Judicial Magistrate will frame a charge under section 240 of the Code of the Criminal Procedure 1973. If warrant cases are instituted on police report, the record made during investigation by the police is available to pursue by the Court and the procedure of trial is mentioned under section 238 to 243. Some of it has been already discussed (supra). But if the accused refused to plead guilty to the charge and claim to be tried the Magistrate shall fix the date for the examination of the prosecution witnesses in section 242 (2) of the Code. Then the Magistrate may on the application of prosecution issue summons to any of its witness directing them to attend the Court for adducing any evidence or to produce any documents or thing under section 242 (1) (2) of the Code through police machinery to compel attendance of witnesses. If summons has been served and the witness remained present in the Court as per section 242(3) of the Code and on the date fixed Magistrate shall proceed to take all such evidence as may be produced by the prosecution. Under Section 242(2) of the Code, power may be exercised suo-motu where the prosecution is negligent or guilty of latches refuse to exercise this power in the case as material unless the accused in fact misled by such error or omission and it has occasioned a failure of justice in section 215 of the Code. Moreover, No finding on sentence or order by the Court shall be deemed invalid merely on the ground that no charge was framed or on such a ground of any error, omission or irregularity in the charge including any misjoinder of the charges, unless in the opinion of the Court of appeal, confirmation or revision, failure of justice occasioned thereby in section 464 of the Code.

In Asaram B. Yadav Vs State of Maharashtra247 High Court observed that if the Court of appeal, confirmation or revision is of the opinion that a failure of justice in fact has been occasioned, it may a) in the case of omission to frame a charge ordered that the charge be framed and that the trial be recommended from this point of view immediately after

framing the charge b) in the case of error, omission or irregularity in the charge direct a new trial by framing new charge/s. However, if the Court is of the opinion that the facts of the case are such that no valid charge could be framed against the accused in respect of the facts proved it shall quash the conviction.

The settled position is that while considering the question of framing the charge/s under said section was the evidence for the limited purpose of finding out whether or not prima facie case against the accused had been made out or the material placed before the Court disclosed grave suspicion against the accused which has not been properly explained. The Court will be fully justified in framing the charge and proceeding with the trial. By and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave one, he will be fully satisfied in discharging the accused and in exercising the jurisdiction under section 227 of the Code. The Judge cannot act merely as a post office or mouthpiece of the prosecution, but has to consider the broad effect of the evidence and the documents produced before the Court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting the trial.

In Satwa V/s State of Maharashtra248 it has been held that it is the duty of the Court to frame a charge however, Assistant Public Prosecutor /Public Prosecutor has to look after whether it has been framed correctly or require some addition in the charge. Major defects or lacuna should not be left in the charge as laid down by the above case (supra) else trial will be vitiated before framing of charge, Court has to discharge the accused. Charge under section 211(7) of the Code of previous conviction has to be framed if the offence trying is proved and previous conviction has to be proved as per section 298 of the Code. i.e. extract of jail record signed by the in-charge of the jail or Court Officer having custody of the records in which conviction is recorded.

The prosecution will take the examination in chief of its witnesses:

This is also known as direct examination in which leading question can not be asked if objected to by the adverse party under section 142 of the Evidence Act. Calling party in- examination in chief or in reexamination cannot put a leading question except with the permission of the Court. The Court shall permit leading questions as to the matters which are introductory or undisputed or which have in the opinion of the Court already been sufficiently proved, it can only be asked by calling party. If the witnesses are not deposing as per his statement to the police in writing or reduced into writing by the police can declared hostile with the permission of the Court. Witness as hostile under section 154 Evidence Act and can cross examine him by calling party in the manner laid down in section 145 of the Evidence Act i.e. cross examination as to the previous statements in writing. To point out contradictions or lower down the credibility of the witness (supra). A witness called by the prosecution is permitted to be cross examined on behalf of the prosecution. Result of that course being adopted is to discredit that witness altogether and not merely to get rid of a part of his testimony as reported in Jaideosingh V/s State. The Leading question under section 141 of Evidence Act means any question suggesting the answer which the person putting, its wishes or expects to receive favourable answer is called a leading question, which might be put in the cross examination by adverse party. Generally a witness won over by the accused is hostile witness and not desirous to tell the truth before the Court as he displays hostility. His temper, attitude demeanour in a witness box shows distinctly hostile feeling to wards the prosecution when witness says nothing about occurrence. His evidence will be useless as observed by the Apex Court in Kathi Adhibhai Bimal Bhai V/s State of Gujrat. However, in Gurasing V/s State of Rajasthan Their Lordship K. T. Thomas and R. P. Sethi laid down as a rule that :- It is a misconceived notion that merely because witness is declared hostile with permission of


251 2003 Criminal Law Journal, P.487 (Supreme Court).
the Court his entire evidence should be rendered unworthy of consideration. In criminal trial where the prosecution witness is cross examined and contradicted with the leave of the Court by the party calling him for evidence cannot as a matter of general rule be treated as washed off the record altogether. It is for the Court to consider in each case, if as a result of such cross examination and contradictions, the witness stands discredited or can still be believed in regard to any part of his testimony, he asserted in appropriate cases the Court can rely upon the part of the testimony of such witness if that part of the deposition is credit worthy.

Another mode of impeaching the credit of the witness is found in section 155 of the Evidence Act:

It is the cardinal principle of law that if the credit of the witness is to be impeached, when he is not supporting or turn hostile, his attention must be drawn to the former statement which is alleged to be inconsistent with the part of his subsequent deposition before the Court and an opportunity should be offered to him to explain how the inconsistency arose and show the Court that he is branded as a liar.

The object of examination in chief:

The object is to lay before the Court the whole of the information of witness which is relevant and materials. To elicit the truth, to prove the facts, which bear upon the issue in favour of the party calling the witness. The witness can give evidence of facts only and not evidence of law, make a witness deposite for what he has been called by calling party i.e. prosecution to prove all material facts within its knowledge relating to the prosecution case. It must confine to relevant facts and not to the opinion, inference of belief. But if he does not recollect because of laps of time.

and say fade memory, prosecution can take permission of the Court under section 159 of the Evidence Act to refresh his memory by referring to any writing made by himself or reduced into writing as per his say by any other person for which he is questioned or so soon, afterwards that the Court considers that read by the witness within the time aforesaid, when he read it he know it to be correct or not. The spirit behind it is that a witness should allow assisting his memory by looking at the document containing an account of it. A witness is not like a tape recorder. Memory some time may play false. Therefore, this provision to bring truth before the Court. Mere cross-examination of hostile witness by calling him would not make him unreliable. In Dhanu Debnath and others Vs State of Tripura\textsuperscript{2}\textsuperscript{3} Guwahati High Court, Their Lordships held that there must be some material showing that the said witness has resiled from his earlier statement or not speaking the truth and shifted his loyalty to adversary.

**Cross-examination:**

The examination of witness by adverse party shall be called cross examination in which leading question in section 141 of Evidence Act is allowed, i.e. any question suggesting the answers i.e. leading questions is allowed and in section 142 of the Evidence Act, leading questions can be asked in the cross examination. The object of cross examination is to test the truth of the statement made by the witness to see that how far his memory is reliable or power of observation he possesses to test the veracity, or to discover who he is, what his position in life is or to shake his credit by impeaching character although it may incriminate him or might expose him to penalty or for forfeiture of property in section 146 of the Evidence Act, (i.e. question lawful in cross examination). If the cross-examination is properly conducted it will be most useful and efficacious means of discovering the truth. But prosecutor has to keep bird eye view so that misleading, question should not be asked.

\textsuperscript{23} 1999 Criminal Law Journal, P.123
Exception is of section 91 of the Code, i.e. merely a witness summoned to produce the documents does not become a witness for cross examination. Such a person may attend the Court or may depute any other person to produce the document/s in the Court. Following questions cannot be asked in the cross-examination. Proviso of section 132 of the Evidence Act i.e. no such answer which a witness shall be compelled to give, shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer and section 148 to 152 of the Evidence Act, question cannot be asked in the cross examination. Under section 148, title of this section says that the Court to decide when a question shall be asked and when the witness compelled to answer. It says if the character is a relevant issue, witness has to answer it but if the character is relevant only to shake the credit of the witness it shall be in the discretion of the Court to allow or disallow the question\textsuperscript{254}.

It is necessary to make careful provision against a reckless and revengeful cross-examination. It would be a great hardship if every person who came forward to adduce the evidence was liable at the whim of unscrupulous cross examination to have every detail of his private life and dragged into the light and to be compelled to reply all the questions which are put only to defame him. Prakash V/s state of Maharashtra\textsuperscript{255}, it has been held that once the question which is not relevant is put, the matter is within the discretion of the Court, whether it has to be compelled to answer or warning should be ensued that witness is not obliged to answer the same under section 146 of the Evidence Act. The object of law is to show the character of the witness as to telling the truth. In England, for the purpose of proving the character by repute, general character is excluded and the character for veracity only is stated. The credit of the witness shaken, if it can be shown that he is not a man of veracity and not that he is of bad moral character. A black marketer necessarily untruthful nor a non-


\textsuperscript{255} 1975 Criminal Law Journal, P.1297 (Supreme Court).
black marketer necessarily a man of veracity held in Baburao Patel V/s. Bal Thakare.\textsuperscript{256} Provision under section 137 of the Evidence Act requires that party should be afforded a reasonable opportunity to cross examine a witness held in Pyarelal Saxeria V/s Devishankar Parashar.\textsuperscript{257} So also mere cross examination of hostile witness by the party calling him would not make him unreliable, held in Danu Dhananjay and others V/s. State of Tripura.\textsuperscript{258}

After examination in chief, the witness if not cross-examined, will not be safe to rely upon it, held in Gopal Saran V/s. Satyanarayan.\textsuperscript{259} However, the statement recorded by the Magistrate under section 164 of the Code is admissible even without examining the Magistrate in the Court subject to limitation provided in section 147 of the Evidence Act, i.e. when the witness is to be compelled to answer, in section 159 of the Evidence Act, to refresh the memory, by referring writing made by him or by any other person and read by the witness and find it to be correct. In Ripankumar V/s Department of custom\textsuperscript{260} held that the evidence means the examination-in-chief and cross examination by adverse party. Witness if not subjected to cross-examination, as such neither his statement before the Court cannot be termed as evidence nor it can be read in evidence.

The Court shall have regard to the following consideration for allowing questions:-

Prosecution is duty bound to raise an objection for fair cross-examination.

Under section 148 of the Evidence Act, following category of questions are proper if -

\textsuperscript{256}1997 Criminal Law Journal, P.1637.
\textsuperscript{257}A. I. R. 1994 M. P., P. 113
\textsuperscript{258}1999 Criminal Law Journal, P. 1231.
\textsuperscript{259}A. I. R. 1989 Supreme Court, P. 1141.
\textsuperscript{260}2001 Criminal Law Journal, P. 1288.
Proper question:

i) The truth of imputation seriously affects the opinion of the Court as to the credibility of the witness on the matter in which he testifies, the Court should allow the question.

Improper question:

ii) It will be improper if the imputations relates to matter so remote in time or of such a character, it would affect the veracity of the witness in slight degree there by truth would not affect.

Disproportionate question:

iii) Such question is improper if there is a great disproportion between the importance of the imputation conveyed and importance of evidence given. Moreover, if the evidence is very serious on the point of character of witness, the question ought not to be asked.

When refusing to answer:

iv) If the Court seems fit that if the witness is refusing to answer, the inference can be drawn that answer if given would be unfavourable to him, but is not bound to do so, as section 149 of Evidence Act says that no question to be asked without a reasonable ground. The Court should disallow question, which are unnecessarily provocative or mere harassment.

Section 151 Evidence Act says that indecent and scandalous question cannot be asked unless they relate to facts in issue. So also under section 152 of the Evidence Act, the questions intended to insult or annoy cannot be asked. Prosecution can raise an objection if Court feels it needless offensive in form.

It is a power of a Court to control the cross-examination of witness. If the irrelevant questions are to be asked, they should be discouraged. It
increases cost of the litigation without any benefit to party and sheer waste of time.

It is said that the prosecutor must have close watch while cross examination is going on by adverse party, it may result in hypothetical misleading or indecent and scandalous questions, so also this leading and compound question, which should not be asked to ordinary witness of fact.

Re-examination:

The examination of witnesses subsequent to cross-examination by adverse party is called reexamination. Calling party is entitled to take reexamination with the permission of the Court if any ambiguity can occur or discover in the cross-examination. If any suspicion is cast on the evidence by prosecution in cross-examination. However, by adverse party if any new question entertained by the Court then Prosecution has a right to cross-examine the witness on the said point. Section 138 of the Evidence Act says that leading question cannot be asked in the re-examination except with the permission of the Court but inspite of it, if the prosecution witness is not support or stick up to his previous statement to the Police, then with the permission of the Court leading question can put to the witness in reexamination, but in such a case an adverse party must be given opportunity to cross examination held in Dahyabhai V/s State of Gujart.\(^{251}\) It has been held in Rammi @ Rameshwar V/S State of Madhya Pradesh\(^{262}\). Re-examination cannot be confined to ambiguities alone which arose in cross examination. Question can be put to obtain explanation required for any matter referred to in cross-examination. If the Public Prosecutor feels that certain matter requires more elicitation from the witness he has the freedom and the right to put such questions, as he deems necessary for that purpose subject of course to the control of the Court. The re-examination will be allowed at the end of cross examination.

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\(^{251}\) A. I. R. 1964 Supreme Court, P. 1563.
\(^{262}\) 1999 Crimes, P. 32 (Supreme Court).
and the matter elicited in re-examination gives rise to any suspicion that it was the result of tutoring, it would of course be open to a Judge that the lapse of time might have given opportunity for preparation as held in Bakhari Gope V/s Abdul Halim\textsuperscript{263}.

The Court can call upon the witness in section 311 of the Code at any stage, even if the prosecutor does not request for calling the witnesses. Court would not be obliged to take coercive meaning to ensure their attendance as held in Nain Singh V/s Nain Singh\textsuperscript{264}, and also in State of Karnataka V/s Nallayappa\textsuperscript{265} laid down that prosecution was not to be blamed as trial Court did not take coercive steps to ensure presence of material witnesses i.e. investigating Officer, Indian Motor Vehicle Inspector and doctors. So also under section 311 of the Code. Justice Dr. Prabha Upasani Judgment D. B. Goel V/s Ibrahim Haji Husen Sanghani and others\textsuperscript{266} for recalling of witnesses, held that all the prosecution witnesses and the statements of the accused recorded under section 313 of the Code witness sought to be re-examined and to be allowed to produce certain documents. No explanation as to why those documents were not produced earlier during the recording of his evidence when the trial was going on for four years. Honourable High Court held that allowing such an application at a belated stage would tantamount to allow the prosecution to fill up the lacunas. Therefore, rejection of an application for recalling the witnesses by the Trial Court was proper. Narayan Ganpati warambhe V/s State of Maharashtra\textsuperscript{267} Prosecution led evidence and thereafter case closed on account of direction in the term of decision of Supreme Court given in Rajdev Sharma V/s State of Bihar\textsuperscript{268}. Resort can be had to lead evidence of prosecution witnesses under section 311 of the Criminal Procedure Code 1973.

\textsuperscript{263} A. I. R. 1995 Patana, P. 362.
\textsuperscript{265} 1996 Crimes, P. 347 (Karnatak High Court).
\textsuperscript{266} 2001 Criminal Law Journal, P.450 (Bombay).
\textsuperscript{267} 2001 Criminal Law Journal, P. 577 (Bombay, Nagpur Bench).
\textsuperscript{268} 1998 Criminal Law Journal, P.4541 (Supreme Court).
Question put by the Magistrate or Judge or for the order of production of documents in section 165 of the Evidence Act:

The Courts are not to look on as passive agents where cases are being tried by them. They conduct trials and it is their duty to see that it is full and proper. They have power and the duty to question witnesses in order to elicit relevant matter to clear up idea of the Court. Section 165 of Evidence Act empowers the Judges.287

1) To ask any question he pleases to like in any form at any time to any witness or to the parties about any fact relevant or irrelevant.

2) To order the production of document or thing/s. Parties and their agent cannot make any objection to it. Thereafter, parties can put question with the permission of the Court, but there are certain limitations to this power of Judges or Magistrates they are:-

1) The Magistrate can cross-examine or order production of thing to obtain proper proof of the relevant facts.

2) Though irrelevant questions put by the Court, the Judgment must be based upon the facts declared by this Act i.e. to be relevant and duly proved.

3) The Court cannot compel the witness to answer any question or produce any document which are privileged in section 121 to 132 of the Evidence Act, no Judge shall ask any question which is, would be improper for any other person to ask under section 148 or 149 of the Evidence Act.

4) Improper questions should not be asked by the Judge or Magistrate.

5) The Court shall not be entitled to dispense with primary evidence of any document except in the case in which secondary evidence is

allowed under this Act. In *Ramchandra V/s State of Haryana*\(^{270}\). It has been held that the Court is active participant in the Trial by putting questions to the witnesses in the search of truth so as to protect the weak and innocent, only that question should not be to frighten, coarse, confuse, and intimidate the witness. But there are some restrictions on the power of the Court. If the accused is unrepresented due to poverty, the judge should put the question to get the truth held in *Okila Luha V/s State Orissa*\(^{271}\). Moreover, the Court cannot in the course of Judgment permit the prosecution to reintroduce evidence to cover up obvious lacuna under section 326 (1) or 311 of the Code held in *Omprakash S. Sharma V/s State of Maharashtra*\(^{272}\).

In latest well celebrate case is *Zahira Habibulla H. Shaikh and another V/s State of Gujrat and others. (Best Bakery Case)*\(^{273}\). In para B the Apex Court held that Presiding Judge must not be a spectator and a mere recording machine but should play an active role in recording evidence collecting process and elicit all relevant materials necessary for reaching the correct conclusion to find out the truth.

However, the Judge puts many questions to the witness in examination in chief or in the cross examination, which take the witness away from the trend of the question put by the Public Prosecutor / Assistant Public Prosecutor is deprecated as held in *Shivansubba Nadar*\(^{274}\). It has been held that Court should always bear in mind that it is designed to further ends of justice. It should not be used in inquisitorial manner. It is no part of the duty of the Court to act as a counsel for one or other of the parties as the primary duty of the Court is to weigh evidence, for both parties and come to decision.

Moreover, Magistrate should not hurry by putting his own questions to dispose of the case hurriedly and discard peremptory provisions of law in

\(^{270}\) 1981 Criminal Law Journal, P. 919 (Supreme Court).
\(^{271}\) 1984 Criminal Law Journal, P.1828 (Orissa).
\(^{272}\) 1993 Criminal Law Journal, P. 3175 (Bombay).
\(^{274}\) A. I. R. 1951 Madras, P. 772.
a zeal of dispose of cases expeditiously held in Hiralal V/s State of Maharashtra\(^{275}\). Because justice would fail not only by unjust conviction of the innocent but also by the acquittals of the guilty for unjustifiable failure to produce available evidence as held in Nageshvara V/s State of Maharashtra and others\(^{276}\).

So also under section 242 proviso, says that while recording evidence for the prosecution, Magistrate may permit the cross examination of any witness to be deferred until any other witness/s have been examined or recalled any witness for further cross examination or if the prosecution wants to examine any other witness not cited by, in the witness list but necessary in the interest of justice to examine him, prosecutor can prefer an application to the Court under section 311 of the Code and if ordered by Judge or Magistrate, can examine him.

**Addition of person whose name appear as culprit in examination in chief:**

Prosecutor can apply to Court against other persons appearing to be guilty of an offence in section 319 of the Code.

If it appears in the course of trial from the evidence on record that some person other than the accused has also committed an offence, those persons tried together with the accused in the Court if the Public Prosecutor / Assistant Public Prosecutor applied to the Court or the Court suo-motu shall proceed against those accused persons. It need not be informed on cross-examination. No accused can be tried for charge other than on which he was summonsed in section 319(1) of the Code for securing the attendance of such person for proceeding. The Court may issue a summon/s or may arrest by issuing warrant or detained him under section 319 (2) of the Code.

\(^{275}\) 1964 Mh. L. J., P. 35 (Bombay).
\(^{276}\) 1973 Mh. L. J., P. 144 (Supreme Court).
This provision is applied to all the Courts including Sessions Court. It has a power to do so without there being a committal order against that person, condition is that - if some witnesses have been already examined can be reheard as proceeding commences a fresh. As held in Dinashchandra V/s State of Uttar Pradesh and others\textsuperscript{277}.

In Jarnaisingh V/s State of Haryana\textsuperscript{276}, it has been held by Apex Court that any person not being an accused, in Sec. 319 covers a person who is not before the Court in case in which order in section 319 is passed. It is the duty of the Court to bring before it any person who appears to have committed an offence and to convict and passed order of sentence of proof of such person having committed an offence.

Under proviso of section 319: Issuance of summons to non accused / applicant - power of the Court-

It is held (supra) that the name of the applicant was mentioned in the First Information Report but he was not charge sheeted. Evidence of complainant stated in his examination in chief regarding the involvement of the applicant in alleged offence. In such circumstances order summoning the applicant is not improper. In para no.10 of the case, it has been mentioned that the term evidence as has been used in Section 319 of the Code does not mean evidence completed by the cross examination. The Court can take action under Section 319 of the Code even in the deposition, as held in Ramgopal V/s. State of Uttar Pradesh\textsuperscript{279}. In para No. 11 of the said case, it is mentioned that the revisionist first of all will appear and then he would be granted an opportunity to cross-examine the witness. It is also provided that in case of revisionist moves an application to this effect that no case is made out against him or raising another contention, then the Additional Sessions Judge will consider and dispose of the same after providing adequate opportunity of the hearing to the revisionist.

\textsuperscript{277} 2001 Criminal Law Journal, P. 318 (Allahabad).
\textsuperscript{278} 2003 Criminal Law Journal, P. 2307 (Supreme Court).
\textsuperscript{279} 1999 Allahabad Journal, P. 539.
Power and duties to examine the accused under section 313 of the Criminal Procedure Code:

After recording all the prosecution evidence Court will examine the accused in section 313 to enable the accused personally to explain any circumstances appearing in the evidence against him, the Court a) may at any stage put a question to him as the Court considers necessary, b) The Court Shall after the prosecution witnesses examined and before he is called for his defence, questioned him generally on the case. However, in summons cases where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b) of section 313 (1) of the Code. In warrant cases the attendance of the counsel can be dispensed with but not of accused as he has to undergo examination. Held in Anbazhagan V/s Superintendent of Police and others.\(^\text{280}\) It has been held that in warrant triable cases in exceptional circumstances statement of accused can be dispense with but in application by counsel of accused did not opposed by Public Prosecutor therefore Court held that "be you ever so high, the law is above you". And therefore presence of accused is necessary. As the oath is not administered to the accused he is not liable for punishment for refusing to answer the questions or by false answers under clause 3 of Article 20 of the Constitution of India. It can be taken into consideration, at the time of Judgment. At this stage, the accused personally explain the circumstances appearing in evidence against him. So also the answer given shall be considered in enquiry or trial and put in evidence against him.

Above provision is not to enable the Court to cross-examine the accused for the purposes of trapping him or forced admission of fact, which the prosecution has failed to examine. The object is to afford the accused a fair and proper opportunity of explaining the circumstances which appear against him. The Apex Court held that if an accused is not asked question

on his motive for the crime it may prejudice him and thus vitiate the trial as held in *Suresh Chandra Bihari v/s. State of Bihar*.

In *Mohansingh v/s Prem Singh* the Apex Court by Division Bench Justice Hon'ble D. M. Dharmadikari held that statement made by the accused in section 313 can lend credence to evidence laid by prosecution. But cannot be made sole basis for conviction. The settled law is "it can be relied as a whole or in part. It may also be possible to rely upon inculpatatory part of his statement if exculpatory part is found to be false. The evidence laid by prosecution was found to be unreliable. This statement is not a substantive piece of evidence. It can only be used for appreciating evidence laid by prosecution to accept or reject it.

The above section is based on the principal that "audi alteram partem" Viz. no one should be condemned unheard. Accused should be heard not merely as what is prima facie proved against him but on every circumstances appearing in the evidence against him. The statement must be read over to him, personally and signed by him and the Judge or the Magistrate. Accused can plead self defence in it and say that he has to be examined himself on oath in section 315 of the Code and also can give defence in section 243 (1) of the Code. He can produce his witnesses in his defence or can apply to the Court to issue process to his witnesses.

Every error or omission in complying with section 313 of the Code does not necessarily vitiate the trial and it depends on the degree of error and whether it causes serious prejudice to the accused.

Accused person can be a competent witness for defence on oath to disprove charges against him. He can be a witness on his own request.

**Evidence for defence in section 243 of the Code:**

Accused has to produce his defence witness if so needed in evidence in favour of him self. Magistrate is to issue process to defence.

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281 1995 S.C.C. (Criminal), P. 60
witnesses or accused can bring with him for compelling his attendance for the purposes of examination as a defence witness and thereafter cross by the prosecutor or for the production of any document or other thing. But if he issues process for vexatious delay for the purpose of defeating the ends of justice, Magistrate can refuse it observed in Arivazhagan Vis State.283

Argument under Section 314 of the Code:

An Oral argument and memorandum of arguments will be heard by the Court, of the prosecution and the defence, as their witnesses have been examined the Court in their favour concise oral argument and may, before concluding the oral argument if any, can submit the memorandum to the Court setting forth concisely and under distinct heading. A copy of it shall be furnished to opposite party, however, if such argument are not concise or relevant, the Court may regulate it in section 314 (1) (4) of the Code. However, no adjournment is granted to submit written argument provided the Court considers it necessary.284

Conclusion of the Trial:

After going through all the evidence led by the prosecution and defence, the Magistrate comes to the conclusion that if he finds the accused not guilty, he shall record an order of an acquittal in section 248 (1) of the Code, (2) however, if he finds that the accused is guilty but does not proceed to in accordance with the provisions of 325 of the Code i.e. procedure when Magistrate cannot pass sentence sufficiently and severely, he may record his opinion and submit his proceedings along with the accused to Chief Judicial Magistrate for the Judgment and Orders. The Chief Judicial Magistrate may call the parties or recall any witness and may

take any evidence and pass the sentence according to law. Prosecutor must present there to see whether the punishment fit the crime.

Clause 3 of section 248 where previous conviction is charged against the accused under 7 of section 211 of the Code is liable by reason of such previous conviction to enhance punishment in section 75 of Indian Penal Code and it is intended to prove such previous conviction for the purpose of enhancement of the punishment, the Court may think fit to award the subsequent offence, the fact, the date, and the place of previous conviction shall be stated in the Charge and if such statement is omitted the Court may add it before sentence is passed and if the accused does not admit of such previous conviction, the Magistrate may after the said accused has convicted in the Criminal Case at hand, take evidence in respect of the alleged previous conviction and record a finding thereon. However, no such charge is read out by the Magistrate or referred in any manner by the prosecution unless the accused has been convicted in section 248 (2) of the Code. Generally the Court which start the trial must close it or it will be declared de novo. In *Mangal Saha V/s State of Bihar* it has been held that storage of food grain in violation of Food Grain dealers Licencing Order, finding of guilt recorded by the Court based on evidence recorded by predecessor Judge is illegal, option was recall all witnesses and record finding.

Moreover, in section 250(1) of the Code, if the Magistrate while discharging or acquitting the accused, thinking that there was no reasonable ground for making accusation against the accused person, he may call upon a person (reporter) making such accusation to show cause why he should not pay compensation to the accused person. Under section 250(2), after hearing such person Magistrate may for reason to be recorded, pass an order fixing the compensation to be paid by complainant to the accused person. The amount of compensation shall not exceed the amount of fine which the Magistrate is empower to impose. In default of

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payment, the person ordered, shall undergo simple imprisonment for the period not exceeding 30 days in section 250 (3) of Criminal Procedure Code. It is applicable to all the trials.

Trial in warrant cases on complaint to Court under section 244 to 249 of the Criminal Procedure Code 73:

For non-appearance or death of a complainant. In Food Adulteration cases and other complaint cases, in such trial, when the proceeding have been instituted upon complaint and on day fixed for hearing of the case, the complainant is absent and if the offence is lawfully compoundable or is not cognizable offence, the Magistrate may in his discretion at any time before the charge has been framed discharge the accused. The power to discharge the accused is to be exercised judiciously. If the offence is of serious nature and the circumstances of the case prima facie support the case, it would be improper to discharge the accused on such ground as held in Ganesh V/s Eknath Bombay High Court Section 249. So also Allahabad High Court held in Ishwar Saran V/s State of Uttar Pradesh and in State of M. P. V/s Mohammad Jabbar Khan held that Non-appearance of complainant, the forest Officer on many occasions in this complaint case of cutting trees from forest land. Discharge of accused was improper keeping in view the gravity of the matter and nature of offence. Magistrate would have ensure presence of complainant instead of discharge the accused. Default being casual, Magistrate is not bound to discharge the accused. Word "May" has been used in this section as section 249, vest discretion with Court. It is not necessary for the Magistrate to discharge the accused in each case. One good test for exercising jurisdiction would be whether the complainant has been willing.
and prosecuting the case diligently or has been putting in appearance casually.

III Procedure for Trial of Summons cases and Summary trials by Magistrate:

The basis of classification of a seriousness of offence that determine, what type of trial will be applicable (as per Schedule 1 under column 6 of the Code. Summons cases are less serious as compared to warrant cases, which can be seen from the definition of section 2 (W) and (X) of the Code. Section 2 (W) is in respect of summons cases, which reveals that "Case relating to offence and not being a warrant case, and what is warrant case as mentioned in section 2 (x), it means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years, which throw light that summons case are always about minor offences where the punishment is not exceeding two years and mostly on complaint. Tried with much less formality and the manner of their trial is less elaborate. No formal charge only particulars of the offence explained to the accused with clarity by the Court and he shall be asked if he pleads guilty or cause to show why he should not be convicted or has any defence and there after not to frame to charge, only particulars. If he has admitted the offence, he can be convicted at once and if not, in such events, the Court empowered to use summary procedure in section 260 of the Code, i.e. shorten form of regular or warrant trial procedure to save time of the Court. The Court has to record the evidence only in the language of the Court and that too in brief. Memorandum of substance of evidence is enough. The intention is that the cases are not very serious but such cases should be decided quickly else add expenses and harassment to the parties without substantially aiding the cause of justice.\textsuperscript{291} Law Commission of India in its 41st report in Sept. 1969 mention that in view of the safe guard provided as to the type of Judicial Officers

who may exercise this power. The nature of the offences, that may be so
tried and the punishment inflicted in such trials summary jurisdiction is
justifiable\textsuperscript{292} e.g. prevention of Food Adulteration Act, 1954, section 16A
titled as Power of the Court to try cases summarily. Moreover, in the
Immoral Traffic (prevention) Act of 1956, under section 22 (B) i.e. power of
the Court to try the cases summarily. Wisdom of legislature is that not very
serious cases but where the punishment is not exceeding 2 years, should
be decided quickly or provisions in the Special Law has been made in this
respect. All essentials of fair trial are present where there are two offences
complained of, one is a warrant triable and the other is summons trial, in
such cases greater charge procedure will prevail. The following procedure
shall be observed by the Magistrate in section 251 of the Code i.e.
substance of accusation to be stated, in \textit{Tomba Meetai V/s Smt. Satyavati
Devi}\textsuperscript{293}. Section 259, 251 of the Code. Warrant triable section and
summons triable section. The argument of respondent's counsel was in this
case, the trial of defamation in which punishment extends to two years
along with fine or with both. However, if the accused did not pay fine, then
he has to undergo further imprisonment and in such event, the punishment
exceeds two years and therefore, procedure of warrant trial case is
applicable. However, the Hon'ble High Court held that Criminal Trial
commences in accordance with the offences punishable prescribed under
section, for which the accused is charged. Therefore, during the trial only
on the substantive portion of sentence prescribed under the section has to
be looked into.

The Principal object of the Provision is : in section 251 of the Code is
fulfilled.

When the accused appeared before the Court the particulars of the
offence of which person is an accused should be stated to him to
understand the implications of the offence and asked whether he pleads
guilty or has any defence for not guilty of an offence. But it is not necessary

\textsuperscript{292} \textit{Ibid. P. 1582.}

\textsuperscript{293} \textit{2000 Criminal Law Journal, P. 4451 Gauhati High Court.}
to frame a formal charge. Procedure can be adopted where substantive sentence not exceeding two years. Summons cases may be tried in a summary way by the Chief Judicial Magistrate or any Metropolitan Magistrate or if the High Court empowers, in such event, Judicial Magistrate First Class can try in section 261 of the Code. Evidence at length need not be required to be recorded by the Magistrate or above officers. The Magistrate can permit him to appear through his pleader and can dispense with the personal attendance in section 205, 317 of the Code and can also direct personal attendance. Even if the allegations explained to the accused at this trial is that the accused constituted an offence under a section, which does not apply the offender, can still be punished under the provisions properly applicable on the facts proved as provided in section 255 (3) of the Code i.e. Magistrate may convict the accused of any offence triable under this chapter, while from the facts admitted or proved, he appears to have committed, whatever may be the nature of the complaint or summons and the accused will not cause prejudice thereby. If the accused pleads guilty when the particulars framed and explained to him, then the Magistrate shall convict him in section 252 of the Code. Plea should be recorded in his own words as nearly as possible i.e. words actually used by the accused. The Magistrate in his discretion convicts him. If there are number of accused persons, the plea of each accused be separately recorded as above. In the Judgment of conviction - as held in Mahant Kausalyadas V/s State of Madras. It has been held that the admission of the accused shall be recorded as nearly as possible in his own words. The provision of section 252 (conviction an plea of guilt) is not mandatory. As the provision of joinder of particular charge and joint trial is applicable, the view has been taken by the Court in most of the cases, as held in K. Shanmugasundar V/s State Inspector Railway Police.

295 A.I.R. 1966 Supreme Court, P. 22.
So also in a case of Anand Vithoba Lohkare and others v/s State of Maharashtra267. In this case the Bombay High Court Bench at Nagpur, has considered the view that in section 252 of the Code, substance of the accusation must be stated to him in framing the particulars and he shall be asked whether he pleads guilty or has any defence to make. In this case the appellant had admitted the guilt, however, it is not specifically mentioned in the impugned order passed by Judicial Magistrate First Class that the particulars of the offence explained to each one of the applicants individually and each one understood the same and their plea of guilt is not recorded individually in the manner provided in law. The particulars of the offence explained to the appellants have not been understood by the appellants correctly which could be seen from the pursis filed by them in the Court in criminal case under section 12(a) of the Bombay Prevention of Gambling Act, which demonstrates that the particulars in respect of the Offence has not been properly explained to the applicants individually and jointly explain to all the accused and same has not been properly understood by the applicants in section 252 of the Code and the violation of the provisions of section 251 and 252 of the Code therefore conviction not proper.

Section 253 of the Code deals with the conviction on plea of guilty in absence of the accused in petty cases In 41st Report Law Commission recommended that to avoid unnecessary trouble to the offender in Petty Offences and willing to plead guilty, and pay penalty, they should not be compelled to appear in the Court in person, they can appear through pleader.

Therefore, the section runs as follows:

1) Where a summons has been issued under section 206 of the Code (Special Summons in case of Petty offences) and the accused desire to plead guilty to the charge without appearing before the Magistrate, he

shall transmit to the Magistrate by Post or by messenger, a letter containing his plea and also the amount of fine specified in the Summons.

2) The Magistrate may then convict the accused in his absence on the plea of guilt and sentence him to pay a fine specified in the Summons. The amount transmitted shall then be adjusted that fine. In a case, where a pleader, authorised by the accused pleads guilty on behalf of the accused, the Magistrate shall record the plea as nearly as possible in the words of the pleader and may convict the accused on such plea and sentence him as aforesaid.

Section 254 of the Code deals with procedure when no such admission is made:

It means hearing of prosecution is necessary therefore, this Section says that if the Magistrate does not convict the accused under section 252, 253 as above, the Magistrate shall proceed to hear the prosecution under section 254(1) of the Code i.e. Magistrate allow the prosecution to open its case by giving the facts and circumstances constituting the offence and stating by what evidence, it proposes to prove its case, and also to hear the accused and take all such evidence as he produce in his defence.

If the Magistrate may thinks fit, on the application of the prosecution or the accused, issues summons to any witness directing him to attend or to produce any document or other things.

Court has a duty to secure the attendance of the witness and Assistant Public prosecutor has to take the help of the Court. In case of failure to do so acquittal is illegal.

It is the prima facie duty of the prosecution to call all the witnesses who are shown to be connected with transactions to adduce material evidence. i.e. examination in chief followed by cross examination. If the
witnesses are not called without sufficient reason, the Court may draw an adverse inference against the prosecution. The prosecution can only be relieved by showing that if called they would not speak the truth. No unfavorable inference can be drawn against the prosecution even not having called any witness.  

In *Shiv Charan Yadav V/s State of Bihar and others* it is held in this case no summons were issued or steps were taken to prosecution witnesses even who is injured. The Public Prosecutor did not take help of the Court. The Public Prosecutor only taking the adjournment through application and the Court will grant it. The informant denied justice and as such the prosecution witnesses could not come and the accused acquitted. Held that acquittal order being illegal and was liable to be set a side and the case remanded back for re-trial.

**Evidence for the prosecution in section 255 (1) of the Code:**

The Magistrate shall then take all such evidence produced by the prosecution in its support in section 254(1) of the Code. Even the Magistrate may on the application of the prosecution issue summons to any witness directing him to attend or produce any document or thing in section 255 (1) of the Code. The provisions regarding the interpretation of evidence to the accused or his pleader in certain cases lays section 279 of the Code.

If the Magistrate after taking the entire evidence finds the accused not guilty, he shall record an order of acquittal. In *Jodhi Yadeo V/s Kasi Yadeo* It has been held that despite several opportunities were provided to

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301 Ibid, P. 197.
the prosecutor, witnesses were not produce by prosecution ordinarily the order of the Court will be of acquittal. Therefore the said order can never be said to be illegal and improper.

The difference between section 221(2) and 255(3) are as follows:

In section 221 of the Code: When charge is doubtful, what offence has been committed

States that if the accused is charged with a particular offence but it appears from the evidence that he has committed different offence for which he might have been charged. It means that the offence committed must have been cognate offence, i.e. A is only charged with theft and it appears that he committed the offence of criminal breach of trust or that of a receiving of stolen goods, he may be convicted of criminal breach of trust or of receiving stolen property though he may not be charged with offence. Such as theft and criminal breach of trust but not refer to offences of distinct character e.g. murder and theft.

However, in section 255 (3) the Code the Magistrate may in section 252 or 255 of the Code convict the accused of any offence triable under this chapter, which from the facts admitted or proved that he appears to have committed, whatever may be the nature of the complaint or summons. If the Magistrate is satisfied that the accused would not be prejudiced he can convict the accused. This section gives the Magistrate discretion to proceed in those cases where the evidence of the prosecution establishes an offence other than referred in complaint or summons. If the Magistrate thinks that offence different from referred in the complaint is prima facie established, he must act first to explain the particulars of the offence of which he is an accused so that he may be able to make his defence. Moreover, Magistrate before convicting the accused in section 255 (3) of
the Code for different offence should satisfy himself that by doing so the accused is not in any way prejudiced\textsuperscript{304}

As the examination of each witness proceeds, the Magistrate shall make memorandum of the substance of his evidence. If he is unable to make such memorandum of the substance of evidence himself, cause such memorandum to be made in writing or from his dictation in open Court in section 274 (1) of the Code, it shall be signed by the Magistrate and shall form part of record in section 274 (2) of the Code.

Recording of remarks respecting the demeanour of the witness in section 280 of the Code are the same as are applicable in respect of evidence recorded in the trial before a Court of Sessions or in warrant trial cases.

Thereafter, under section 314 of the Code the Court will hear the concise oral argument and can submit the memorandum of argument of prosecution. Then personal examination of accused. However, in summons cases where the Court has to dispense with the personal attendance of the accused, the Court may dispense with such examination of the accused proviso to Section 313 (1) (b) of the Code no oath shall be administered.

\textbf{Thereafter, under section 254 evidence for the prosecution and evidence for defence:}

As narrated earlier Magistrate then takes evidence of the defence under section 254(1) and he can also issue summons to defence witnesses at the instance of the accused.

Thereafter, an argument in section 314 of the Code allow as follows:

Court will hear the argument of prosecution and defence.

After taking all evidence, if the Magistrate finds that the accused is not guilty he shall record an order of acquittal in section 255 (1) Of the Code and he is required to pass sentence according to law.

However, considering the character of the offender, the nature of the offence and the circumstances of the case, the Magistrate may instead of passing the order of sentence decide to release the offender after admonition in section 360 of the Code or on an probation of good conduct under the Probation Of Offenders Act 1958, under section 3 and 4.

Moreover, accused can be convicted under section 255 (3) of the Code, any offence triable under this Chapter. The Magistrate may convict the accused of any offence (amenable to trial in summon case) which from the facts admitted or proved, the accused appear to have committed and if the Magistrate will be satisfied, that it will not cause any prejudice to the accused.

If the evidence is necessary to take in detail, in the course of trial in summons case relating to an offence required to punish with imprisonment for more than 6 months and it appears to the Magistrate that in the interest of justice, the offence should be tried as warrant trial case i.e. procedure for trial. The Magistrate may proceed to rehear the case in the matter provided by this Code for the trial of warrant cases and may recall any witness who may have been examined in section 259 of the Code i.e. power of the Court to convert summons cases into warrant cases.

However, it is worth to note that it is not permissible to try warrant case as a summons case. The object of the Law Commission to prepare such provision is to enlarge the Scope of summons triable case.

Procedure of previous conviction that has been given in warrant trial case is not applicable to summons triable case.

305 Ibid. P.2357.
No hearing on the point of punishment:

Under section 255 of the Code 1973, in Varkey V/s State of Kerala\textsuperscript{357} hearing of the accused on the question of sentence as mentioned under section 235 (2) in the Sessions Trial and under section 248 (2) of the Code in warrant trials, sub clause (2) of section 255 the Code says that where the Magistrate does not proceed in accordance with the provisions of Section 325 or 360 of the Code. If he shall finds the accused guilty pass sentence upon him according to law. The provision does not enjoin a trial Magistrate to hear the accused on the question of sentence.

Trial in summons cases where death or nonappearance of the complainant:

In the event above, the Magistrate has a wide discretion to deal with the case. He may acquit the accused or adjourn the hearing of the case or may dispense with the attendance of complainant and proceed with the case. The Magistrate has to exercise his discretion with great care and caution under section 256 of the Code.

If the complainant is not present in the Court on the day fixed for appearance of accused in summons case or any day subsequent there to for which hearing may be adjourned because the complainant does not appear, the Magistrate shall not with standing anything hereinbefore contained, acquit the accused unless for some reason he thinks proper to adjourn the hearing of the case.

Provided that if the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of the opinion that the personal attendance is not necessary, the Magistrate may dispense with his attendance and proceed with the case. Under section 256(2), same provisions apply also to cases where non-appearance of complainant is due to his death. No automatic order can be passed on non-

\textsuperscript{357} 1989 Criminal Law Journal, P. 2357.
appearance of the complainant as held in E.L. Joseph V/s Dharmarajan and others.  

Abatement of proceeding on the death of the accused and withdrawal of complaint:

The object proceeding is to punish the accused on his conviction of any offence. Therefore, the criminal proceedings abate on the death of the accused. To continue thereafter is meaningless. Moreover, appeal against conviction and or sentence shall also finally abate on the death of appellant accused 394(2) of the Code.  

In a trial of a summons cases, initiated on private complaint if the complainant at any time before the final order is passed satisfies the Magistrate that there are sufficient ground for permitting him to withdraw his complaint against the accused, the Magistrate may permit him to withdraw the same and shall therefore acquit the accused.

Power to stop Proceeding in certain cases by Magistrate:

If in a summons case, Judicial Magistrate First class or any other Judicial Magistrate (instituted otherwise than upon complaint) with the previous sanction of the Chief Judicial Magistrate may stop the proceedings at any stage without pronouncing any judgment. While stopping the proceeding the Magistrate shall record reasons for doing so. The stoppage of the proceedings will have the effect of acquittal of the accused if the stoppage is made after the evidence of principal witnesses has been recorded, and if the stoppage is made before the record of such evidence, it shall have the effect of discharge of the accused person/s. (Section 258 of the Code 1973).

From the above all discussion, before commencing trials of offences, which can be, tried summarily, the Magistrate should consider the appropriateness and desirability of the following summary procedure\textsuperscript{310}.

Summary procedure in the following cases though strictly legal is not appropriate, therefore, should not ordinarily be followed.

1) Cases which are \textit{prima facie} likely in the event of conviction to call for more severe punishment than can be awarded in summary trial e.g. cases against previous convictions.

2) Cases which are \textit{per se} lengthy and complicated.

3) Cases arising out of disputed titles.

4) Serious cases in which for any particular reason, it is desirable to record full evidence for future reference e.g. where Government servant is an accused\textsuperscript{311}.

**IV Summary Trials:**

Summary trials are short trials for the speedy disposal of the cases in petty offences. It does not necessitate lengthy proceeding which is sufficient summary record for delivering justice concluded before the Magistrate. It is generally prescribed for the minor offences with small punishment\textsuperscript{312}. Object is to shorten record in petty cases and less work of Magistrate as held in \textit{Marta V/s Piadade}\textsuperscript{313}.

**Procedure:**

Normally, the procedure observed the same as prescribed for the summons cases, subject to the special provisions made in this behalf. It is not intended to deprive the rights of the accused in spite of charge,

\textsuperscript{310} Ibid. Pp. 1196-1199.


\textsuperscript{313} A.I.R 1969 Goa. P. 94.
particulars of an offence is explained to the accused. However, in Judgment, if the accused is convicted, brief reasons for finding to be stated and not the reason for sentence. It will not deprive the accused of any of the rights which falls under the trial of warrant cases by Magistrate and summons trial by Magistrate. Section 260 (i.e. power to try summarily) and section 261 (Summary trial by Magistrate of Second Class) of the Code specify the offences that can be tried in summary way and Magistrate who can try them. Section 262 to 265 lays down the procedure to be followed in such trials.

The following Magistrates may try in summary way any of the offences specified in section 260(2) of the Code.

Section 260(1) says that:

1) Notwithstanding anything contained in this Code section 260(1) says that a) any Chief Judicial Magistrate b) any Metropolitan Magistrate, c) any Magistrate of the First class specifically empowered in this behalf by the High Court may if he thinks fit, try in summary way all or any of the Offences mentioned in this Section to proceed with the Summary Trials. d) Moreover, section 261 provides that any Magistrate of Second Class if empowered by the High Court invested with the power of Magistrate of Second class, power to try summarily any offence punishable with fine or with imprisonment for a term not exceeding six months with or without fine and any abetment of or attempt to commit any such offence.

However, under section 461(m) of the Code 1973, if the Magistrate is not empowered to deal with the case in summary manner but tries the case summarily, said trial shall be void ab initio.

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Under section 260 (1) "if the Magistrate may thinks fit" : it means that the Magistrate has a discretion to try such offences in summary way if he thinks fit to do so. The Magistrate should use his discretion according to the circumstances and should in general, avoid, summary trial in serious cases. However, where the facts are complicated, which result in serious consequences, should not be applied summary procedure. The Magistrate may try in a summary way all or any of the following offences, i.e. clause (i) to (ix) of the sub-section 1 of section 260 of the Code enumerate the offences.

i) Offences not punishable with death, imprisonment for the life or imprisonment for a term not exceeding two years,

ii) The theft in section 379, 380, 381 of the Indian Penal Code the value of the property stolen does not exceed Rs.200/-.

iii) Receiving or retaining stolen property in section 411 of the Indian Penal Code where the value of the property does not exceed Rs.200/-.

iv) Assisting in the concealment or disposal of stolen property in section 414 of Indian Penal Code where the value of the property does not exceed Rs.200/-.

v) Offences under section 454, and 456 of Indian Penal Code.

vi) Insult with intent to provoke a breach of peace in section 504 and Criminal intimidation in section 506 of Indian Penal Code,

vii) Abatement of any of the foregoing offences;

viii) an attempt to commit any of the following offences when such attempt is a offence,

ix) any offence constituted by an act in respect of which a complaint may be made in section 20 of the Cattle trespass Act, 1871. Provided that no offence in which the Magistrate exercises the special powers conferred

317 Ibid. P. 1199.
by Section 34 shall be tried in summary way. However, section 260(1)
(i) does not limit only the offences under Indian Penal Code but also
applies to offences under any other enactment. Mischief combined with
theft trespass are triable summarily\footnote{\textit{Sohoni - The Code of Criminal Procedure 1973, revised by R. Nagurnani. (The Law Book

Therefore, it has been mentioned under section 260(2) of the Code
that when in the course of summary trials, it appears to the Magistrate that
"nature of the case is such that it is undesirable to try summarily, the
Magistrate shall recall any of the witnesses who may have been examined
and proceed to rehear the case in the manner provided by this Code", i.e.
summary trial to be given up in favour of the regular trial. However, holding
a part of the trial in summary manner and rest in the regular manner is
illegal\footnote{Ibid. P. 3032.}

It clearly indicates that the Magistrate empowered to try summarily
has discretion to do so. However, the discretion is to be exercised in a
judicious way but the nature of the offence shall be as mentioned above,
titled as procedure for summary trials. As per provision of section 250 of
the Code Compensation is awardable in the summary trial cases. However,
the summary procedure against the Government, Servant is bad in law as
held in \textit{Ramlochan Vs State of Uttar Pradesh}\footnote{1978 Criminal Law Journal, P. 544.}

So also, "in the case of deaf and dumb accused ought to be tried
summarily".

If an accused does not plead guilty in such trial, the Court must
record the substance and Judgment must contain brief reasons as held in
\textit{Shankaran Vs Rasheed}\footnote{1980 Criminal Law Journal, P. 304.}. Under section 261, the High Court can confer
power on Magistrate Second Class to try the case summarily for an offence
punishable with fine or with imprisonment for a term not exceeding 6
months with or without fine or abatement or attempt to commit any such offence\textsuperscript{322}.

So also under section 262 (1) of the Code says that the subject to the special provisions made in this behalf, the ordinary procedure prescribed for the trial of a summons case shall be followed in the trial of the cases to be tried in a summary way.

So also under section 262(2) says that if the accused is found guilty, punishment awarded should not be exceeding three months and there is no limit to fine. An imprisonment in default of fine may exceed limit as held in \textit{Ghulam V/s Emperor}\textsuperscript{323}. Even though the cases punishable under sections 379, 380, 381 of Indian Penal Code are triable summarily (where the amount does not exceed Rs.200/-) but if it is combined with the charge of previous conviction under the above offences is not triable summarily\textsuperscript{324}. Moreover, the cases which are hotly contested should not be tried summarily. The trial lasting long time (six weeks), the summary trial to be given up in favour of the regular trial. In fact, this procedure for the trial of summons cases and the accused can be discharged as per section 258 of the Code after the evidence of principal witnesses has been recorded pronounce the Judgment of acquittal under this Code as held in \textit{Sheikh Ahmad Hussain V/s State of Maharashtra}\textsuperscript{325}.

The object of this section is to restrict the sentence of imprisonment, even though accused convicted for more than one offence, cannot be sentenced to imprisonment for a term exceeding three months in the aggregate, and if inflicted on each charge, then it must run concurrently. This limit refers only on the substantive sentence and not to an alternative sentence of imprisonment in default of fine. The order of discharge in summons case is an acquittal, as held in \textit{Public Prosecutor V/s Hindustan}

\textsuperscript{323} 44 Criminal Law Journal. P. 637.
Motors. The Magistrate can take bond for keeping peace in section 106 of the Code i.e. security for peace on conviction.

In respect of how to keep record in Summary Trials as mentioned under section 263 of the Code 1973.

In every case tried summarily the Magistrate shall enter in such form as the State Government may prescribe, the following particulars namely:

a) the serial number of the case
b) the date of commission of the offence
c) the date of the report or complaint
d) the name of the complainant (if any)
e) the name, parentage and residence of the accused
f) the offence complained of and the offence (if any) proved and in cases coming under clause (2) and (3) or (4) of Sub-section 260, the value of the property in respect of which the offence has been committed.
g) the plea of the accused and his examination (if any),
h) finding,
i) the sentence or the other final order,
j) the date on which the proceedings terminated.

Even though record is brief, this section is not violate of Article 14 of the constitution of India as held in Bindeswami Vs Birju.

In recording the particulars, the trial Court must give substance of an offence complained of by mentioning all necessary facts constituting the

offence. Mere mention of Section of an Offence is not enough. The Court on its own motion V/s Shankaroo\textsuperscript{326}. In summary trial the Magistrate should not record what witness impart but only substantial parts of the evidence of each witness actually said only precise part of judicious selected material evidence as it is necessary in convicting the accused to give a brief statement with reasons, i.e. short summary of what the prosecution witnesses deposed and why the Magistrate should believe the said evidence? If there is defence witness then it should be necessary for Magistrate to say why the evidence of the prosecution is preferred, the Magistrate may make it clear that what was the defence case. In such trial, no record of evidence is maintained but the Magistrate for his own convenience jot down some notes of evidence\textsuperscript{329}. If the accused decline to admit the offence and claim to be tried in such events State will be represented by Assistant Public Prosecutor before the Court competent to try.

As nothing in section 326 of the Code applies to summary Trials\textsuperscript{326} then the proceeding will have to be stayed in section 322 of the Code as the trial turned to be de novo.

However, where the Magistrate cannot pass a severe sentence in such a trial, the proceeding should be submitted to the Superior Magistrate in section 325 of the Code.

When the accused does not plead guilty, he must be asked to state whether he would like to reexamine the prosecution witnesses and this right is fully preserved and section 313 of the Code has also be applied here.

\textsuperscript{326} 1983 Criminal Law Journal, P. 63

The pronouncement of Judgment in section 264 of the Code 1973:

In every case tried summarily, in which the accused does not plead guilty, the Magistrate shall record the substance of evidence and a judgment containing a brief statement of the reasons for the findings.

The purpose under this section is obviously required that the record of substance of evidence shall be separated from the Judgment delivered by the Magistrate. However, there should be a speaking order. Brief statement of reasons for finding should be given in the case of acquittal. The object can best be served by the case being heard and disposed off by the same Magistrate. Evidence in such trial to be recorded in the presence of accused in section 273 of the Code\textsuperscript{330}.

Section 265 deals with the language of record and judgment:

Every such record and Judgment shall be written in the languages of the Court, the attention of the Court is invited to the High Court Circular No. 0101/II/71/D1/dt 15/3/1974. Read with High Court circular no. A. 0606/56/D/22nd Dec.1956 and Government Notification no. OFL-1066(ii) - M D/30 March 1966 published in the part IV-A of the Maharashtra Government Gazette dt./30.4.1966 issued by the Government of Maharashtra in section 558 of the Code. 1898, which inter alia provides that the language of the Court would be in "Marathi" excepting for the purpose mentioned therein which include charge, notes of evidence, order of Judgment of Criminal Court. The said Notification is saved under section 484 (2) of the Code. The Judgment must be signed by Presiding Officer may be typed by some one else is legal\textsuperscript{331}.

Whether appeal lies in section 376 (d) of the Code lays down that there shall be no appeal by the accused in such cases, where the

\textsuperscript{330} Ibid. Pp. 3045 – 3051.

Magistrate imposes sentence of imprisonment, but such sentence shall not be appealable merely on the ground that (i) The person convicted is to order to furnish security of keeping the peace (ii) of a direction for imprisonment in default of payment of fine is included in the sentence. (iii) if the accused is convicted in more than one offence, but the amount of fine imposes does not exceed Rs. 200/-.

Some common features for all Trials:

Summary procedure to deal with the certain cases of perjury:

a) Case of Perjury:

The offence of giving false evidence or fabricating false evidence can be dealt with in section 195,340,343 of the Code, if knowingly and will fully given a false evidence with an intention that such evidence should be used in such proceeding and if the Magistrate is satisfied that it is necessary in the interest of justice to try the witness summarily for the offence. In such cases, after giving reasonable opportunities to the accused of showing cause that why he should not be punished for such an offence, the Court may try or on admission, and sentence him an imprisonment which may extent to three months or with fine up to Rs. 500/- or with both.

b) Certain procedure of contempt of Lawful Authority of Public Servants:

When the Court ordered such offences which come under section 175,178,179,180 or section 228 of Indian Penal Code section 175 deals with an intentional omission to produce the documents. Section 171 deals with an intentional refusing to take oath; section 179 says that refusal to answer the questions by one who is legally bound to state the truth. So also Section 180 deals with refusal to sign a statement made to the public servant when legally required to do so and Section 228 deals with an
intentional insult or interruption to public servant sitting in any stage of Judicial Proceeding. Court can detain the offender in custody, take cognizance of an offence and after giving reasonable opportunity to be heard fine him not exceeding Rs. 200/- i/d S.I for a month in section 345 (1) of the Code 1973.

c) Local inspection:

Under section 310 of the Code In all important cases, on an application of prosecution, defence or the Court at its own, in the interest of justice, for the just decision of the case after due notice to the parties, visit and inspect the spot or any place in which an offence was committed and without delay record the memorandum of observations of such inspection, it may help in appreciating the evidence of witnesses.

The Court should supply the copy of Judgment of conviction free of costs to the accused in section 353 (4) of the Code.

Judgment in cases tried summarily:

In every case tried summarily in which accused does not plead guilty. The Magistrate shall record the substance of evidence and the Judgment containing the brief statement of the reasons for finding. (Section 264). 332

Mandatory provisions:

Substance of evidence applies a judicious selection of that part of evidence which is material substance of every separate judgment and judgment must be written by Magistrate who has recorded the substance of evidence though the sentence passed is non appealable, which must enable higher Court to decide that there was sufficient material to support

the finding. Brief statement of reasons must be given as findings. Failure to
do so render the Judgment illegal.

Even the substance of evidence recorded by Magistrate under this
section can be made use of by his successor Magistrate, but if it recorded
in such a manner that it cannot be properly appreciated by his success or
the desirable to start the trial de novo in the case of Mathai Anna Kitty V/s
Issak Type. In summary trials this section requires brief statement of
reasons for sentence in each manner that a Higher Court may be in a
position to decide that there were sufficient material before the trial Court to
support its findings and the reasons must be based on evidence as held in
Sakaram Unni V/s Rasheed under section 273 of the Code all evidence
shall be taken in the presence of accused or his pleader unless the
personal attendance of accused dispensed with.

In section 326 of the Code the Apex Court held in Ranbir V/s
State held that the Magistrate or Judge can exercise is discretion only for
further examination and not for fresh examination of witness for fresh trial.
So also the law gives no power to the succeeding Judge to proceed with
the trial from the stage at which his predecessor has left in section 326
Magistrate can do so but summary trial cases and summons trial cases are
exceptions to it. The succeeding Magistrate has no option to it but start a
fresh trial under clause 3 of section 326 of the Code. Held in State of
Rajasthan V/s Rajesh Agrawal.

Section 265 - Language of the record and Judgment:

Every such record and Judgment written in the language of the
Court. In this connection the attention of the Magistrate is invited to the
order contained, High Court circular no. P.0101/II/71 dated 15.3.1974 Read
with High Court circular no. A-0606/56 dated 22nd December 1956 and
Government Notification no. OFL-1066 (ii)/14 dated 30th March 1966
published in part IV-A of the Maharashtra Government Gazette dated 30th of April 1966 issued by the Government of Maharashtra under section 558 of the of the Code 1898, which provides that the language of the Court would be "Marathi" expecting for the purposes mentioned therein which include charge, notes of evidence, order and Judgment of Criminal Court\textsuperscript{337}. The said notification is saved in section 484 (2) of the Code 1973. The Judgment must be signed by the Presiding Officer may be typed by someone else is legal as stated in Veerathaiag V/s Rameswami\textsuperscript{338}. Record made in section 263 and the Judgment recorded in section 264 shall written by the Presiding Officer either in English or in the language of the Court.

Conclusion

In regard to chapter No.6 sum up from the above chapter we can conclude that there are four kinds of criminal trials for the different categories of offences depending on severity of the crime and punishment awarded to the culprit have been discussed. Moreover it can be said that while working, prosecutor has to maintain what must be done or not done while recording the evidence. Which should be the language of the Court in recording the evidence and which provision of the Criminal Procedure Code can be exhausted by the prosecutor so that guilty should not escape punishment from Court of law has been shown. If previous conviction proved heavy punishment must be awarded by the Court to the accused after argument in respect of evidence on record.

Before recording evidence, which formality has to be completed by the prosecutor e.g. to see whether accused is given copies of charge sheet and after charge is framed and trial has been started Prosecutor can prefer an application before the Court under section 294 of the Code to admit the formal document by the counsel of the defence. There are four kinds of trial viz

\textsuperscript{338} A.I.R. 1964 Mysore, P. 11.
Session trial, warrant trial, summons trial and summary trial and to see whether accused tried under proper kind of trial. Whether charge has been framed correctly or not is to be seen by the Prosecutor. Prosecutor can examine all the witness of his choice. Prosecutor can request the Court to declare its witness hostile if the witness is not supporting as per his statement to police and cross examine him to lower down his creditability. Prosecutor can submit any material document before the Court. Prosecutor can take examination in chief, and after cross by defence can request the Court to re-examine the said witness if any ambiguity appear in cross-examination of the witness. Prosecutor has a right to cross-examine defence witness. Show the reported cases of Supreme Court and High Court in favour of Prosecution. Moreover there is a general trend of hostility among the witnesses. The case of perjury can be launched against that witness and fine and punish by the same Court in Session triable cases. This can indicate that the role of prosecutor is vital in conducting cases.