CHAPTER- VII
ROLE OF JUDICIARY IN THE ENFORCEMENT OF HUMAN RIGHTS

A) Introduction

The democratic constitutional systems have always assigned high prestige to the judiciary especially in view of the challenging take entrusted to it. The notion of functional independence of the law courts in a democratic country also makes the judiciary too sensitive to its position vis-à-vis, other braches of government and the extra-constitutional structures which the democratic system creates for its sustenance. The court system being somewhat away and above the democratic din and bustle, characteristic of the legislatures can play an objective guarding.

The Indian judicial system has a long and glorious history of functional accomplishments and admirable social purpose. The ancient and mediaeval period of Indian history made innovations in the filed of administration of justice but what free India today has in the name of judicial system is a proud legacy of the British Raj. Notwithstanding, all their hunches and precautionary susceptibilities the Britishers evolved a system of judiciary and criminal justice in country which was a queer-mixture of Anglo-Saxon Principles.

The Republican Constitution of India while proclaiming its faith in Western liberalism and parliamentary democracy treated its judiciary with utmost respect and sensitivity. The Supreme Court of India and the High Courts in each States is the apex of the judicial reforms of the country which, for the purposes of dealing with criminal cases consist of a number of courts presided over by Sessions Judge, Metropolitan Magistrates and judicial Magistrates at different places in each State. With coming into force, the Code of Criminal Procedure, 1973, the Judiciary has been separated from the executive as envisaged in Article 50 of the Constitution of India and effect of separation has been established throughout the country.

The functioning of our courts is linked with the image of our judicial system. The image of the courts depends not upon the architectural beauty and the
spaciousness of the courts buildings. It also does not depend upon the finally cut robes of the members of the Bench and Bar, not upon the other trappings of the courts. Likewise, the image of the courts does not depend upon long arguments, the number of authorities cited and the erudition displayed in judgments\textsuperscript{5}. It depends in the final analysis, upon the way the cases are handled upon the extent of confidence the courts inspire in the parties to the case before the, upon the promptness or absence of delay in the disposal of cases and upon the approximation of the judicial findings of fact with the realities of the matters.

Administration of criminal justice is provided by a wide range of legislative measures of diverse kinds. But in recent time judiciary, particularly at the appellate level, has played a vital role in giving creative interpretations leading to broadening and evolving new concepts of criminal justice system. Such judicial role is a marked feature of judicial process, particularly, emanating from the Supreme Court. In this way is would be useful to refer to certain judicial enunciations that go in to make the character of contemporary criminals justice administration\textsuperscript{6}. Such enunciations relate to certain vital impacts on the processes of criminal justice administration in India.

B) Judicial Control on Police Powers

The Indian judiciary led by Supreme Court has exhibited a judicial activism in recognizing and enforcing the laws, the legal profession is designed to be a profession of service… service to the community. The important duty of the profession is to act as an interpreter, guide and faithful servant of the community.

i) First Information Report, Police Custody and Charge Sheet

The Police has been trying to build up an image as a ruthless, oppressive machinery to create terror and thus to prevent crime. The attitude does not work well and adoption results in the loss of reputation as ineffective force in carrying out the task assigned to it. The law responded to the situation by giving more and more safeguards to the accused. The Supreme Court has got an opportunity to dwell on the need for adding more protective rights to the accused in view of the charges of abuse of power by police.

It was held by the Supreme Court in *Thulia Kaili V. State of Tamil Nadu*\(^7\), that:

“The FIR is section 154 in the criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed. The names of the actual culprits and the part played by them as well as the names of the eye witnesses present at the scene of occurrence. Delay in lodging the F.I.R quite often results in embellishment which is a creature of after through on account of delay, the report not only get bereft of the advantage of spontaneity. Danger creeps into the introduction of colored version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lading the FIR report should be satisfactorily explained.”

Supreme Court in *Apren Joseph alias Current Kun Jukunju V. State of Kerala*\(^8\), held that:

“The receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation. Nor does the stature provide that such information report can only be made by an eye witness. FIR under Section 154 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant’s evidence in court. But this information when recorded is the basis of the case set up by the informant. It is very useful if recorded before there is time and opportunity to embellish or before the informant’s memory fades. Undue or unreasonable delay in lodging the F.I.R., therefore, inevitably gives rise to suspicion which puts the court on guard to look for the possible motive and the explanation for the delay and consider its effect on trustworthiness or otherwise of the prosecution version. No duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the court in each. Mere delay in lodging the F.I.R. with the police is, therefore, not necessarily, as a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case. It can be used as a previous statement for the purpose of corroboration or contradiction of its maker under section 157 and Section 145 of the Indian evidence Act.”

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\(^7\) See, AIR 1973 SC p.501

\(^8\) See, AIR 1973 SC p.1
In Hallu V. State of M.P\(^9\), the Apex Court refused to attach any importance to the circumstance that the names of the appellants were not mentioned in the report on the ground that through it was earliest in point of time it could not be treated as the First Information report under Section 154 of the Criminal Procedure Code. In this view the Apex Court clearly held, that:

“Section 154 does not require that the Report must be given by a person who has personal knowledge of the incident reported. The section speaks of information relating to the commission of a cognizable offence given to an officer in charge of a police station.”

In Pudda Narayana V. State of Andhra Pradesh\(^10\), the Supreme Court held that judgment of the learned Additional Sessions Judge and pointed out a number of circumstances which according to him cast a serious doubt on the veracity of the prosecution case. In the first place, it was argued that the learned Additional Sessions Judge rightly held that as the F.I.R., did not contain the overt acts attributed to each of the accuse, the story of the prosecution must be held to be an afterthought. Dealing with this aspect of the matter, the High Court pointed out that the F.I.R. was lodged soon after the occurrence and there was no occasion for the information to have mentioned all the material particulars in the F.I.R. which had to be narrated and proved at the trial.

Another point taken by the learned Additional Sessions Judge was that in the inquest report details of the overt acts committed by the various accused have not been mentioned in the relevant column. The learned Judge in fact has assumed that because the details were not mentioned in the requisite column of the inquest report, therefore, the presumption will be that the eye witnesses did not mention the overt acts in their statements before the police. To begin with it seems that the learned Additional Sessions Judge’s approach is legally erroneous. A statement recorded by the Police during the investigation is not at all admissible and the proper procedure is to confirm the witnesses to the contradictions.

In Balaka Singh V. State of Punjab\(^11\), the brief statement of the facts of the case mentioned in the inquest report is based on the report lodged by Banta Singh. In this brief statement, however the names of Inder Singh, Sucha Singh, Teja Singh and

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\(^9\) See, AIR 1974 SC p.1936  
\(^10\) See, AIR 1975 SC p.1252  
Makhan Singh accused are not mentioned as culprits, specifically. It is correct that in the brief facts mentioned in the body there is no reference of the names of these four men.

Thus even the A.S.I. while admitting that the names of the four accused were not mentioned by Banta Singh has not chosen to give any explanation for this deliberate omission to that effect. According to the prosecution the names of the four accused who have been acquitted by the High Court had already been mentioned in the F.I.R. which was lodged 4/5 hours before the inquest report was prepared. Any Investigating officer possessing some intelligence would have at once questioned Banta Singh as to how it is that while he had named there four accused in the F.I.R. He had not referred to them in his brief statement in the inquest report. In these circumstances, therefore, the High Court was fully justified in holding that the omission of the names of the four accused acquitted by the High Court in the inquest report was a very important circumstance which went in favour of the four accused. This omission has a two-fold reaction. In the first place it throws doubt on the complicity of the four accused acquitted by the High Court and secondly it casts serous doubt on the veracity and authenticity of the F.I.R itself. It is not understandable as to why the four accused that are alleged to have taken an active part in the assault on the deceased were not at all mentioned in the inquest report and in the brief statement of the very person who had lodged the F.I.R four hours before. Counsel for the State tried to justify this omission on the ground that in the inquest report the names of all the nine accused appear to have been mentioned at the top of that document. There is, however, no column for mentioning the names of the accused and therefore, there was no occasion for the Investigating Officer to have mentioned the names of the accused in that particular place.

Finally the Investigating Officer Teja Singh admitted in his evidence that he had prepared the inquest report and that he had read out the same to Banta Singh and Harnam Singh but later tried to say that he did not recollect whether he had read out the inquest report to Banta Singh and Harnam Singh before getting their thumb impressions on the inquest report. This circumstance speaks volumes against the prosecution case. If, therefore, it is once established that the names of the four accused were deliberately added in the inquest report at the instance of the prosecution there is no guarantee regarding the truth about the participation in the assault on the deceased by the appellants.
Another finding which demolishes the entire edifice and fabric of the prosecution case is that the F.I.R. itself was not written at 10 P.M. as alleged by the informant Banta Singh but it was written out after the inquest report was prepared by the A.S.I. and after the names of the four accused acquitted by the High Court were inserted in the inquest report. If this is true then the entire case of the prosecution becomes extremely doubtful. The High Court has also derived support from another important circumstance to come to the conclusion that the F.I.R. was not written at 10 P.M. as alleged by the prosecution but after the preparation of the inquest report at about 2-30 A.M. The High Courts points out that according to the prosecution the special report reached the Ilaqa Magistrate at 11 A.M. on September 2, 1966 i.e. more than 12 hours after the F.I.R. was lodged at the police station whereas it should have been delivered to the Ilaqa Magistrate during the night or at least in the early morning.

Counsel appearing for the appellants submitted that under the High Court Circulars and the Police Rules it was incumbent upon the Inspector who recorded the F.I.R. to send a copy of the F.I.R. to the Ilaqa Magistrate immediately without any loss of time and the delay in sending the F.I.R. has not been properly explained by the prosecution as rightly held by the High Court. It is, therefore, clear that the F.I.R. itself was a belated document and came into existence during the small hours of September 2, 1966. Indeed if this was so, then there was sufficient time for the prosecution party who are undoubtedly inimical to the accused to deliberate and prepare a false case not only against the four accused who have been acquitted, but against the other five appellants also. The High Court also found that the best person to explain the delay in sending the special report to the Ilaqa Magistrate was the police Constable who had carried the F.I.R. to the Ilaqa Magistrate but the Constable has not been examined, by the prosecution. On this point the High Court observed as follows:

“The delay with which the special report was made available to the Ilaqa Magistrate is indicative of the fact that the first information report did not come into existence probably till about sunrise by then the dead body had already been dispatched for the purpose of post-mortem examination to Patiala along with the inquest report, so that the Investigating Officer was no longer in a position to make alterations in the body of that report and all that he could do was to add later on the names of the said four appellants to its heading.”
This finding of the High Court is based on cogent materials and convincing reasons, but unfortunately the High Court has not considered the effect of this finding on the truth of the prosecution case with regard to the participation of the appellants. In our opinion, in view of the finding given by the High Court it has been clearly established that the F.I.R. was lodged not at 10 P.M. as alleged by the prosecution but some time in the early morning of September 2, 1966. It this was so, then the F.I.R. lost its authenticity. If the prosecution could go to the extent of implicating four innocent persons by inserting their names in the inquest report and in the F. I. R. which was written subsequent to the inquest report they could very well have put in the names of the other five appellants also because they were equally inimical to the prosecution party, and there could be no difficulty in doing so because it is found by the High Court that all the prosecution witnesses belonged to one party who are on inimical terms with the accused.

In Sarwan Singh V. State of Punjab\textsuperscript{12}, the Supreme Court was of the view that it is well settled that mere delay in dispatch of the F.I.R. is not a circumstance which can throw out the prosecution case in its entirety. The matter was also considered by the Apex Court in Pola Singh V. State of Punjab\textsuperscript{13}, where the court observed as follows:

“But when we find in this case that the F.I.R. was actually recorded without delay and the investigation started on the basis of that F.I.R. and there is no other infirmity brought to our notice, then, however improper or objectionable the delayed receipt of the report by the Magistrate concerned it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable.”

In these circumstances therefore, the learned Judges held that the Additional Sessions Judge was not at all justified in rejecting the prosecution case on the ground of the delay in dispatch of the F.I.R. in the peculiar circumstances of this case.

In Kurukshetra University V. State of Haryana\textsuperscript{14}, the Kurukshetra University filed a first information report through its Warden with regard to an incident which is alleged to have taken place on the night between 25\textsuperscript{th} and 26\textsuperscript{th} of Sep., 1975 in one of the University hostels. Acting on that report, the police

\textsuperscript{12} See, AIR 1976 SC p.2304; 1974 (4) SCC p.369
\textsuperscript{13} See, AIR 1972 SC p.2679
\textsuperscript{14} See, AIR 1977 SC p.2229
registered a case under Sections 448 and 452, Indian Penal Code, against respondent 2, Vinay Kumar. But before any investigation could be done by the police respondent 2 filed a petition in the High Court of Punjab and Haryana praying that the First Information Report be quashed. The High Court, without issuing notice to the University, quashed the First Information Report by its judgment dated December 22, 1975 and directed respondent 1, the State of Haryana to pay a sum of Rs. 300/- by way of costs to respondent 2. The University asked for a review of the order since it has no notice of the proceedings, but that application was dismissed[ by the High Court, giving rise to this appeal.

The Apex Court held that:

“The High Court in the exercise of its inherent powers under section 482 of the Code of Criminal Procedure, it could quash a First Information Report. The police had not even commenced investigation into the complainant filed by the Warden of the University and no proceeding at all was pending in any court in pursuance of the F.I.R. It ought to be realized that inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim or caprice. That Statutory power has to be exercised sparingly, with circumspection and in the rarest of rare cases.”

It was held by Fazil Ali Patanjali Sastri, S.R. Dass and Vivan Bose, JJ., in Tara Singh V. State\(^\text{15}\) that:

“Section 173 (1) (a) requires that as soon as the police investigation under Chapter XIV is complete, the police should forward to the Magistrate a report in the prescribed form setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of case. Where, therefore, the first report made by the police to a Magistrate, though called incomplete challan, contain all these particulars and a second report called a supplementary challan is filed subsequently, giving the names of certain witnesses who are merely formal witnesses, the First Report is in fact, a complete report as required by Section 173(1) (a) and it is not necessarily vitiated by the mere fact that a supplementary challan is subsequently filed. The conviction and sentence are set aside and the case is sent back to the High Court with a direction that court will order a retrial denovo in the Session court, treating committal as good.”

\(^\text{15}\) See, AIR 1951 SC p.441
In Tula Ram v. Kishore Singh\(^{16}\) case the Apex Court observed that:

“In these circumstances we are satisfied that the action taken by the magistrate was fully supportable in law and he did not commit any error in recording the statement of the complaint and the witnesses and thereafter, issuing process against the appellants. The High Court has discussed the points involved threadbare and has also cited number of decisions and we entirely agree with the view taken by the High Court.”

Fazil Ali, J. further held that:

“Thus on careful consideration of the facts and circumstances of the case he following legal proposition emerges:

That the Magistrate can order investigation under Section 156(3) only at the pre-cognizance stage, that is to say before taking cognizance under section 190, 200 and 204 and where as Magistrate decides to take cognizance under the provisions of Chapter XIV he is not entitled in law to order any investigation under Section 156(3).

Though in cases not failing within the proviso of Section 202 he can order an investigation by police which would be in the nature of an enquiry as contemplated by Section 202 of the Code.

Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives:-

He can pursue the complaint and is satisfied that there are sufficient grounds for proceedings he can straight away issue process to the accused but before he does so he must comply with the requirements of section 200 and record the evidence of the complainant of his witnesses.

The Magistrate can postpone the issue of process and direct an enquiry by himself.

The Magistrate can postpone the issue of process and direct and enquiry by any other person or an investigation by the police.

In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that three are sufficient grounds for proceedings he can dismiss the complaint.

Where a Magistrate orders investigation by the police before taking cognizance under section 156(3) of the Code and receives the report and discharge the accused or straightway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190 as described above.

The present case we find no merit in his appeal which is accordingly dismissed\(^{17}\).”

\(^{16}\) See, AIR 1977 SC p.2401; See also, AIR 1976 SC p.1672

\(^{17}\) See, Ibid
V. R. Krishna lyer, J., in **Nandini Sathpathy V. P. L. Dhani** held that:

“Every litigation has a touch of human crisis and, as here; it is but a legal projection of life’s vicissitudes. A Complaint was filed by the D.S.P., Vigilance Cuttack, against the appellant, the former Chief Minister of Orissa, under Section 179 IPC, before S.D. Judicial Magistrate, Sadar, Cuttack alleging offending facts which we will presently explain. Thereupon the Magistrate took cognizance of the offence and issued summons for appearance against the accused. Aggrieved by the action of the Magistrate urging that the complaint did not and could not disclose an offence, the agitated accused appellant moved the High Court under Article 226 of the Constitution as well as Section 401 of the Cr.P.C. challenging the validity of the magisterial proceedings. The broads submission unsuccessfully made before the High Court, was that the charge rested upon a failure to answer interrogation by the police but this charge unsustainable because the umbrella of Article 20(3) of the Constitution and the immunity under Section 161(2) of the were wide enough to shield her in her refusal. We have declared the law on a thorny constitutional question where the amber light from American rulings and beacon beams from Indian precedents has aided us in our decision. Where, however, the accused person is a woman and the police constantly insists on the woman to appear at contravention of the provisions of Section 160(1) of the Code of Cr.P.C. In view of Supreme Court such deviance must be visited with prompt punishment since police men may not be a law into themselves expecting others to obey the law.”

In **Hussainara Khatoon v. Home Secretary, Bihar**, P.N. Bhagwati, J. held that:

“When an under trial prisoner is produced before a Magistrate and he has been in detention for 90 days or 60 days, as the case may be, the Magistrate must, before making an order of further remand to judicial custody, point out the under-trial prisoner that he is entitled to be released on bail. If thee are adequate grounds to Magistrate may extend the period – not excluding 60 days, for detention of an accused in the police custody. On the expiry of the period person should be released on the bail.”

In **Harpal Singh V. State of H.P**., a Special Leave directed against the judgment of the High Court of Himachal Pradesh, S.M. Fazil Ali, J. held as under:

“The appellants have been convicted under Section 376 of the I.P.C and sentenced to rigorous imprisonment for four years each. The central evidence in the case consists of the testimony of Saroj Kumari, the girl who is said to have been raped by the appellant and other who was acquitted by the trial court. The occurrence according to the prosecutor, took place on the night intervening the 20th and

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18 See, AIR 1978 SC p.1025
19 See, AIR 1979 SC p.1377
20 See, AIR 1981 SC p.361
21st August, 1972. The F.I.R was lodged on 31st August, 1972. The complainant had given reasonable explanation for lodging it after ten days of the occurrence, She stated that a honour of the family was involved, its members had to decide whether to take the matter to the court or not. The police can’t refuse to report the F.I.R.”

**Gurnam Kaur v. Bakshish Singh**\(^1\), in this case the High Court had discarded the evidence of eye witnesses on superficial and unsubstantial grounds. Apart from the fact that there were no justifiable grounds for rejecting their testimony. The Apex Court greatly impressed by the evidence of and the substantial corroboration received by it from the First Information Report and the medical and the expert evidence and observed that an examination of the First Information Report shows that Bakshish Singh was responsible for firing two shots at Karam Singh and one shot at Gurdeep Singh. He was alleged to have shot once at the legs and later again at the neck of Karam Singh and once on the right thigh of Gurdeep Singh. The medical evidence supports the evidence of and what is more important the medical evidence is in tune with the First Information Report. The empty cartridges which were found at the scene of Occurrence Show that two of them found near Karam Singh and one found near Gurdeep Singh were shot from the pistol of Baskshish Singh. The manner in which the medical evidence and the expert evidence fit in with the earliest version given in the First Information Report.

**In Sevi V. State of Tamil Nadu**\(^2\), one of the disturbing features of the case were the strange conduct of the Sub-Inspector of Police. According to him he was told by a person on the telephone that there was some rioting at Kottaiyur and that some persons were stabbed. He made and entry in the general diary and proceeded to Kottaiyur taking with him the F.I.R. book, the hospital Memo book etc. This was indeed very extraordinary conduct on the part of the Sub-Inspector of Police. If he was not satisfied with the information that any cognizable offence had been committed he was quite righting making an entry in the general diary and proceeding to the village to verify the information without registering any F.I.R. But, we have yet not come across any case where an officer In-charge of a Police Station has carried with him the F.I.R. Book. The First Information Report book is supposed to be at the Police Station House all the time. If the Sub-Inspector is not satisfied on the information received by him that a cognizable offence has been

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\(^1\) See, AIR 1981 SC p.631  
\(^2\) See, AIR 1981 SC p.1230
committed and wants to verify the information his duty is to make an entry in the general diary, proceed to the village and take a complaint at the village from someone who is in a position to give a report about the commission of a cognizable offence. Thereafter, the ordinary procedure is to send the report to the police Station to be registered at the Police Station by the Officer In-charge of the Police Station. But, indeed, we have never come across a case where the Station House Officer has taken the First Information Report Book with him to the scene of occurrence. According to the suggestion of defense the original First Information Report Which was registered was something altogether different from what has now been put forward as the First Information Report and that the present report is one which has been substituted in the place of another which was destroyed. To substantiate their suggestion the defence requested the Sessions Judge to direct the Sub-Inspector to produce the First Information Report Book in the Court so that the counterfoils might be examined. The Sub-Inspector was unable to produce the relevant.

F.I.R. Book in Court notwithstanding the directions of the Court. The F.I.R. book, if produced, would have contained the necessary counterfoils corresponding to the F.I.R. produced in Court. The Sub-Inspector when questioned stated that he searched for the counterfoil book but was unable to find it. Though he claimed that relevant entries had been made in the general diary at the Station. But the Sub-Inspector did not produce the general diary in court. The Production of the general dairy would have certainly dispelled suspicion. In the circumstances we think that there is great force in the submission of the learned counsel for the accused that the original F.I.R. has been suppressed and, in its place some other document has been substituted. If that is so, the entire prosecution case becomes suspect. All the eye-witnesses are partisan witnesses and notwithstanding the fact that four of them were injured we are unable to accept their evidence in the peculiar circumstances of the case. Where the entire evidence is of a partisan character impartial investigation can lend assurance to the Court to enable it to accept such partisan evidence. But where the investigation itself is found to be tainted the task of the Court to shift the evidence becomes every difficult indeed. Another feature of the case which doubts the credibility of the witnesses is the photographic and somewhat dramatic account which they gave of the incident with minute details of the attack on each of the victims. According to the account of the witnesses it was as if each of the victims of the attack came upon the stage one after the other to be attacked by different accused.
in succession, each victim and his assailant being followed by the next victim and the next assailant. Surely the account of the witnesses is too dramatic and sounds obviously invented to allow each witness to give evidence of the entire attack. But the witnesses themselves admit in cross-examination that they were all attacked simultaneously. If so, it was impossible for each of them to have noticed the attack on everyone else.

Having regarded to all these special features of this case the Court held that:

“The High Court was justified in setting aside the acquittal of the appellants and convicting them. The appeals are, therefore, allowed. The appellants, if not on bail, will be released forthwith. It they are on bail their bail bounds will stand cancelled.”

In State (Delhi Administration) v. Dharampal and others\textsuperscript{23}, it was observed by the court that:

“So far as authorization of the police custody of accused under Section 167(2) is concerned, it is legislative mandate that in no way the detention of accused in police custody can be authorized for any time after expiry of the period of first fifteen days remand. The Magistrate may allow the detention other than custody in police till 90(60), days, as the case may be. The Magistrate is competent to authorize detention of any accused in police custody for a specific period on adequate ground on in the first fifteen days and that detention in police custody or judicial custody or vice-versa can be authorized only within first fifteen days. After fifteen days detention the accused cannot be sent to police custody at all except in other cases in which remand of first fifteen days has not started. It was stated in the above citation that the words from ‘time to time’ occurring in Section show that several orders can be passed under Sec. 167(1) and that the nature of custody can be altered from judicial custody to police custody and vice-versa during the first period of 15 days mentioned in Sec. 167(2) of Code of Criminal Procedure and that after fifteen days the accused could only be kept in judicial custody or in any other custody as ordered by the Magistrate but not in the custody of police.”

Y.V. Chanderachud CJ, A. Varadarajan and Amarendra Nath Sen, JJ., held in State of W.B. v. Swapan Kumar Guha\textsuperscript{24} case that:

“Usually, in case of cognizable offences, the investigation is initiated by giving of information under Section 154 to a police officer-in-charge of a police station. However, such first information report is not an indispensable requisite for the investigation of crime. Even without any F.I.R., if a police officer-in-charge of a police station has

\textsuperscript{23} See, 1982 CrLJ p.1103

\textsuperscript{24} See, 1982 (1) SCC p.561
reason to suspect the commission of a cognizable offence, he can proceed to investigate the offence under Section 157(1). The police, of course, have to unfettered discretion to commence investigation under Section 157. They can exercise the power of investigation only if FIR or other relevant material prima facie discloses the commission of a cognizable offence.”

According to Ahmadi, J., explanation in Prithichand v. State of Himachal Pradesh, case the learned counsel for the appellant submitted that there was delay in filing the first information report. We do not thing so, immediately after the incident was narrated to the mother and other ladies, a decision was taken to await the return of the father before deciding on the course of action. On the arrival of the father the Sarpanch was contacted. Who advised that police should be informed about the incident? The Sarpanch, however, stated that he would accompany them next morning since it was already dark. The girl was taken to Palampur Station next morning and the F.I.R was lodged. We therefore, do not think that there was any delay in reporting the matter to the police.

In State of U.P. v. R.K. Srivastava, the Court expressed that:

“It is a well settled principle of law that if the allegations made in the FIR are taken at their face value and accepted in their entirety do not constitute an offence, the criminal proceedings instituted on the basis of such FIR should be quashed.”

The question is whether the facts disclosed in the FIR constitute the offences with which the accuse have been charged. It is manifestly clear from the allegations in the FIR that the respondent or the other accused had not intention whatsoever to make any wrongful gain or to make any wrongful loss to the Bank. They had accepted the said three cheque amounting to Rs. 54,600/- and sent the same for clearance after debiting the LOC account. The said cheques have been encased and the money was received by the state Bank of India. The Court further observed that, the High Court has rightly held that the allegations made in the FIR do not constitute any offence of cheating, nor do they constitute any offence of forgery. No document has been referred to in the FIR as the outcome of forgery.

Finally the Supreme Court observed that:

“The High Court had rightly held that as the criminal proceedings have been started against the respondent on the basis of a FIR which

25 See, AIR 1989 SC p.702
26 See, AIR 1989 SC p.2222
does not contain any definite accusation; it amounts to an abuse of process of the Court and, as such is liable to be quashed.”

It was observed by the Supreme Court in *Tara Singh V. State of Punjab*\(^{27}\) case that:

“Delay in giving the F.I.R. by itself cannot be ground to doubt the prosecution case. In the instant case, the names of the accused were consistently mentioned throughout. There was absolutely no ground to hold that the F.I.R. was brought into existence subsequently during the investigation and the mere delay in lodging the report by itself could not give scope an adverse inference leading to rejection of the prosecution case outright. The evidence of the eye-witnesses was consistent and corroborated by the medical evidence. There was no inordinate and unexplained delay in filing F.I.R.”

**In State of Andhra Pradesh v. P.V. Pavithran**\(^{28}\), The High Court has quashed the First Information Report on the ground that there was inordinate delay in the investigation. Aggrieved by that judgment, the State has preferred this criminal appeal.

**Mr. Madhava Readdy**, learned senior counsel appearing on behalf of the appellant took an exception to the observation of the learned single Judge of the High Court reading:-

“……hold that wherever there is an inordinate delay on the part of the investigating agency in completing investigation, the case merits quashing of the First Information Report even Generally, this Court will not quash the F.I.R. because it amounts to stopping of investigation, but where there is an inordinate delay, the same is a ground to quash even the F.I.R.” and contended that the above observation is too wide a proposition and it would be detrimental to the prosecution in future under all circumstances, regardless of the reasons therefore.”

Observation of the High Court makes it necessary to examine the question whether a mere delay in the investigation of a criminal proceeding will by itself serve as a sufficient ground for quashing the proceedings in pursuance of the registration of the case notwithstanding whatever may be the reasons for the delay. This question has come up for determination in a number of cases wherein this Court has examined the right of an accused for a speedy investigation and trial in a criminal case in the light of Article 21 of the Constitution of India.

\(^{27}\) See, 1990 CrLJ SC p. 2681

\(^{28}\) See, AIR 1990 SC p.1266; also see, Raghuvir Singh v. State of Bihar, AIR 1987 SC p.149
There is no denying the fact that a lethargic and lackadaisical manner of investigation over a prolonged period makes an accused in a criminal proceedings to live every moment under extreme emotional and mental stress and strain and to remain always under a fear psychosis. Therefore, it is imperative that if investigation of a criminal proceeding staggers on with tardy pace due to the indolence or inefficiency of the investigating agency causing unreasonable and substantial delay resulting in grave prejudice or disadvantage to the accused, the Court as the protector of the right and personal liberty of the citizen will step in and resort to the drastic remedy of quashing further proceedings in such investigation.

While so, there are offences of grave magnitude such as diabolical crimes of conspiracy or clandestine crimes committed by members of the underworld with their tentacles spread over various parts of the country or even abroad. The very nature of such offences would necessarily involve considerable time for unearthing the crimes and bringing the culprits to book. Therefore, it is not possible to formulate inflexible guidelines or rigid principles of uniform application for, speedily investigation or to stipulate any arbitrary period of limitation within which investigation in a criminal case should be completed.

The determination of the question whether the accused has been deprived of a fair trial on account of delayed or protracted investigation would also, therefore, depend on various factors including whether such delay was unreasonably long or caused deliberately or intentionally to hamper the defence of the accused or whether such delay was inevitable in the nature of things or whether it was due to the dilatory tactics adopted by the accused. The court, in addition, has to consider whether such delay on the part of the investigating agency has caused grave prejudice or disadvantage to the accused.

The assessments of the above factors necessarily vary from case to case. It would, therefore, follow that no general and wide proposition of law can be formulated that whenever there is inordinate delay on the part of the investigating agency in completing the investigation, such delay, ipso facto, would provide ground for quashing the First Information Report or the proceedings arising there from.
The Supreme Court observed that:

“No general-and wide proposition of law can be formulated that wherever there is any inordinate delay on the part of the investigating agency in completing the investigation, such delay is a ground to quash the F.I.R.”

Ratnavel Pandian, J., in State of Haryana v. Ch. Bhajan Lal and others\(^\text{29}\), observed that:

“The king is under no man, but under God and the law was the reply of the Chief Justice of England, Sir Edward Coke when James- I once declared, then I am to be under the law. It is a treason to affirm it’ – so wrote Henry Bracon who was a Judge of the king’s Bench.”

The words of Bracon in his treatise in Latin quad red non debt eases sub hominy seed sub deo et lege’ (that the kind should not be under man, but under God and the law) were quoted time and time again when the Stuart king claimed to rule by divine right. We would like to quote and requite those words of Sir Edward Coke even at the threshold. In our democratic polity under the Constitution based on the concept of ‘Rule of law’ which we have adopted and given to ourselves and which serves as an aorta in the anatomy of our democratic system. The law is supreme. Everyone whether the individually or collectively is unquestionably under the supremacy of the law. Whoever he may be, however, high he is, he is under the law. No matter how powerful he is and how rich he may be.

It was held by the Supreme Court that:

“If any information disclosing a cognizable offence is laid before an officer-in-charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police-officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. The commencement of investigation in a cognizable offence by a police officer is subject to condition:

The police officer should have reason to suspect the commission of a cognizable offence as required by Section 157(10).

Secondly, the police officer should subjectively satisfy himself as to whether there is sufficient ground for entering on an investigation even before he starts an investigation into the facts and circumstances of the case as contemplated under Clause (b) of the proviso to section 157(1).

Further, as clause (b) of the proviso permits the police officer to satisfy himself about the sufficiency of the grounds even before entering on an investigation, it postulates that the police officer has to

\(^{29}\) See, Air 1992 SC p.604
draw his satisfaction only on the material which were placed before
him at the stage, namely, the first information together with the
documents, if any, enclosed. In other words, the police officer has to
satisfy himself only on the allegations mentioned in the F.I.R. before
he enters on an investigation as to whether those allegations do
constitute a cognizable offence warranting an investigation.”

In Joginder Kumar v. State of U.P.\(^{30}\), the petitioner, a young advocate of
years, was called by the SSP, Ghaziabad, U.P., in his office for making enquiries in
some case. It was alleged that on 7-1-1994 at about to O’clock he personally along
with his brother appeared before the SSP, at about 12.55 p.m. the brother of the
petitioner sent a telegram to the Chief Minister of U.P. apprehending the petitioner’s
false implication in some criminal cases and his death in fake encounter. In the
evening it came to be known that the petitioner was detained in the illegal custody of
SHO. Next day the SHO instead of producing the petitioner before a Magistrate,
asked the relatives to approach the SSP. On 9-1-1994 in the evening the relatives of
the petitioner came to know that the petitioner had been taken to some undisclosed
destination. Under these circumstances the writ petition under Article 32 was
preferred for release of the petitioner, the Supreme Court on 11.1.1994 ordered
notice to the State of U.P. as well as SSP Gaziabad. The SSP along with the
petitioner appeared before the court on 14-1-1994 and stated that the petitioner was
not in detention at all and that his help was taken for detecting some cases relating to
abduction and the petitioner was helpful in cooperating with the police, therefore,
there was no question of detaining him.

The M.N. Venkatachalia, CJ. S. Mohan and Dr. A.S. Anand, JJ., of the
Supreme Court held that:

“The right of the arrested person to have someone informed, upon
request and to consul privately with a lawyer was recounted by
section 56(1) of the Police and Criminal Evidence Act, 1984. These
rights are inherent in Articles 21 and 22 (1) of the Constitution of
India and required to be recognized and scrupulously protected. For
effective enforcement of these fundamental rights the following
requirements are issued:
(1) An arrested person being held in custody is entitled, if he so
requests to have one friend, relative or other person who is known to
him or likely to take an interest in his welfare told as for as in
practicable that he has been arrested and where he is being detained.

\(^{30}\) 1994 (4) SCC p.260
The police officer shall inform the arrested person when he is brought to the police station of this right.

(3) An entry shall be required to the made in the diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly. It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with."

**Bar Association v. State**\(^{31}\) was a case, in which a practicing lawyer, his wife and child were abducted and murdered and the lawyers’ fraternity was not satisfied with investigation and demanded judicial enquiry. The Supreme Court held that:

“When investigation was completed a charge-sheet filed, it is not for the Supreme Court to ordinarily direct the re-opening of investigation. However, in the facts and circumstances of the case to do complete justice in the matter and to install confidence in public mind, the Supreme Court directed fresh investigation by the CBI.”

According to Dr. A.S. Anand and Faizanuddin, JJ, in a Judgment delivered

**in Bhiru Singh V. State of Rajasthan**\(^{32}\) :-

“The FIR is given by an accused himself to a police officer and amounts to a confessional statement; proof of the confession is prohibited by Section 25 of the Evidence Act. The Section 164 provides that ‘no confession made to a police officer shall be proved as against a person accused of any offence’. If the FIR given by the accused is non-confessional, it may be admissible in evidence against the accused as an admission under Section 21 of the Evidence Act or as showing his conduct under Section 8 of the Evidence Act.”

**In Girish Yadav v. State of M.P**\(^{33}\), the Learned senior counsel for the appellants invited the attention to the decision of the Apex Court in the case of **Meharaj Singh (L/NK.) v. State of U.P**\(^{34}\), wherein Dr. A.S. Anand, J. sitting with Faizan Uddin, J. had to consider a similar grievance regarding the alleged antetiming of FIR. In this connection the following pertinent observations were made:

“FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstances in which the crime was committed, including the names of the actual culprits and the parts played by them, the

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\(^{31}\) See, 1994 Cr LJ SC p. 1368

\(^{32}\) See, 1994 (2) SCC p.467

\(^{33}\) See, AIR 1996 SC 3098,1996( 8) SCC p.186

\(^{34}\) See, 1994(5) SCC 188 , (1994 AIR SCW p.2210)
weapons, if any, used, as also the names of the eye-witnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets benefit of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the Courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course, the prosecution can offer a satisfactory explanation for the delay in dispatching or receipt of the copy of the FIR by the local Magistrate. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under section 174, Cr. P.C., is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR.”

**In Baldev Singh v. State of Punjab** 35, the Supreme Court held that:

“The FIR is not a substantive piece of evidence, it is only relevant in judging the veracity of prosecution case and the value to be attached to it depends on the facts of each case. Only the essential or broad picture need be stated in the FIR and all minute details need not be mentioned therein. It is not a verbatim summary of the prosecution case. It need not contain details of the occurrence as if it were an “encyclopedia” of the occurrence. It may not be even necessary to catalogue the overt acts therein. None mentioning of some facts or vague referent to some others are not fatal.”

**In Rupan Deol Bajaj v. Kanwar Pal Singh Gill** 36 case Justice M.K. Mukherjee, observed that:

“We are constrained to say that in making the observations the High Court has flagrantly disregarded –unwittingly we presume- the settled principle of law that at the stage of quashing an FIR or complaint the High Court is not justified in embracing upon an

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enquiry as to the probability, reliability or genuineness of the allegation made therein.”

It has been pointed out In Bhajan Lal’s case\(^{37}\), that:

“FIR or a complaint may be quashed if the allegation made therein are so absurd and inherently improbable that no prudent person can ever reach a just conclusion that there is sufficient grounds for proceeding against the accused but conducted investigation in a fair and impartial manner and apprehending that the police would conclude the investigation by treading the case was untraced, he was filing the complaint. On the receipt of the complaint the Chief Judicial Magistrate transferred it to a Judicial Magistrate for disposal and the latter, in view of the fact that an investigation by the police was in progress in relation to the same offences called for a report from the investigating officer in accordance with section 210 of Cr.P.C. In mean time on December 6, 1988 to be precise Mr. Gill moved the High Court by filing a petition under Section 482 Cr.P.C. for quashing the FIR and the complaint. On that petition an interim order was passed staying the investigation into the FIR lodged by Mrs. Bajaj. Resultantly the learned Judicial Magistrate proceeded with the complaint and the witnesses produced by them. The petition earlier filed by Mr. Gill under Section 482 Cr.P.C. came up for haring before the High Court thereafter and was allowed by its order and both the FIR and complaint were quashed. The above two orders of the High Court are under challenge under these appeals at the instance of Mr. and Mrs. Bajaj of the two appeals were first proceed the High Court has not recorded such a finding, obviously because on the allegation in the FIR is not possible to do so. For the reasons aforesaid we must hold that the High Court has committed a gross error of law in quashing the FIR and the complaint. Accordingly, we set aside the impugned judgment and dismiss the petition filed by Mr. Gill in the High Court under Section 482 Cr. P.C. Before we part with this judgment we wish to mention that in the course of his arguments, Mr. Sanghi, suggested that mater may be given quietness if Mr. Gill was to express regret for his alleged misbehavior. That is a matter for the parties to consider for the offences in question are compoundable with the permission of the court.”

S. Saghir Ahmad, J. in State of Orissa v. Sharat Chandera Sahu\(^{38}\) case held that:

“When information is given to an officer-in charge of a police station of a commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate. No police officer shall investigate a non-

\(^{37}\) See, 1992 AIR SC p.604
\(^{38}\) See,1996(6) SCC p.435
cognizable case without the order of a magistrate having power to try such case or commit the case for trial. Any police officer receiving such order may exercise the same power in respect of the investigation (except the power of arrest without warrant) as an officer-in-charge of a police station may exercise in a cognizable case. Whereas cause relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, not withstanding that the other offences are non-cognizable. In a situation where a criminal case consists of both cognizable and non-cognizable offences. To meet such a situation Sec. 155(4) provides that where a case relates to two or more offences of which at least one is cognizable, the case alleging admission of offences under Section 494 and 498-A IPC could be investigated by the police, though offences under Section 494 is a non-cognizable offence, by virtue of Section 155(4).”

In Bandlamuddi Atchuta Ramaiah and others v. State of A.P. 39, the legal position was that a statement contained in the FIR furnished by one of the accused in the case cannot, in any manner, be used against another accused. Even as against the accused who made it, statement cannot be used if it is inclupartory in nature nor can it be used for the purpose of corroboration or contradiction unless its maker offers himself as a witness in the trial. The very limited use of it is an admission under section 21 of the Evidence Act against its maker alone unless the admission does not amount to confession. The Supreme Court observed that:

“A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Sec. 157, Evidence Act, or to contradict it under Sec. 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses.”

It was observed by the Supreme Court in Munshi Prasad and others v. State of Bihar 40 that:

“The appellants contended that delayed receipt of the FIR in the Court of the Chief Judicial Magistrate cannot but be viewed with suspicion. While it is true that Section 157 of the Cr.P.C. makes it obligatory on the officer-in-charge of the police station to send a report of the information received to a Magistrate forthwith, but that does not mean an imply to denounce and discard and otherwise positive and trustworthy evidence on record. If the court is otherwise convinced and has come to a conclusion as regards the truthfulness of

39 See, AIR 1997 SC p.496
40 See, 2001 CrLJ SC p.4708,4708
the prosecution case, merely delay, which can otherwise be ascribed to be reasonable, would not itself demolish the prosecution case.”

**In Rajesh v. State of Gujarat**⁴¹, the Supreme Court in its judgment dealt with the aspect that:

“Merely non-mentioning of the number of crime registered upon FIR or name of prosecution witness would not lead the court to believe that the FIR had been ante-timed in view of the unequivocal, reliable and confidence inspiring testimony.”

It was observed by the Supreme Court in **Sohan Lal alias Sohan Singh v. State of Punjab**⁴², & that:

“The F.I.R. is only a report about the information as to the commission of an offence. It is not substantive evidence, as the police have yet to investigate the offence. If Bansi Ram’s was the testimony in support of the prosecution, then perhaps the counsel’s was right. The statement made by Kamlesh Rani under Section 161 of the Cr.P.C. recorded on 7.4.1996 by Satnam Singh, ASI both of which can be treated as dying declarations.”

It was held by the Supreme Court in **Jogender Nath Gharei v. State of Orissa**⁴³, that:

“A cumulative reading of the provisions of the Cr.P.C. makes it clear that Magistrate, who on receipt of a complaint orders an investigation under Section 156(3) and receives a police report under Section 173(1) may thereafter do one of three things viz. :-

He may decide that there is no sufficient ground for proceeding further and drop the case. He may take cognizance of an offence under Section 190(1)(b) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. He may take cognizance of an offence under section 190(1)(b) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an enquiry under Section 202, if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be.”

The Supreme Court observed in **Jandel Singh v. State of M.P.**⁴⁴, that:

“Investigating officer reached the spot at about 10.00 p.m. He did not carry the investigation further at night due to darkness. He did not make any effort to search for the accused though their houses were a

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⁴¹ See, AIR 2002 p.1412
⁴² See, 2003 CrLJ SC p. 456
⁴³ See, 2003 CrLJ SC p. 3953
⁴⁴ See, 2003 CrLJ SC p.3528
few steps away from the place of occurrence. It is unbelievable that an investigating officer who is going for the investigation of a murder case at night would not carry torch with him or try to procure some other sauce of light to carry on with the investigation. There were houses all around and could have easily arranged for some light. He did not send a copy of the First Information Report to the Jurisdictional Magistrate. Cumulatively all these facts put a doubt on the prosecution version and it leaves an impression that the prosecution has not come out with the truth. All probability the commission of crime came to notice in the morning and thereafter the investigation started. If that be so, the presences of eye-witnesses become very much doubtful.”

In Krishnan and another v. State 45 the Supreme Court observed that:

“The FIR was given almost immediately, rules out any possibility of deliberation to falsely implicate any person. All the materials particulars implicating the four appellant were given. It has to be noted that both the trial courts and High Court have analyzed in great detail. Prosecution witness evidence to form the basis for conviction. Therefore, the trial court and the High court rightly acted upon the evidence the highly hypothetical imaginative story advance by the defense to contend that his family members killed the deceased is to hollow to be accepted. If that was really so, they would not have been chosen the place and the time for doing so. There is not even a shadow of material to substantive the plea.”

It was observed by the Supreme Court in State of Maharashtra v. Christian Community welfare council of India and another 46, that:

“Herein we notice the mandate issued by the High Court to prevent the police from arresting a lady without the presence of the lady constable, said reaction also prohibits the arrest of a lady after sunset and before sunrise under any circumstances. While we do agree with the object behind the direction issued by the High Court in Cl.(vii) of operative part of its judgment, we think a strict compliance of the said direction, in a given circumstance, would cause practical difficulty in investigating agencies and might even give room for evading the process of law by unscrupulous accused. While it is necessary to protect the female sought to be arrested by the police from police misdeed it may not be always possible and practical to have to the presence of a lady constable when the necessity for such arrest arises, therefore, we think this direction issued requires some modifications without disturbing the object behind the same. We think the object will be served if a direction is issued to the arresting authority that while arresting a female person, all efforts should be made to keep a lady constable present but in circumstances where the arresting officer is reasonably satisfied that such presence of a lady

45 See, AIR 2003 SC p.2978
46 See, AIR 2004 SC p.7
Constable is not available or possible and/or the delay in arresting caused by securing the presence of a lady constable would impede the course of investigation such arresting officer for reasons to be recorded either before the arrest or immediately after the arrest be permitted to arrest female person for lawful reasons at any time of the day or night depending on the circumstances of the case even without the presence of a lady Constable. We also direct that with the above modification is regarded to the direction issued by the High Court in Cl. (vii) of this appeal, this appeal is disposed off.”

Subba Rao, J. speaking for Court in State rep. by Inspector of Police Vigilance and Anti-corruption Tiruchinrapalli Tamil Nadu v. Jaya Pal observed that:

“The police officer, who laid/recorded the FIR regarding the suspected commission of certain cognizable offences by the respondent, is competent to investigate the case and submit the final report to the court of Special Judge. There is nothing in the provisions of the Cr.P.C. which preclude the Inspector of Police, vigilance from taking up to the investigation. The fact that the said police officer prepared the FIR on the basis of the information received by him and registered the suspected crime does not disqualify him from taking up the investigation of the cognizable offence. A suo-motu move on the part of the police officer to investigate a cognizable offence impelled by the information received from some source is not outside the purview of the provisions contained in Section 154 to 157 of the Code of Criminal Procedure or any other provisions of the Code. The proceedings cannot be quashed on premise that the investigation by the same officer who ‘lodged’ the FIR would prejudice the accused in as much as the investigating officer cannot be expected to act fairly and objectively. There is no principle or binding authority to old that the moment the competent police officer on the basis of information received, makes out an FIR incorporating his name as informant, he forfeits his right to investigate. A suo motu move on the part of the police officer to investigate a cognizable offence impelled by the information received from some sources not outside the purview of provision of Section 154 of 157, the scheme was Sections 154, 156 and 157 was clarified this by the court.”

The Supreme Court in Inspector of Police v. N.T. Joy Immaculate highlighted that:

“Section 167 Cr.P.C empowers a Judicial Magistrate to authorize the detention of an accused in the custody of police. Section 209 Cr.P.C. confers powers upon a magistrate to remand an accused to custody until the case has been committed to the court of Sessions and also

47 See, 2004 CrLJ SC p.1819
48 See, 2004 CrLJ SC p.215
until the conclusion of the trial. Section 309 Cr.P.C. confers power upon a court to remand an accused to custody after taking cognizance of an offence or during commencement of trial when he finds it necessary to adjourn the enquiry or trial. The order of the remand has no baring on the proceedings of the trial itself nor it can have any effect on the ultimate decision of the case. It an [A remand order cannot affect the progress of the trial or its decisions in any manner. It cannot be categorized even as an ‘intermediate order’. The order is, therefore, a pure and simple interlocutory order and in view of the bar created by sub-Section (2) of Section 397(2) Cr.P.C. a revision against the said order is not maintainable.”

In Rajinder Singh Katoch - Appellant v. Chandigarh Administration & Ors. - Respondents, the Supreme Court observed:

Indian Penal Code, Section 439 - Criminal Procedure Code, Section 482 - Criminal Procedure Code, Section 154 - Criminal complaint - Police can enquire before lodging FIR - Report lodged with Police - Police has a right to make a preliminary enquiry whether complaint had any substance or not - In the instant case Police did not register FIR as there was no substance. In the instant case complainant lodged a report with Police for registering a case against his brother, to restrain him from entering into his family house - Police did not register the case though allegations in the complaint disclosed a cognizable offence - Police made a preliminary enquiry and found complaint had no substance - Police cannot be directed to register FIR. Appellant and respondent No. 4 herein are brothers and co-sharers. They jointly possess some properties. Appellant herein allegedly came to Chandigarh to reside in the family house sometimes in 2001. He allegedly kept his belongings there and came back to Delhi. In 2002, he, when came to Chandigarh, was allegedly restrained by his brother from entering into the house. His complaint to the Police Station went unheeded. First Information Report, according to him, was not registered despite the fact that it disclosed a cognizable offence. He filed an application under Section 482 of the Code of Criminal Procedure before the Punjab and Haryana High Court. The said application was dismissed by reason of the impugned judgment, stating:

"The petitioner has filed this petition under Section 482 of the Cr.P.C. for issuing directions to respondent No. 2 and 3 to register a case against respondent No. 4 for house trespass and theft. Respondent
No. 4 is the real brother of the petitioner. The said house in question is a joint property of seven legal heirs. After the death of father of the petitioner, the same has been inherited by seven persons. In the reply, it has been stated that the petitioner was not residing in the aforesaid house and the allegations leveled by him found to be false being family dispute.”

Although the officer in charge of a police station is legally bound to register a first information report in terms of Section 154 of the Code of Criminal Procedure, if the allegations made by them gives rise to an offence which can be investigated without obtaining any permission from the Magistrate concerned; the same by itself, however, does not take away the right of the competent officer to make a preliminary enquiry, in a given case, in order to find out as to whether the first information sought to be lodged had any substance or not. In this case, the authorities had made investigations into the matter. In fact, the Superintendent of Police himself has, pursuant to the directions issued by the High Court, investigated into the matter and visited the spot in order to find out the truth in the complaint of the petitioner from the neighbors. It was found that the complaint made by the appellant was false and the same had been filed with an ulterior motive to take illegal possession of the first floor of the house.

Criminal proceedings, in our opinion, cannot be taken recourse to for enforcing such a civil right. In any event, in a case of this nature where the authorities bound by law have already investigated into the matter and found that the allegations made by the appellant against respondent No. 4 were not correct, it would not be proper for us to issue any direction to the respondent Nos. 1 to 3 to lodge a first information report.

"Only an anonymous complaint was made in June 2004. Evidently it was within the province of the first respondent to commence a preliminary inquiry. The procedure laid down in the CBI Manual and in particular when it was required to inquire into the allegation of the corruption on the part of some public servants, recourse to the provisions of the Manual cannot be said to be unfair. It did not find any reason to convert the preliminary inquiry into a regular case. Pursuant to or in furtherance of the recommendations made by the first respondent, which had received the imprimatur by the Central Vigilance Commission, departmental proceedings were initiated. The Central vigilance Commission advised the Railway Board to initiate minor penalty proceedings against the delinquent officers by a letter dated 04.08.2005."
There is no merit in the appeal. It is dismissed accordingly.

**In Ramjas v. State of Madhya Pradesh**, Dilip Raosaheb Deshmukh, J. (Chhattisgarh)\(^{50}\) High Court observed that:

1860, Sections 354, 376 and 34 - Offence under Section 354 - Committed by one and under Section 376 by other accused - With a married lady when at 7.00 p.m. she was going to attend call of nature - Initially when prosecutrix went to lodge FIR, police wrongly registered case under Section 354 only and date of incident also, with intention to help accused persons - Sari seized by police - Neither sent for chemical test nor prosecutrix sent for medical examination by police - On such action of police, prosecutrix filed complaint - Court took cognizance and accepted prosecutrix' version that her FIR was not lodged correctly - After trial Court found that prosecution story is reliable and corroborated by other evidence too - It was also found that police was helping accused and not sending of sari of prosecutrix for chemical analysis and not sending her for medical examination is indicative of this fact - Court, there-fore, convicted accused persons for the alleged offences - High Court after appreciation of entire case and evidence, found that conviction of accused persons was justified.

Not being satisfied with the manner in which her report was written and the offence of rape was diluted to Section 354, IPC, the prosecutrix lodged a complaint Ex. D. 3 on 16.11.1987 to the Superintendent of Police, Rajnandgaon that on 8.11.1987 while she had gone to attend a call of nature, appellant-Ramjas committed rape on her after gagging her mouth while appellant Kalamdas held her hands and feet. It was alleged that on 12.11.1987 when the prosecutrix went to lodge FIR at Police Station Khairagarh, her report was not written as told by her and an offence only under Section 354 was registered.

Having heard the rival contentions, I have perused the record. There is no element of any doubt that the report of the prosecutrix was not written truthfully on 12.12.1987 at Police Station Khairagarh by Sub-Inspector L.N. Shukla PW 5. The complainant had in complaint case No. 727/87 clearly alleged in paragraph 11 that upon refusal by the village Patel to render any assistance to them, they went to lodge report on 12.11.1987 at Police Station Khairagarh. In the meanwhile, the appellants had already approached the Police at Police Station Khairagarh who were mixed up

\(^{50}\) See, 2006(2) F.J.C.C. p.163
with the appellants. The complicity of Sub- Inspector L.N. Shukla in shielding the
appellants is also borne out from the fact that in the charge-sheet under Section 354,
IPC, against the appellants herein, the seizure memo of the *saaree* of the prosecutrix
was also not filed with the documents under Section 173, Cr PC although the *saaree*
of the prosecutrix was in possession of the Police, Khairagarh. The prosecutrix was
also not sent for medical examination by the investigating officer.

The testimony of the prosecutrix clearly shows that the incident took place
on Sunday evening and her husband and father-in-law had returned to the village on
Wednesday. On the next day, they went to the village Patel who asked them to lodge
a report. Thereafter on Thursday they went to the Police Station along with the son
of the village Kotwar. The fact that husband of the prosecutrix had returned three
days after the incident is also borne out from the testimony of Punbai PW 2, mother-in-law of the prosecutrix. Thus it is highly improbable that while lodging the FIR at
Police Station Khairagarh on 12.11.1987 the prosecutrix would have given the date
and time of occurrence as 11.11.1987 at 7.00 p.m. Not only this, the fact that the
prosecutrix made a written complaint *vide* Ex. D. 3 to the Superintendent of Police,
Rajnandgaon within 4 days of lodging of the FIR *i.e.* on 16.11.1987 clearly shows
that she had a genuine grievance that her report was not truthfully recorded by Sub-
Inspector L.N. Shukla. The very fact that the prosecutrix lodged a private complaint
soon thereafter on 23.11.1987 in the Court of Judicial Magistrate First Class,
Khairagarh also clearly shows that she lost faith in the police investigation since the
police were mixed up with the appellants and despite her complaint to the
Superintendent of Police, Rajnandgaon a challan under Section 354, IPC was filed
by the P.S. Khairagarh against the appellants herein. Therefore, in view of the
above, the mere fact that the FIR Ex. P. 1 mentioned the date of occurrence as
11.11.1987 or did not mention the factum of rape is of no avail to the prosecution
since the FIR of the prosecutrix had not been recorded truthfully by Sub-Inspector
L.N. Shukla PW 4 to shield the appellants. In the face of these factors when despite
the reluctance of the Police to book the culprits for cape the crime is brought to light
there is a built-in assurance that the charge is genuine rather than fabricated.

Having thus considered the evidence led by the prosecution in its entirety, I
am of the considered opinion that:

“The conviction of the appellant-Ramjas under Section 376, IPC and
354, IPC and the appellant-Kalamdas under Section 376, read with
Section 34, IPC and sentences awarded there under by the learned Additional Sessions Judge do not call for any interference. In the result, the appeal being devoid of merit is dismissed. Bail bonds of the appellants stand cancelled. They shall surrender before the Additional Sessions Judge, Khairagarh on 3rd May, 2006 to undergo sentence.”

A copy of this judgment is sent to Additional Sessions Judge, Khairagarh to ensure compliance and to report that the appellants have surrendered, as ordered and have been sent to jail to undergo sentence.

In State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru, the Supreme Court interpreted many criminal statutes and the important points are as under:

A. Indian Penal Code, Section 107 - Indian Penal Code, Sections 121 & 121A - Planned attack on Parliament House by use of explosives and fire arms is an act of waging war - Accused held guilty of abetting of waging war - Capital punishment awarded by High Court upheld. Indian Penal Code, Section 121 - Waging war - Attack on Parliament House with sophisticated arms and powerful explosives with a view to lay seize to the building with idea of destabilizing the functioning of Government and in that process, venturing to engage the security forces guarding the Parliament in armed combat, amounts to waging war against the Government. Indian Penal Code, Section 121 - Waging war - Violent acts targeted against armed forces and public officials cannot be branded as acts of waging war against Government if it is found that the object sought to be attained is of general public nature or has a political hue - Old English and Indian authorities explaining meaning of expression 'Waging war' are not relevant.

B. Criminal Procedure Code, Section 196 - Prevention of Terrorism Act, 2002, Section 50 - Sanction for prosecution under POTA accorded by Competent Authority - Sanction order also contained an offence for which no sanction was required - Sanction does not become invalid - Cannot be said that Authority did not apply its mind. AIR 1948 Privy Council 82 relied.

C. Prevention of Terrorism Act, 2002, (POTA) Sections 3(2) & 3(3) - Terrorists making attack on Parliament House and causing death of eight security personnel

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and others by use of fire arms and explosives - All the terrorists killed at spot -

Persons found guilty of conspiracy whether can be awarded death sentence under

POTA with aid of Section 120B IPC - (No) - Under Section 3(2) death sentence is

prescribed for the persons who actually do the terrorist act and not the conspirators -

Conspirators, however, can be awarded death sentence under Section 302 IPC with

aid of Section 120B IPC - In the instant case death sentence awarded to conspirator.

D. Indian Penal Code, Section 302 - Prevention of Terrorism Act, 2002, (POTA) Section 3(2) - Constitution of India, Article 20 - Double Jeopardy – Terrorising act killing a number of persons - Accused liable under Section 302 IPC and Section 3(2) of POTA - Offences under Section 302 IPC, Section 3(2) and Section 3(3) of POTA are all distinct offences and a person can be charged, tried, convicted and punished for each of them severally - The analysis of these provisions show that the ingredients of these offences are substantially different and that an offence falling within the ambit of Section 3(1) may not be squarely covered by the offence under Section 300 IPC.

E. Indian Penal Code, Section 120B - Prevention of Terrorism Act, 2002, (POTA) Sections 3(2) & 3(3) - Conspiracy to do a terrorist act - A conspirator of terrorist act cannot be punished with death of sentence - Punishment prescribed is 5 years to life imprisonment under Section 3(3) of POTA - Section 120B of IPC is not applicable for purpose of sentence - Sentence of death to a conspirator converted to life imprisonment.

F. Prevention of Terrorism Act, 2002, (POTA) Sections 32 - Confession - Arrest of accused under POTA - His confession recorded and accused produced before Magistrate - Therefore accused remained in custody of Police and not sent to police custody- It breached provisions of Section 32(5) - Sufficient time given to accused for reflection - Not safe to act upon confession. Prevention of Terrorism Act, 2002, (POTA) Sections 52 & 32 - Confession - Arrest of accused under POTA - Accused not informed his right to meet and contact lawyer - Nor could any relative of accused informed of arrest - Confession of accused recorded - Confession not be acted upon. Prevention of Terrorism Act, 2002, (POTA) Section 32(5) - Confession recorded by Police Officer and thereafter accused produced before Magistrate - Magistrate instead of sending the accused to Judicial Custody may give him to Police Custody for any special reason if the accused is still wanted in investigation - It will not make the confession invalid. Prevention of Terrorism Act, 2002, (POTA)
Sections 52(2) & 32 - Right of accused against self-incrimination - Arrest of accused under POTA - Under Section 52 accused has to be informed of his right to meet and consult a legal practitioner - Accused not informed of his right - This will not automatically invalidate confession - Denial of rights to accused under Section 52(2) to (4) will be one of the relevant factors that would weigh with the Court to act upon or discard the confession. Terrorist and Disruptive Activities (Prevention) Act, Section 15(1) - Retracted Confession - Confession recorded by Police Officer - It is substantive evidence against the maker and maker of confession can be convicted - But it is desirable to look into corroboration in broad sense when it is retracted. Terrorist and Disruptive Activities (Prevention) Act, Section 15(1) - Confession recorded by Police Officer under Section 15 of TADA whether can form basis of conviction of co-accused - Maker of confession as well ac- accused can be convicted but in regard to co accused as a matter of caution, a general corroboration should be sought for but in cases where the court is satisfied that the probative value of such confession is such that it does not require corroboration then it may base a conviction on the basis of such confession of the co-accused without corroboration. 2003(2) RCR(Crl.) 844 (SC) relied.

G. Prevention of Terrorism Act, 2002, (POTA) Section 32 - Terrorist and Disruptive Activities (Prevention) Act, Section 15(1) - Confessional statement recorded by Police Officer under POTA and TADA is substantive piece of evidence and can be the basis of conviction of the maker - But it is desirable to look into corroboration when it is retracted. Evidence Act, Section 30 - Prevention of Terrorism Act, 2002, (POTA) Section 32(1) - Confession made by accused under POTA is admissible in evidence against maker and not against co-accused - Such a confession cannot be used against the co-accused even under Section 30 of the Evidence Act. Prevention of Terrorism Act, 2002, (POTA) Section 32(1) - Confession recorded by Police Officer under Section 32(1) of POTA is admissible - Prosecution has to prove beyond reasonable doubt that the confession was made voluntarily and was reliable - The voluntariness and reliability of confession will be tested by Court.

H. Evidence Act, Sections 25 & 24 - Confession – When valid:-

a) A confession by hope or promise of advantage, reward or immunity or by force or by fear induced by violence or threats of violence cannot constitute evidence against the maker of confession.
b) The confession should have been made with full knowledge of the nature and consequences of the confession. If any reasonable doubt is entertained by the court that these ingredients are not satisfied, the court should eschew the confession from consideration.

c) Authority recording the confession - be it a Magistrate or some other statutory functionary at the pre-trial stage - Must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the persons in authority.

Evidence Act, Sections 25, 24 and 30 - Evidentiary value of retracted confession:-

a. If the Court finds that confession was retracted and if the court is satisfied that it was retracted because of an after-thought or advice, the retraction may not weigh with the court.

b. A true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an after-thought and that the earlier statement was true. 1958 SCR 428 relied.

c. A court shall not base a conviction on retracted confession without corroboration. It is not a rule of law, but is only rule of prudence. AIR 1957 SC 216 relied.

d. Each and every circumstance mentioned in the retracted confession regarding the complicity of the maker need not be separately and independently corroborated. 1958 SCR 428 relied.

e. Use of retracted confession against the co-accused however stands on a different footing from the use of such confession against the maker.

f. Confession can only be used to lend assurance to other evidence against a co-accused. AIR 1952 SC 159 relied.

g. Confession of a co-accused cannot be elevated to the status of substantive evidence which can form the basis of conviction of the co-accused. AIR 1947 SC 257 relied.

I. Constitution of India, Article 20 - General Clauses Act, Section 26 - Doubly Jeopardy - Where there are two distinct offences made up of different ingredients, the bar under Section 26 of the General Clauses Act or for that matter, the embargo under Article 20 of the Constitution, has no application, though the offences may
have some overlapping features - The crucial requirement of either Article 20 of the Constitution or Section 26 of the General Clauses Act is that the offences are the same or identical in all respects. (1988)4 SCC 655 relied.

J. Telegraph Act (Indian), Section 25 - Evidence Act, Section 7 - Tape recorded conversation - Admissibility of - A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible as res gestae under the Evidence Act. (1973)1 SCC 471 relied. Evidence Act, Section 7 - Telegraph Act (Indian), Section 25 - Tape recorded conversation illegally collected - It is admissible in evidence. 1994(3) RCR (Crl.) 595 (SC) relied.

K. Criminal Procedure Code, Section 161(2) - Constitution of India, Article 20(3) - Right of accused against self-incrimination - The area covered by Article 20(3) and Section 161(2) of CrPC is substantially the same - Section 161(2) of the CrPC is a parliamentary gloss on the constitutional clause - It cannot be contended that two provisions, namely, Article 20(3) and Section 161, did not operate at the anterior stages before the case came to Court and the incriminating utterance of the accused, previously recorded, was attempted to be introduced - The protection afforded to an accused insofar as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. Criminal Procedure Code, Sections 161 & 156 - Constitution of India, Articles 20(3) and 22(1) - Right of accused against self-incrimination - Suspect in the police custody shall not be denied the right to meet and consult his lawyer even at the stage of interrogation - In other words, if he wishes to have the presence of the lawyer, he shall not be denied that opportunity. 1978(2) SCC 424 relied.

L. Evidence Act, Section 27 - Discovery of fact - Statement made by accused while in Police Custody disclosing the place where object was concealed - Police recovered the object without taking the accused to the place of recovery - It will not make the information of accused inadmissible - Though in most of the cases the person who makes the disclosure himself leads the Police Officer to the place where an object is concealed and points out the same to him, however, it is not essential that there should be such pointing out in order to make the information admissible under Section 27 - If the Police Officer chooses not to take the informant-accused to the spot, it will have no bearing on the point of admissibility under Section 27,
though it may be one of the aspects that goes into evaluation of that particular piece of evidence.

M. Evidence Act, Section 9 - Test Identification Parade relates to the stage of investigation and the omission to conduct the same will not always affect the credibility of the witness who identifies the accused in the Court - Substantive evidence is the evidence of identification in Court and the test identification parade provides corroboration to the identification of the witness in Court. 2003(3) RCR (CrI.) 550 (SC) relied.

N. Criminal Procedure Code, Section 100 - Evidence Act, Section 27 - Search and seizure by Police without associating independent witness - It is no ground to disbelieve the Police Officials if in the facts of case, independent witness could not be joined - Of course, close scrutiny of evidence is what is required - There is no law that the evidence of police officials in regard to seizure ought to be discarded.

O. Criminal Procedure Code, Section 162 - Evidence Act, Sections 25 & 26 - Confessions made to a police officer and a confession made by any person while he or she is in police custody cannot be proved against that person accused of an offence - Of course, a confession made in the immediate presence of a Magistrate can be proved against him - So also Section 162 Cr.P.C. bars the reception of any statements made to a police officer in the course of an investigation as evidence against the accused person at any enquiry or trial except to the extent that such statements can be made use of by the accused to contradict the witnesses.

P. Criminal Procedure Code, Section 154 - Prevention of Terrorism Act, 2002, (POTA) Sections 3, 4 and 5 - Indian Penal Code, Sections 121-A, 302, 307 - Terrorist and Disruptive Activities (Prevention) Act - FIR registered under various offences of IPC - Offence of POTA not invoked though it could also be invoked at the time of registration of FIR - Offence under POTA added subsequently - Not shown that there was any mala fide on part of Police - It may be a bona fide mistake and not motivated.

Q. Criminal Procedure Code, Sections 215 and 228 - Error in framing of charges - A provision of offence which was not applicable mentioned in the charge-sheet - It is no ground to set aside the charge and invalidate trial - Accused should show that he was misled and prejudice was caused to him on account of defect in framing of charges. AIR 1956 SC 116 and (1964)3 SCR 297 relied.
In Dalbir Singh v. State of U.P., the Supreme Court observed that:

“Constitution of Indian, Article 20(3), 21 and 22 - Indian Penal Code, 1860 Sections 330, 342 and 346 - Death - Custodial torture and diabolic acts - Deceased committed suicide in lock up of police station - FIR registered and certain police officials charged for offences punishable under Sections 330, 342 and 306 - Sanction for prosecution granted - Cognizance of offences has been taken - Held, that no further direction is necessary at present - Prayer for compensation declined as it depends upon the issue as to whether there was custodial death. Constitution of India, Article 20(3), 21 and 22 - Indian Penal Code, 1860 Sections 330, 342 and 346 - Custodial Death - In cases of police torture or custodial death, there is rarely any direct ocular evidence of the complicity of the police personnel alone who can only explain the circumstances in which a person in their custody died - Police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilized society, governed by the rule of law and poses a serious threat to an orderly civilized society. Torture in custody flouts the basic rights of the citizens recognized by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/under - trial prisoners or suspects tarnish the image of any civilized nation and encourage the men in ‘Khaki’ to consider themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crops, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading, towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve; otherwise the common man may tend to gradually lose faith in the efficacy of the system of judiciary itself, which, if it happens, will be a sad day, for anyone to reckon with.”

In Bhoopat Singh v. J.B. Katariya, the Supreme Court observed that:

“By this order we are disposing of the appeals filed by the complainant, State of U.P. and one of the three accused, namely, J.B. Katariya (hereinafter referred to as the appellant) against judgment dated 14.2.2002 rendered by the Division Bench of Allahabad High Court in Criminal Appeal Nos.2350 of 1997, 22 of 1998 and 1315 of 1998. The appellant was tried for offences under Sections 302 and 342 of the Indian Penal Code, 1860 (for short ‘the I.P.C.’) and Sections 7 and 13 of the Prevention of Corruption Act. The other two
accused, namely, Ghanshyam Sharma and Ram Narain were tried for offences under Sections 302 read with Section 34 and 342 I.P.C. The trial Court convicted the appellant under Section 302 I.P.C. and sentenced him to undergo imprisonment for life. He was further convicted under Section 342 I.P.C. and sentenced to undergo rigorous imprisonment for six months. However, he was acquitted of the charge under Section 7 read with Section 13 of the Prevention of Corruption Act. Ghanshyam Sharma and Ram Narain were acquitted of the charge under Section 302 read with Section 34 I.P.C. but were convicted under Section 323 read with Section 34 I.P.C. as also under Section 342 I.P.C and sentenced to undergo rigorous imprisonment for six months. All the sentences were ordered to run concurrently.

The accused filed two appeals (one by the appellant and the other by Ghanshyam Sharma and Ram Narain) to challenge their conviction by the trial court. State of U.P. also filed an appeal against the acquittal of the appellant under Section 7 read with 13 of the Prevention of Corruption Act and that of Ghanshyam Sharma and Ram Narain of the charge under Section 302 read with Section 34 I.P.C.

The High Court dismissed the appeal filed on behalf of the State but allowed the one filed by Ghanshyam and Ram Narain and set aside their conviction under Section 302 read with Section 34 I.P.C. and Section 342 I.P.C. So far as the appellant is concerned, the High Court allowed his appeal in-part and altered his conviction from Section 302 I.P.C. to Section 304 Part II I.P.C. and sentenced him to undergo rigorous imprisonment for two years. The High Court also directed him to pay a fine of Rs.25,000/- and in default, to undergo further imprisonment for six months.

In the context of the argument of learned counsel for the complainant and the State that the statement of Dr. C.N. Shukla (PW-8) who along with Dr. Singhal conducted post-mortem on the body of the deceased is sufficient for convicting the appellant under Section 302 I.P.C. and the High Court gravely erred in altering his conviction from Section 302 to Section 304 Part II I.P.C. it is opposite to mention that in his examination-in-chief itself PW-8 made apparently conflicting statements. In paragraph 3 Dr. Shukla stated, "in our opinion, the death of the deceased may have been caused due to ante-mortem injuries, bleeding and shock."

In paragraph 6, Dr. Shukla opined that the injuries on the body of the deceased could be caused by lathi and that ante-mortem injuries were ordinarily sufficient to cause death. In view of this, it is not safe to rely on the testimony of PW-8 for recording a firm Conclusion that injuries inflicted by the appellant were sufficient to cause death in the ordinary course of nature and the High Court cannot be said to have erred in altering the appellant's conviction from Section 302 to Section 304 Part II I.P.C.
However, we are convinced that the High Court committed serious error in awarding sentence of 2 years imprisonment only to the appellant. Though, it may appear repetitive, we consider it necessary to mention that the appellant had taken undue advantage of his position as a police officer and mercilessly assaulted the deceased while he was in police custody. As many as 18 injuries were inflicted on the person of the deceased. There was internal bleeding in at least 5 injuries. The appellant whose duty was to protect life and property of the public had, instead, caused death of a young person, aged 20 years. Therefore, notwithstanding, the fact that the incident had taken place 22 years ago and the appellant is now 64 years of age, we are of the view that the sentence awarded to the appellant deserves to be suitably enhanced. The affidavit and certificate produced by the learned senior counsel for the appellant cannot be relied upon for approving the sentence awarded by the High Court because the same appears to have been procured by the appellant at the last moment to earn sympathy of the Court. Taking into consideration the totality of circumstances, we feel that ends of justice will be met by enhancing the sentence awarded to the appellant from 2 years to 5 years.”

In Munshi Singh Gautam (D) v. State of M.P. ⁵⁴, the Supreme Court pointed out that:

Constitution of India, Article 21 - Custodial torture - Torture or assault by State - In Article 21 of Constitution of India, there is inbuilt guarantee against torture or assault by the State or its functionaries - Custodial torture and violence cannot be permitted to defy the rights flowing from Constitution.

Arijit Pasayat, J. –

"If you once forfeit the confidence of our fellow citizens you can never regain their respect and esteem. It is true that you can fool all the people some of the time, and some of the people all the time, but you cannot fool all the people all the time", said Abraham Lincoln.

Custodial violence, torture and abuse of police power are not peculiar to this country, but it is widespread. It has been the concern of international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1948 which marked the emergence of a worldwide

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trend of protection and guarantee of certain basic human rights stipulates in Article 5 that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Despite this pious declaration, the crime continues unabated, though every civilized nation shows its concern and makes efforts for its eradication. If it is assuming alarming proportions, now a days, all around it is merely on account of the devilish devices adopted by those at the helm of affairs who proclaim from roof tops to be the defenders of democracy and protectors of peoples' rights and yet do not hesitate to condescend behind the screen to let loose their men in uniform to settle personal scores, feigning ignorance of what happens and pretending to be peace loving puritans and saviours of citizens' rights.

Article 21 which is one of the luminary provisions in the Constitution of India, 1950 (in short the 'Constitution') and is a part of the scheme for fundamental rights occupies a place of pride in the Constitution. The Article mandates that no person shall be deprived of his life and personal liberty except according to the procedure established by law. This sacred and cherished right i.e. personal liberty has an important role to play in the life of every citizen. Life or personal liberty includes a right to live with human dignity. There is an inbuilt guarantee against torture or assault by the State or its functionaries. Chapter V of the Code of Criminal Procedure, 1973 (for short the 'Code') deals with the powers of arrest of persons and the safeguards required to be followed by the police to protect the interest of the arrested person. Articles 20(3) and 22 of the Constitution further manifest the constitutional protection extended to every citizen and the guarantees held out for making life meaningful and not a mere animal existence. It is, therefore, difficult to comprehend how torture and custodial violence can be permitted to defy the rights flowing from the Constitution. The dehumanizing torture, assault and death in custody which have assumed alarming proportions raise serious questions about the credibility of rule of law and administration of criminal justice system. The community rightly gets disturbed. The cry for justice becomes louder and warrants immediate remedial measures. This Court has in a large number of cases expressed concern at the atrocities perpetrated by the protectors of law. Justice Brandies's observation which have become classic are in following immortal words:

"Government as the omnipotent and omnipresent teacher teaches the whole people by its example, if the Government becomes a law breaker, it breeds contempt for law, it invites every man to become a

The diabolic recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new and unwarranted peril because guardians of law destroy the human rights by custodial violence and torture and invariably resulting in death. The vulnerability of human rights assumes a traumatic torture when functionaries of the State whose paramount duty is to protect the citizens and not to commit gruesome offences against them, in reality perpetrate them. The concern which was shown in Raghubir Singh's case (supra) more than two decades back seems to have fallen to deaf ears and the situation does not seem to be showing any noticeable change.

Rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues - and the present case is an apt illustration - as to how one after the other police witnesses feigned ignorance about the whole matter.

The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact-situation and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system suspect and vulnerable. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach at times of the courts as well because it reinforces the belief in the mind of the police that no harm would come to them if one prisoner dies in the lock-up because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilized society, governed by the rule of law and poses a serious threat to an orderly civilized society. Torture in custody flouts the basic rights of the citizens recognized by the Indian Constitution and is an affront to human dignity. Police excesses and the mal- treatment of detainees/under-trial
prisoners or suspects tarnishes the image of any civilized nation and encourages the men in 'Khaki' to consider themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crops, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of judiciary itself, which if it happens will be a sad day, for anyone to reckon with.

Though Sections 330 and 331 of the Indian Penal Code, 1860 (for short the 'IPC') make punishable those persons who cause hurt for the purpose of extorting the confession by making the offence punishable with sentence up to 10 years of imprisonment, but the convictions, as experience shows from track record have been very few compared to the considerable increase of such onslaught because the atrocities within the precincts of the police station are often left without much traces or any ocular or other direct evidence to prove as to who the offenders are. Disturbed by this situation the Law Commission in its 113th Report recommended amendments to the Indian Evidence Act, 1872 (in short the 'Evidence Act') so as to provide that in the prosecution of a police officer for an alleged offence of having caused bodily injuries to a person while in police custody, if there is evidence that the injury was caused during the period when the person was in the police custody, the court may presume that the injury was caused by the police officer having the custody of that person during that period unless the police officer proves to the contrary. The onus to prove the contrary must be discharged by the police official concerned. Keeping in view the dehumanizing aspect of the crime, the flagrant violation of the fundamental rights of the victim of the crime and the growing rise in the crimes of this type, where only a few come to light and others don't, the Government and the legislature must give serious thought to the recommendation of the Law Commission and bring about appropriate changes in the law not only to curb the custodial crime but also to see that the custodial crime does not go unpunished. The courts are also required to have a change in their outlook, approach, appreciation and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow
technical approach, while dealing with the cases of custodial crime so that as far as possible within their powers, the truth is found and guilty should not escape so that the victim of the crime has the satisfaction that ultimately the majesty of law has prevailed.

But at the same time there seems to be disturbing trend of increase in cases where false accusations of custodial torture are made, trying to take advantage of the serious concern shown and the stern attitude reflected by the courts while dealing with custodial violence. It needs to be carefully examined whether the allegations of custodial violence are genuine or are sham attempts to gain undeserved benefit masquerading as victims of custodial violence. The case in hand is unique case in the sense that complainant filed a complaint alleging custodial torture while the accused alleged false implication because of oblique motives.

It is the duty of the police, when a crime is reported, to collect evidence to be placed during trial to arrive at the truth. That certainly would not include torturing a person, be he an accused or a witness to extract information. The duty should be done within four corners of law. Law enforcers cannot take law into their hands in the name of collecting evidence.

In State of Madhya Pradesh v. Sheetla Sahai, 55 the Supreme Court observed that:

Criminal Procedure Code, Sections 228 and 240 - Prevention of Corruption Act, 1988, Section 13(1)(d) - Indian Penal Code, Section 120B - Corruption charge against Minister and 6 others including two secretaries to government charge sheet set aside. Contract for construction of Dam granted by Government to contractors - Under agreement, contractors were required to excavate stones from a particular query for use in the construction - It was further provided that in event of change of query for whatever reasons no claim will be entertained for extra lead - Government had to change the query as sufficient quantity stone required for construction was not found - Contractors made a claim for extra lead - Government accepted the claim and paid Rs. 1.46 crores to contractors - Corruption case under Section 13(1)(d) registered against the Minister, two Secretaries to Government, Chief Engineer and some other officers - Corruption case not made.

Prevention of Corruption Act, 1988, Section 19 - Criminal Procedure Code, Section 197 - Prevention of Corruption Act, 1988, Section 13(1)(d) - Sanction for prosecution of Public servant after he ceased to be a public servant - Prosecution of a Minister and others (including two Secretaries to government) under Prevention of Corruption Act read with Section 120B of IPC - Allegation that accused sanctioned payment of Rs. 1.46 crores which was not legal - Sanction for prosecution not obtained on the ground that all the accused had ceased to be public servants when prosecution was launched – charge sheet set aside for want of sanction CrPC - Accused acted as part of official duty.

Whereas in terms of Section 19 of Prevention of Corruption Act, it would not be necessary to obtain sanction in respect of those who had ceased to Public Servants, but Section 197 CrPC requires sanction for those who were or are public servant.

Criminal Procedure Code, Section 173(5) - Criminal Procedure Code, Sections 240 and 228 – Charge-sheet submitted by Police - If upon perusal of the entire materials on record, the court arrives at an opinion that two views are possible, charges can be framed, but if only one and one view is possible to be taken, the court shall not put the accused to harassment by asking him to face a trial. 1996(2) RCR (Criminal) 480 (SC) relied. Criminal Procedure Code, Section 197 - Prevention of Corruption Act, 1988, Section 19 - Sanction for prosecution of Public servant - There exists a distinction between a sanction for prosecution under Section 19 of Prevention of Corruption Act and Section 197 of CrPC - Whereas in terms of Section 19, it would not be necessary to obtain sanction in respect of those who had ceased to be a public servant - Section 197 of the Code of Criminal Procedure requires sanction both for those who were or are public servants. Criminal Procedure Code, Sections 228 and 240 - Framing for charge and recording judgment of acquittal - Held -

1. Tests for the purpose of framing of charge and the one for recording a judgment of conviction are different.
2. Whereas at the time of framing of the charge, the court may take into consideration the fact as to whether the accused might have committed the offence or not, at the time of recording a judgment of conviction, the prosecution is required to prove beyond reasonable doubt that the accused has committed the offence.
3. At the time of framing charge defence of accused cannot be considered.
4. If upon perusal of the entire materials on record, the court arrives at an opinion that two views are possible, charges can be framed, but if only one and one view is possible to be taken, the court shall not put the accused to harassment by asking him to face a trial.

**In Lal Suraj @ Suraj Singh v. State of Jharkhand,** the Supreme Court observed that:

On the basis of a fardbeyan of one Bihari Singh, a First Information Report was registered against seven persons for commission of offences under Sections 147, 148, 149, 307 and 302 of the Indian Penal Code and Section 27 of the Arms Act as well as under Section 3/4 of the Explosive Substance Act *inter alia* alleging that on 24.10.2000 at around 4 p.m. when he along with one Ajay Singh was sitting in his shop near bus stand, Nagendra Choubey, Mukesh Choubey, Pradeep Vishwakarma, Sharvan Vishwakarma, Suraj Singh, B.N. Singh and Arbind Singh came in two vehicles and started firing. Appellant No. 1 was specifically named therein. In the said incident, the complainant and Ajay Singh suffered fire arm injuries. When the people started assembling there, accused persons fled away. The motive for commission of the offence was said to be the murder of one Jagdev wherein the complainant and the said Ajay Singh were accused. The first informant was taken to the hospital and died on 25.10.2000. He gave a dying declaration which was treated to be the First Information Report.

Indisputably, no charge-sheet was filed against the appellants. No cognizance, therefore, was taken against them. Upon commitment of the case to the Court of learned Sessions Judge, the prosecution examined eleven witnesses. The learned Sessions Judge relied upon the evidence of PWs 6 and 7 to allow an application for summoning the appellant in exercise of his power under Section 319 of the Code of Criminal Procedure (for short "Code"). Appellants filed criminal revision application there against before the High Court. By reason of the impugned judgment, the same was dismissed. The Supreme Court held:

“The approach of the learned Sessions Judge was wholly incorrect. The principle of strong suspicion may be a criterion at the stage of framing of charge as all the materials brought during investigation were required to be taken into consideration, but, for the purpose of summoning a person, who did not figure as accused, a different legal

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principle is required to be applied. A court framing a charge would have before it all the materials on record which were required to be proved by the prosecution. In a case where, however, the court exercises its jurisdiction under Section 319 of the Code, the power has to be exercised on the basis of the fresh evidence brought before the court. There lies a fine but clear distinction. Applying the aforementioned legal principles to the fact of this case, we are of the opinion that the learned Sessions Judge as also the High Court committed a serious in passing the impugned judgment. On the basis of the aforementioned evidence, there was no possibility of recording a judgment of conviction against the appellants at all.”

Srinivas Gundluri v. M/s. Sepco Electric Power Construction Corp.57

The appeal arising out of S.L.P (Crl.) No. 326 7 of 2010 is directed against the final judgment dated 01.04.2010 passed by the High Court of Chhattisgarh at Bilaspur in W.A. No. 281 of 2009 whereby the High Court dismissed the appeal filed by the appellants herein and the appeal arising out of S.L.P.(Crl.) No. 5095 of 2010 is preferred against the interim order dated 27.04.2010 passed by the High Court of Judicature of Andhra Pradesh at Hyderabad in Crl. R.C. M.P. No. 1307 of 2010 in Crl. R.C. No. 893 of 2010 staying the order dated 22.04.2010 passed by the Chief Metropolitan Magistrate, Hyderabad rejecting the application for extension of transit bail and also recording of the fact that fraud has been played upon the Court and resultantly, non-bail able warrant was issued against respondent No.1 in this appeal for his arrest and production before JMFC, Korba, Chhattisgarh. Criminal Procedure Code, Section 156(3) - Criminal Procedure Code, Sections 200, 202 and 190 - Criminal complaint filed before Magistrate - Magistrate perusing the complaint and sending the same to Police for investigation under Section 156(3) CrPC - Not illegal - Held :-

“If bare reading of complaint discloses a cognizable offence, then the Magistrate instead of applying his mind to the complaint for deciding whether or not there is sufficient ground for proceeding, may direct the police for investigation. Even after receipt of such report , the Magistrate under Section 190(1)(b) may or may not take cognizance of offence - Magistrate is not bound to take cognizance upon submission of the police report by the Investigation Officer.1988(1) RCR(Crl) 565, (1977) 4 SCC 459 relied. Criminal Procedure Code section-173 - Meaning of word "charge sheet" - Neither the charge sheet nor the final report has been defined in the Code - The charge sheet or final report whatever may be the nomenclature, it only means

a report under Section 173 of the Code which has to be filed by the police officer on completion of his investigation. Criminal Procedure Code, Section 156 - Criminal Procedure Code, Section 202 – Investigation by Police under Section 156(3) CrPC - Chapter XII of the Code contains provisions relating to information to the police and their powers to investigate whereas Chapter XV, which contains Section 202 deals with provisions relating to the steps which a Magistrate has to adopt while and after taking cognizance of any offence on a complaint - The provisions of the above two Chapters deal with two different facts altogether.”

ii) Investigation

The investigation of an offence is the filed exclusively reserved for the police whose powers in that filed are unfettered so long as the power to investigate into the cognizable offence is legitimately expressed in strict compliance with the provision falling under the Criminal Procedure Code.

In Ram Kishan Mithan Lal Sharma v. State of Bombay58, the Supreme Court observed that:

“In order to resolve the conflict of opinion one has to examine the purpose of test identification parades. These parades are held by the police in the course of their investigation for the purpose of enabling witnesses to identify the properties which are the subject-matter of the offence or to identify the persons who are concerned in the offence. They are not held merely for the purpose of identifying property or persons irrespective of their connection with the offence. Whether the police officers interrogate the identifying witnesses or the Panch witnesses who are procured by the police do so, the identifying witnesses are explained the purpose of holding these parades and are asked to identify the properties which are the subject-matter of the offence or the persons who are concerned in the offence.”

The Apex Court further held that:

“An attempt has been made to argue before us that while the evidence of the police officer may be inadmissible, the evidence of the Panch witness as well as of the identifying witnesses themselves, relating to the fact of the prior identification, as an item of corroborative is evidence is admissible. I agree that on the evidence given in this case, there is no scope for such differentiation and that the entire evidence relating to the prior identification parades concerning the 4th accused is in substance, evidence only of the prior statements of the identifying witnesses to the police officer and is hence inadmissible. But I wish to guard myself against being understood as having assented to the suggestion that in law a differentiation can be made in

58 See, AIR 1955 SC p.104
such cases between the three classes of evidence, viz. (1) of the police officer, (2) of the Panch witness, and (3) of the identifying himself, in so far as they speak to a prior identification at a parade held by the police officer. I am inclined to think that such differentiation is unsound and inadmissible. The legal permissibility of the proof is a matter of importance because, though the evidence of prior identification of importance because, through the evidence of prior identification is only corroborative evidence, still such corroboration is of considerable value in cases of the kind.”

**In A.C. Sharma v. Delhi Administration**⁵⁹, the Supreme Court observed that:

“The investigation in the present case by the Deputy Superintendent of Police cannot be considered to be in any way unauthorized or contrary to law. In this connection it may not be out of place also to point out that the function of investigation is merely to collect evidence and any irregularity or even illegality in the course of collection of evidence can scarcely be considered by itself to affect the legality of the trial by an otherwise competent Court of the offence so investigated.”

**In H.N. Rishbud & Inder Singh v. State of Delhi**⁶⁰, it was held that:

“An illegality committed in the course of investigation does not affect the competence and Jurisdiction of the Court for trial and where cognizance of the case has in fact been taken and the case has preceded to termination the invalidity of the preceding investigation does not vitiate the result unless miscarriage of justice has been caused thereby. When any breach of the mandatory provisions relating to investigation is brought to the notice of the Court at an early stage of the trial the Court will have to consider the nature and extent of the violation and pass appropriate orders for such reinvestigation as may be called for, wholly or partly.”

The Apex Court further held that:

“Notwithstanding anything in the police Act, 1861, the Central Government may constitute a special police force to be called the Delhi Special Police Establishment for the investigation in any Union territory of offences notified under Section 3. Subject to any orders which the Central Government may make in this behalf, members of the said Police establishment shall have throughout any Union territory in relation to the investigation of such offences and arrest of persons concerned in such offences, all the powers, duties, privileges and liabilities which police officers of that Union territory have in connection with the investigation of offences committed thereon. Any member of the said police establishment of or above the rank of Sub-Inspector may, subject to any orders which the Central Government may make in this behalf, exercise in any Union territory any of the

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⁵⁹ See, AIR 1973 SC 913, 1973(1) SCC p.726
⁶⁰ See, 1955(1) SCR p.1150, AIR 1955 SC p.196
powers of the officer in charge of a Police Station in the area in which he is for the time being and when so exercising such powers shall, subject to any such orders as aforesaid, be deemed to be an officer in charge of a police station discharging the functions of such an officer within the limits of his Station."

**In State of Bihar and another v. JAC Saldanha and others**\(^61\), the Supreme Court observed as under:

"There is a clear-cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department the superintendence over which vests in the State Government. The executive who is charged with a duty to keep vigilance over law and order situation is obliged to prevent crime and if an offence is alleged to have been committed it is its bounden duty to investigate into the offence and bring the offender to book. Once it investigates and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the investigating officer submits report to the court requesting the court to take cognizance of the offence under Section 190 of the Code its duty comes to an end. On a cognizance of the offence being taken by the court the police function of investigation comes to an end subject to provision contained in Section 173(8), there commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime by the police in its report to the Court, and to award adequate punishment according to law for the offence proved to the satisfaction of the court. There is thus a well defined and well demarcated function in the field of crime detection and its subsequent adjudication between the police and the Magistrate."

**In State of Rajasthan v. Bhawani and others**\(^62\) the High Court has extensively relied upon the site plan prepared by the investigating officer for discarding the prosecution case and for this purpose has referred to the place from where the accused are alleged to have entered the Nohara, the place from where they are alleged to have fired upon the deceased and also has drawn an inference that the place wherefrom the accused are alleged to have fired upon the deceased, the shot could not have hit the houses on the eastern side of the Nohara. Many things mentioned in the site plan have been noted by the investigating officer on the basis of the statements given by the witnesses. Obviously, the place from where the accused entered the Nohara and the place from where they resorted to firing is based

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\(^61\) See, 1980(1) SCC p.554  
\(^62\) See, AIR 2003 SC p.4230
upon the statement of the witnesses. These are clearly his by Section 162 Cr.P.C. what three investigating officer personally saw and noted alone would be admissible. This legal position was explained in Tori Singh and another v. State of U.P.\(^63\) in following words:

“A rough sketch map prepared by the sub-inspector on the basis of statements made to him by witnesses during the course of investigation and showing the place where the deccase was hit and also the places where the witnesses were at the time of the incident would not be admissible in evidence in view of the provisions of S. 162 of the Code of Criminal Procedure, for it is in effect nothing more than the statement of the Sub-Inspector that the eye-witnesses told him that the deceased was at such and such place at the time when he was hit. The sketch-map would be admissible so far as it indicated all that the Sub Inspector saw himself at the spot; but any mark put on the sketch-map based on the statements made by the witnesses to the Sub-Inspector would be inadmissible in view of the clear provisions of S. 162 of the Code of Criminal Procedure as it will be no more than a statement made to the police during investigation. Therefore, such marks on the map cannot be used to found any argument as to the improbability of the deceased being his on that part of the body where he was actually injured, if he was standing at the spot marked on the sketch-map.”

The Apex Court held that:

“The findings recorded by the High Court on the basis of the site plan prepared by the investigating officer whereby it discarded the prosecution case is clearly illegal being based upon in admissible evidence and has to be set aside.”

**In Union of India v. Parkash P. Hinduja**\(^64\), the principal question requiring consideration was whether the court can go into the validity or other wise of the investigation done by the authorities charged with the duty of investigation under the relevant statutes and whether any error or illegality committed during the curse of investigation would so vitiate the charge-sheet so as to render the cognizance taken thereon bad and invalid.

The Supreme Court referred in several decisions and gave its view as under:

“In India as has been shown there is a statuary right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities and it would as their lordships think be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of

\(^{63}\) See, AIR 1962 SC p.399

\(^{64}\) See, AIR2003 SC p.2612
the inherent jurisdiction of the Court. The functions of the judiciary and the Police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under Section 491, Criminal Procedure Code, to give directions in the nature of habeas corpus. In such a case as the present, however the Court’s functions begin when a charge is preferred before it and not until then.”

In Nirmal Singh Kahlon v. State of Punjab,\(^{65}\) the Supreme Court observed that:

Criminal Offence - Charge sheet submitted - State Govt. can order further investigation after submission charge sheet when larger scam came to surface. Lodging of two FIRs in same offence - Corruption case against former Minister - FIR lodged by local police - Investigation handed over to CBI - During investigation larger scam came to surface involving large number of officers beside the Minister - Second FIR by CBI not illegal.

A. Criminal Procedure Code, Section 154 – Registration of two FIRs in same offence - FIR registered – Investigation handed over to CBI - During investigation larger scam came to surface involving more persons - Second FIR not a bar.

B. Criminal Procedure Code, Section 154 - Criminal Procedure Code, Section 173(8) - Delhi Special Police Establishment Act, 1946, Section 6 - Registration of two FIRs in the same offence i.e. one by police and other CBI not illegal :-

“Allegation against a Former Minister that he made appointments of Panchayat Secretaries in an illegal manner by accepting bribe money - FIR registered by local police and charge sheet submitted in the court after investigation - State Govt. thereafter handed over the investigation to CBI - CBI conducted investigation and larger scam came to surface - Minister made recruitments to various posts of Tax Collectors, Patwaris, Clerks by illegal means and made promotions and transfers by accepting heavy amount of money by way of bribe - It involved larger number of officers also - CBI lodged second FIR - Not illegal - It did not remain the same offence - It will be a separate one for which FIR was lodged.”

C. Police Act, 1861, Section 3 - Delhi Special Police Establishment Act, 1946, Section 6 - Delhi Special Police Establishment Act, 1946, Section 36 - Criminal Procedure Code, Section 178(3) - Criminal offence investigated by police and

charge sheet submitted - A larger conspiracy involving more persons came to surface - State Govt. can order further investigation even when charge sheet was submitted - Under Section 3 of Police Act, State Govt. has absolute power over investigation - State can request the CBI to make investigation/further investigation.

D. Delhi Special Police Establishment Act, 1946, Section 6 – Investigation of offence of corruption against former Minister - Offence was serious - High Court asked the State Govt. to refer investigation CBI - It would not render the investigation carried by CBI to be wholly illegal and without jurisdiction as assuming that the reference had been made by the High Court in exercise of its power under Article 226 of the Constitution of India in a public interest litigation, the same would also be valid.

E. Criminal Procedure Code, Section 154 - Criminal Procedure Code, Section 2(h) - A criminal proceeding is initiated on the basis of lodged F.I.R. - Commencement of investigation in the matter may be preceded by a preliminary inquiry - The term 'investigation' has been defined in Section 2(h) of the Code to include all the proceedings under the Code for collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.

F. Constitution of India, Article 21 - An accused is entitled to a fair investigation - Fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India - A victim of a crime, thus, is equally entitled to a fair investigation.

G. Prevention of Corruption Act, 1988, Sections 13(1)(d) and 13(2) - Scam - Meaning of - There is distinction between crime committed by an individual or a group of persons vis-a-vis a scam which means "to get money or property from, another, under false pretenses, by gaining the confidence of the victim, also includes; swindle; defraud". 1979(2) SCC 322 relied.

H. Constitution of India, Articles 226 and 227 - Private Interest Litigation and Public Interest Litigation - High Court is entitled to initiate suo motu Public Interest Litigation - The nature of jurisdiction exercised by High Court in private interest litigation and in public interest litigation is different. Whereas in the latter it is inquisitorial in nature, in the former it is adversarial. In public interest litigation, the court need not strictly follow the ordinary procedure. It may not only appoint
committees but also issue directions upon the State from time to time. 2008(4) RCR (Civil) 95: 2008(5) RAJ 80 (SC) and 2008(12) SCALE 252 relied.

I. Delhi Special Police Establishment Act, 1946, Section 6 - Criminal Procedure Code, Section 156 – Investigation of cognizable offence by CBI - Whether the Court can order C.B.I. to investigate a cognizable offence in a State without the consent of the State Government stands referred to a larger Bench in State of W.B. v. Committee for Protection of Democratic Rights W.B. and others, [(2006) 12 SCC 534], but then concededly the law as it stands recognizes such a power in the High Court.

J. CBI Manual - Delhi Special Police Establishment Act, 1946, Section 6 - CBI Manual has been framed by Union of India - The manual gives power to Supreme Court and High Court to direct investigation by CBI.

K. Police Act, 1861, Section 3 - Criminal Procedure Code, Section 154 - Delhi Special Police Establishment Act, 1946, Sections 6 and 36 - Registration of two FIRs in the same offence (one by police and other by CBI) not illegal – Investigation of case entrusted to CBI by State Govt. - During enquiry CBI came to know of commission of other offences involving larger conspiracy against large number of persons who had not been proceeded against at all by the local police officers - In such a case lodging of second FIR would not be a bar.

L. CBI Manual, Chapter VI - Enquiry of offence handed over to CBI - Lodging of FIR by CBI is governed by the manual - It may hold a preliminary inquiry; it has been given the said power in Chapter VI of the CBI Manual - A prima facie case may be held to have been established only on completion of preliminary enquiry.

**M.C. Mehta v. Union of India, 66** the Supreme Court held that:

Investigation by CBI into an offence - Opinion of Investigating Officers and Law Officers that accused be placed for trial - Opinion of Attorney Journal not required in such a case.

A. Criminal Procedure Code, Section 173(2) - CBI (Crime) Manual, 2005, Clauses 6.1 and 9.15 - A criminal case (Taj Heritage Corridor Scam) investigated by team of CBI Officers on direction of Supreme Court - Investigating Officers recommended that accused be placed on trial - Law Officers of CBI also formed the same opinion - Director CBI, however, obtaining the advice of Attorney General of India, who

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advised that case was not fit for trial - Held, when there was no difference of opinion of the concerned Officers there was no question of reference to the Attorney General - CBI directed to place the evidence collected by Investigating team along with report of S.P. before Court which will decide matter in accordance with law. Criminal Procedure Code, Section 173(2) - Criminal Procedure Code, Section 190 - Criminal offence – Investigation conducted by S.P. who is Officer in-charge of Police Station - Report submitted to Magistrate that no case was made out - Though Magistrate may not accept the report, but it is not open to Magistrate to direct the Police to file a charge-sheet - There is no provision in Cr.P.C. empowering a Magistrate to compel the police to form a particular opinion. 2003(3) RCR (Crl.) 556 (SC): 2004(1) Apex Criminal 325 (SC) and 1967(3) SCR 668 relied.

B. CBI (Crime) Manual, 2005, Clauses 6.1 and 19.15 - Criminal Procedure Code, Section 173(2) - Prevention of Corruption Act, 1988, Section 13(1)(e) – Investigation of offence conducted by S.P. who is in-charge of Police Station and recommended that accused be placed on trial - S.P. is not legally obliged to take opinion of Sr. P.P. - In Clause 19.15 of the CBI Manual it is expressly stated that the report of the S.P. should be prepared personally by the S.P. and that the internal differences of opinion among CBI Officers should not find place in the SP's Report.

C. Criminal Procedure Code, Sections 156, 173 and 168 - Meaning of word 'investigation' - Under Cr.P.C. investigation consists of proceeding to the spot, ascertaining the facts and circumstances of the case, discovery and arrest of the suspected offender, collection of evidence and formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial, and if so, taking the necessary steps for the same by the filing of a charge-sheet under Section 173 - While it is permissible for an officer in charge of a police station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for each one of the steps is that of the officer in charge of the police station.

D. Criminal Procedure Code, Sections 173, 169, 170 and 190 – Investigation into cognizable offence by Police - When a cognizable offence is reported to the police they may after investigation take action under Section 169 or Section 170 Cr.P.C. - If the police thinks that there is no sufficient evidence against the accused, they may, under Section 169 release the accused from custody or, if the police thinks that there is sufficient evidence, they may, under Section 170, forward the accused to a
competent Magistrate - In either case the police has to submit a report of the action taken, under Section 173, to the competent Magistrate who considers it judicially under Section 190 and takes the following action:

a. If the report is a charge-sheet under Section 170, it is open to the Magistrate to agree with it and take cognizance of the offence under Section 190(1) (b); or decline to take cognizance. But he cannot call upon the police to submit a report that the accused need not be proceeded against on the ground that there was no sufficient evidence.

b. If the report is of the action taken under Section 169, then the Magistrate may agree with the report and close the proceedings. If he disagrees with the report, he can give directions to the police under Section 156(3) to make a further investigation. If the police, after further investigation submits a charge-sheet, the Magistrate may follow the procedure where the charge-sheet under Section 170 is filed; but if the police are still of the opinion that there was no sufficient evidence against the accused, the Magistrate may or may not agree with it. Where he agrees, the case against the accused is closed. Where he disagrees and forms an opinion that the facts mentioned in the report constitute an offence, he can take cognizance under Section 190(1) (c). But the Magistrate cannot direct the police to submit a charge-sheet, because the submission of the report depends entirely upon the opinion formed by the police and not on the opinion of the Magistrate. If the Magistrate disagrees with the report of the police he can take cognizance of the offence under Section 190(1) (a) or (c), but, he cannot compel the police to form a particular opinion on investigation and submit a report according to such opinion. 1967(3) SCR 668 relied.

E. Criminal Procedure Code, Sections 156, 168 and 36 - Officer in charge of Police Station can depute subordinate officer to conduct investigation into a criminal case, but responsibility is of officer in-charge - Final step in the investigation, namely, the formation of the opinion as to whether or not there is a case to place the accused on trial is to be of the officer in charge of this police station and this function cannot be delegated - Opinion of the officer in charge of the police station is the basis of the
report - Even a competent Magistrate cannot compel the concerned police officer to form a particular opinion. 1955(1) SCR 1150 relied.

F. Criminal Procedure Code, Sections 172 and 157 - CBI (Crime) Manual, 2005, Clauses 6.1 and 19.15 - CBI Manual is subject to provisions of Cr.P.C. - In case of conflict the Code of Criminal Procedure shall prevail - Even under ordinary law, the investigating officer has a statutory duty to investigate into an offence upon receipt of a First Information Report as envisaged under Section 154 of the Code of Criminal Procedure - Section 157 thereof provides for the procedure for investigation, where for the only duty cast on the investigating officer is to maintain his case diary in terms of Section 172.

G. Prevention of Corruption Act, 1988, Section 13(2) - Criminal Procedure Code, Section 173(2) - Offence under Prevention of Corruption Act – investigation conducted by CBI - Upon conclusion of the investigation, a report has to be filed by CBI under Section 173(2) of the Code of Criminal Procedure to Special Judge who takes the place of Magistrate.

In Ramachandran v. R. Udhayakumar, the Supreme Court observed that:

Criminal Procedure Code, Section 173(2) - Criminal Procedure Code, Section 173(8) – Fresh investigation, Re- investigation and further investigation - Distinction - After completion of investigation under Section 173(2) Cr.P.C., Police has right to further investigation under Section 173(8) Cr.P.C. but not fresh investigation or re- investigation - Directions of the High Court for re- investigation or fresh investigation are clearly indefensible.

Challenge in this appeal is to the order passed by a learned Single Judge of the Madras High Court on a petition filed by respondent no.1 under Section 482 of the Code of Criminal Procedure, 1973 (in short `the Code'). The prayer was to direct the respondent no. 2 the State of Tamil Nadu represented by its Secretary, Government of Home Department to withdraw the litigation in Crime no. 39/2004 on the file of Inspector of Police, Palayanoor Police Station, Sivagangai District and to entrust the same to the file of Central Bureau of Investigation (in short `CBI'). They are respondent Nos. 5 and 6 in the present appeal. Respondent no. 1 had filed the petition seeking for direction to re-investigate the case by the CBI in an alleged

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case of murder by respondent No. 1. There were totally 59 witnesses in the case. The High Court disposed of the petition, *inter alia*, with the following directions:

"Under the above facts and circumstances of the case in the interest of justice, the case in Crime No. 39/2004 on the file of the fourth respondent stands transferred to the Deputy Superintendent of Police, C.B.C.I.D., Madurai who shall entrust this case to a competent and efficient inspector of Police for the purpose of re-investigation in this case. The Inspector of Police who is nominated by the Deputy Superintendent of Police, C.B.C.I.D. shall afresh investigate the matter and file the final report within a period of three months from the date of receipt of a copy of this order from this Court. The fourth respondent shall forthwith hand over the case records in crime No. 39/2004 to the officer to the nominated by the Deputy Superintendent of Police, C.B.C.I.D., Madurai. The Petitioner stands ordered accordingly. Consequently, connected miscellaneous petition is closed."

It is the stand of the appellant that in an application under Section 482 the direction as given could not have been given. It is stated that there was no scope for fresh or re-investigation in view of what is provided in Section 173(8) of the Code.

Learned counsel for respondent No. 1 supported the order of the High Court.

In view of the position of law as indicated above, the directions of the High Court for re-investigation or fresh investigation are clearly indefensible. We, therefore, direct that instead of fresh investigation there can be further investigation if required under Section 173 (8) of the Code. The same can be done by the CB (CID) as directed by the High Court.

The appeal is allowed to the aforesaid extent.

Appeal allowed.

**In Ashok Kumar Todi v. Kishwar Jahan**,68 the Supreme Court observed and pointed out that:

- Death of a person under suspicious circumstances - The matter under investigation with C.I.D. - Investigation transferred to C.B.I. by High Court - C.B.I. is justified in recording FIR.

- Inter-religious marriage between a Muslim boy and Hindu Girl out of love - Both were majors - Harassments and threats to couple - Police to institute Criminal proceedings against such persons - A person has freedom and right to marry a person of his choice.

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A. Constitution of India, Article 19 - Delhi Special Police Establishment Act, 1946, Sections 5 and 6 - Inter-religious marriage between a Muslim boy and Hindu Girl out of love - Both were majors - Harassments and threats to couple - Police to institute Criminal proceedings against such persons - A person has freedom and right to marry a person of his choice. 2006(3) RCR (Crl.) 870: 2006(3) RCR (Civil) 738 relied. Delhi Special Police Establishment Act, 1946, Sections 5 and 6 - Criminal Procedure Code, Sections 174 and 175 - Criminal offence under investigation with C.I.D. - High Court can direct investigation by C.B.I. and submit charge-sheet - Inter religious marriage between a Muslim boy and Hindu girl - Both were majors - Marriage duly registered - Police intervened and handed over the custody of girl to her maternal uncle - After about 14 days dead body of boy found on railway tracks with injuries and with head smashed - Matter with regard to unnatural death under investigation by C.I.D. - Writ filed mother and brother of deceased that they did not expect from C.I.D. - High Court directing the C.B.I. to investigate - C.B.I. recording FIR - It is justified. 2001(3) RCR (Crl.) 830 relied.

B. Constitution of India, Article 19 - Special Marriage Act, 1954, Section 15 - Intercaste and Inter-religious marriage against the wishes of parents - Threats and harassment to couples - Police to institute criminal proceedings against anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation - A person has freedom and right to marry person of one's choice outside one's caste - Further held:-

(i) If any boy or girl who is major undergoes inter-caste or inter-religious marriage, their marital life should not be disturbed or harassed and if anyone gives such threat or commits acts of violence or instigates, it is the responsibility of the officers concerned to take stern action against such persons as provided by law.

(ii) Police officials have no role in their conjugal affairs and the law enforcing authorities have no right to interfere with their married life and, in fact they are duty bound to prevent others who interfere in their married life. 2006(3) RCR (Crl) 870: 2006(3) RCR (Civil) 738 relied.

(iii) Under Scheme of Criminal Procedure Code, investigation commences with lodgement of information relating to the commission of an offence - If it is a cognizable offence, the officer-in-charge of the police station, to whom the information is supplied orally has a statutory duty to reduce it to writing...
and get the signature of the informant - He shall enter the substance of the information, whether given in writing or reduced to writing as aforesaid, in a book prescribed by the State in that behalf.

C. Criminal Procedure Code, Section 173 - Criminal Procedure Code, Section 2(h) - Meaning of word "Investigation" - Criminal Procedure Code, contemplates the following steps to be carried out during investigation :-

1. Proceeding to the spot;
2. Ascertainment of the facts and circumstances of the case;
3. Discovery and arrest of the suspected offender;
4. Collection of evidence relating to the commission of the offence which may consist of –
   i. The examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit,
   ii. The search of places or seizure of things considered necessary for the investigation and to be produced at the trial;
5. Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and, if so, to take necessary steps for the same by the filing of a charge-sheet under Section 173. 2000(4) RCR (Crl) 476 relied.

D. Delhi Special Police Establishment Act, 1946, Sections 5 and 6 - Constitution of India, Article - Criminal offence - High Court has jurisdiction about appointment of special agency like CBI for investigation under the orders of the High Court. 2010(2) RCR (Crl.) 141: 2010(1) RAJ 664 relied. Delhi Special Police Establishment Act, 1946, Sections 5 and 6 - Death of a person under suspicious circumstances - C.I.D. conducting investigation - A complaint made to High Court that C.I.D. was not taking any interest in the investigation and high Police Officers had unauthorizedly intervened in the matter – Investigation given to C.B.I. 2010(2) RCR (Crl.) 141: 2010(1) RAJ 664 relied.

E. Delhi Special Police Establishment Act, Sections 5 and 6 - Criminal Procedure Code, Section 154 - Criminal Procedure Code, Sections 174 and 175 – Investigation by CBI - Unnatural death of person in suspicious circumstances - Matter under investigation with CID - On a writ filed by mother and brother of deceased, High Court directing the CBI to conduct the investigation - In order to find out whether
death was suicidal homicidal, CBI justified in recording FIR - The direction to conduct investigation requires registration of an FIR preceding investigation.

iii) Arrest

Our criminal justice system appears to revolve around the pivotal institution of judiciary. From the very moment of infraction of the right to freedom of movement of a citizen by way of arrest, the judiciary oversees everything at every stage in the criminal justice process.

In Joginder Kumar v. State of U.P. and others\(^69\), the Supreme Court held that:

“"No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the geniuses and bona fides of a complaint and a reasonable belief both as to the person’s complicity and even to sit to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants to the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer affecting the arrest that such arrest is necessary and justified. Except in heinous offences, and arrest must be avoided if a police officer issued notice to person to attend the Station House and not to leave Station without permission would do.”

The Court further observed that:

“A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights. Liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first- the criminal or society, the law violator or the law abider.”

The quality of a nation’s civilization can be largely measured by the methods it uses in the enforcement of criminal law. The Apex Court in *Smt. Nandini Satpathy v. P.L. Dani*⁷⁰, quoting Lewis Mayer’s state:

“To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft. The pendulum over the years has swung to the right.”

The Apex Court while quoting the National Police Commission’s Third Report referring the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action account for 43.2% of the expenditure of the jails. The said Commission in its Third Report observed that:

“It is obvious that a major portion of the arrests were connected with very minor prosecutions and cannot, therefore, be regarded as quite necessary from the point of view of crime prevention. Continued detention in jail of the persons so arrested has also meant avoidable expenditure on their maintenance. In the above period it was estimated that 43.2 per cent of the expenditure in the connected jails was over such prisoners only who in the ultimate analysis need not have been arrested at all.”

Lastly the Supreme Court held that:

“Effective enforcement of the fundamental rights granted under Articles 21 and 22(1) of the Constitution and required to recognized and scrupulously protected. For effective enforcement of these fundamental rights the court issued the following requirements:

- An arrested person being held in custody is entitled, if he so requests to have one friend relative or other person who is known to him or likely to take an interest in this welfare told as for as is practicable that he has been arrested and where is being detained.
- The police officer shall inform the arrested person when he is brought to the police station of this right.
- An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly.”

⁷⁰ See, AIR 1978 SC p.1025
In Sajan Abraham V. State of Kerala\textsuperscript{71}, the Apex Court observe that:

“An obligation is cast on the prosecution while making an arrest or seizure, the officer should make full report of all particulars of such arrest or seizure and send it to his immediate superior officer within 48 hours of such arrest or seizure. The submission is, this has not been done. It is true that the communication to the immediate superior has not been made in the form of a report, which is also recorded by the High Court that has sent copies of FIR and other documents to his superior officer which is not in dispute. The copies of the FIR along with other records regarding the arrest of appellant and seizure of the contraband articles were sent to his superior officer immediately after registering the said case. So, all the necessary information to be submitted in a report was sent. This constitutes substantial compliance and mere absence of any such report cannot be said it has prejudiced the accused. This section is not mandatory in nature. When substantial compliance has been made, as in the present case it would not vitiate the prosecution case.”

In D.K. Basu v. State of West Bengal\textsuperscript{72}, the Supreme Court considered it appropriate to issue the following requirement to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:

“The police personal carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tages with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.
A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
The time, of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives court-side the district or and through the Legal Aid Organization in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

\textsuperscript{71} See, AIR 2001 SC p.3190,2001 (6) SCC p.692
\textsuperscript{72} See, AIR 1997 SC p.610; 1997 CrLJ p.743
The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained. An entry must be made in the diary at the place of detention rearing the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body, must be recorded at that time. The “Inspection Memo” must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all Tehsils and Districts as well. Copies of all the documents including the memo of arrest, referred to above, should be sent to the (sic) Magistrate for his record. The arrestee may be permitted to meet his lawyer during interrogation, through not throughout the interrogation. A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous police board.”

The Supreme Court further held that:

“These directions are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the Courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee.”

**State of Maharashtra v. Bhaurao Punjbrao Gawande,** 73

The present appeal is filed by the State of Maharashtra and others against the sole respondent (original petitioner) against the judgment and order passed by the High Court of Judicature at Bombay (Nagpur Bench) on October 17, 2006 in Writ Petition No. 372 of 2006. By the impugned order, the High Court (partly) allowed the petition filed by the detenu-writ petitioner and set aside the order of detention dated July 27, 2006 passed by the Commissioner of Police (Nagpur City) under the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980.

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73 See, 2008(2) RCR (Criminal) p.179
A. Constitution of India, Article 226 - Preventive detention - Order of Preventive detention cannot be set aside by Writ Court at pre-execution or pre-arrest stage unless there are exceptional circumstances as mentioned in the case of 1991(1) RCR(Criminal) 677 which are as under:

i. Obligation to furnish to the detenu the grounds of detention;

ii. Right to make representation against such action;

iii. Constitution of Advisory Board consisting of persons who are or have been qualified to be appointed as Judges of the High Court;

iv. Reference of the case of the detenu to the Advisory Board;

v. Hearing of the detenu by the Advisory Board in person;

vi. Obligation of the Government to revoke detention order if the Advisory Board so opines;

vii. Maximum period for which a person can be detained;

viii. Revocation of detention order by the Government on the representation by the detenu, etc.

Further held:

“Interference by a Court of Law at that stage must be an exception rather than a rule and such an exercise can be undertaken by a Writ Court with extreme care, caution and circumspection.” 1991(1) RCR (Criminal) 677 (SC) relied.

B. Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, Section 3(1) - Indulging in Black Marketing of Kerosene which is an essential commodity - Several cases instituted against him - Authority passed an order with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies of commodities to the community" i.e. selling of kerosene in black market - Order upheld. 1991(1) RCR (Criminal) 677 (SC) relied.

C. Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, Section 3(1) - Preventive Detention - Satisfaction of the Detaining Authority is 'subjective' in nature and the Court cannot substitute its 'objective' opinion for the subjective satisfaction of Detaining Authority - That, however, does not mean that the subjective satisfaction of Detaining Authority is wholly immune from judicial reviewability - By judicial decisions, courts have...
carved out areas, though limited, within which the validity of subjective satisfaction can be tested judicially.

D. Constitution of India, Articles 226 and 227 - Personal liberty is a precious right - Writ of habeas corpus is writ of habeas corpus has been described as "a great constitutional privilege" or "the first security of civil liberty" - By this writ, the Court directs the person or authority who has detained another person to bring the body of the prisoner before the Court so as to enable the Court to decide the validity, jurisdiction or justification for such detention.

E. Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, Section 3(1) - Constitution of India, Article 226 - Preventive Detention - Meaning and concept :-

i. There is no authoritative definition of 'preventive detention' either in the Constitution or in any other statute - The expression, however, is used in contradistinction to the word 'punitive'.

ii. It is not a punitive or penal provision but is in the nature of preventive action or precautionary measure.

iii. Primary object of preventive detention is not to punish a person for having done something but to intercept him before he does it.

iv. It is not a penalty for past activities of an individual but is intended to pre-empt the person from indulging in future activities sought to be prohibited by a relevant law and with a view to preventing him from doing harm in future.

v. Power of detention is not a quasi-judicial power.

F. Constitution of India, Article 226 - Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, Section 3(1) - Essential Commodities Act, Section 7 - Petitioner selling Kerosene Oil in black market which is essential commodity - Activities ranged from year 2002 to 2006 - Several cases registered against him - Order of preventive detention passed against him - Petitioner absconded and did not surrender - Petitioner could challenge the order before execution if the order was for wrong purpose - Order of detention to prevent the petitioner from selling Kerosene Oil in black market was not a wrong
purpose - Order could not be set aside at pre-execution stage. 1991(1) RCR (Criminal) 677 (SC) relied.

G. Preventive detention - Power of detention is not a quasi-judicial power.

H. Preventive detention - An order of detention can be challenged on certain grounds such as:-

i) Order is not passed by the competent authority, condition precedent for the exercise of power does not exist;

ii) Subjective satisfaction arrived at by the Detaining Authority is irrational.

iii) The order is mala fide; there is non-application of mind on the part of the Detaining Authority in passing the order; the grounds are, or one of the grounds is, vague, indefinite, irrelevant, extraneous, non-existent or stale; the order is belated;

(iv) Person against whom an order is passed is already in jail; the order is punitive in nature; the order is not approved by State/Central Government as required by law;

Failure to refer the case of the detenu to the Board constituted under the statute;

I. Criminal Procedure Code, Section 439 - Constitution of India, Article 226 - Preventive detention - Accused in custody - Writ against detention - Bail cannot be granted in habeas corpus proceedings directed against orders of detention.

J. Preventive detention and Punitive detention - Preventive detention is a precautionary measure and is intended to pre-empt a person from indulging in illegal or anti-social activities in order to safeguard the defence of India, public safety, maintenance of public order, maintenance of supplies and services essential to the life of the community, prevention of smuggling activities.

**Usha Agarwal v. Union of India,** 74

The preventive detention of one Sandip Agarwal (‘detenu' for short) under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (‘COFEPOSA Act' for short) is under challenge in these two matters, namely, criminal appeal by special leave against the judgment dated 21.4.2006 in Writ Petition No. 23908/2005 of the Calcutta High Court and a petition seeking a writ of habeas corpus under Article 32 of the Constitution of India. Both have been filed by the mother of the detenu.

The events subsequent to filing of the writ petition were placed on record in the pending writ petition and the order of detention was challenged on the following grounds:

(a) Relevant materials were withheld by the sponsoring authority from the Detaining Authority.
(b) The Detaining Authority had considered and relied on non-existent and irrelevant material in making the order of detention.
(c) The translations of Hindi documents were belatedly supplied.
(d) Copies of the documents which were relied upon by the Detaining Authority furnished to the detenu, contained several sheets which were illegible thereby preventing the detenu from making an effective representation.
(e) There was inordinate delay in considering the representation made by the detenu to the Central Government and serving the same on the detenu.
(f) The order of detention was based on a solitary incident. There was no material to show that there was any possibility of the detenu indulging in smuggling activities in future.
(g) The allegations against the detenu did not amount to `smuggling' and therefore the order of detention was not justified.

Division Bench of the Calcutta High Court rejected all these contentions and consequently, dismissed the writ petition by judgment dated 21.4.2006. The said judgment of the Calcutta High Court is challenged in this appeal by special leave. Simultaneously, the petition under Article 32 has also been filed before this Court, challenging the detention. The Apex court held in this case:

A. Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, Section 3(1) - Order of Preventive Detention - Where copies supplied at the request of the detenu were illegible, the constitutional safeguards were violated and the order of detention is liable to be quashed - In the instant case copies of certain documents supplied to detenu were partially illegible, but the copies were of those documents which the detenu itself had given to Department - Detenu cannot make a grievance on this account - The entire issue of furnishing of illegible copies is with reference to the question whether detenu's right to make an effective representation against his detention is hampered by non-supply of legible copies - Detenu was in no
way hampered by the fact that a few of the sheets/copies of documents were partly illegible.

B. Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, Section 3(1) - Order of Preventive Detention - Sponsoring Authority withheld from Detaining Authority an order by which all EXIM benefits were stopped to companies of detenu - Cannot be said that said order was relevant document, non-consideration of which would vitiate the detention order.

C. Constitution of India, Article 22 - Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, Section 3(1) - Preventive Detention - A detention under COFEPOSA Act is anticipatory and preventive - It is neither punitive nor curative - Preventive detention being one of the two exceptions to the constitutional protection under Article 22 against arrest and detention, certain procedural safeguards are provided in respect of exercise of the power to direct preventive detention - The procedural safeguards under the Constitution have been interpreted, to require every material which is relevant, having a bearing on the question as to whether a person should be detained under the Act, to be placed before the detaining authority, as the decision to detain a person is rendered by a detaining authority on his subjective satisfaction as to the existence of the grounds for such detention.

D. Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, Section 3(1) - Order of Preventive Detention - It is not for the sponsoring authority to decide as to which of the relevant documents should be placed before the detaining authority, or which of the documents are likely to help, or not help, the prospective detenu - Consequently, the sponsoring authority cannot exclude any particular document from the material to be placed before the detaining authority - If the relevant facts or documents which may influence the subjective satisfaction of the detaining authority on the question whether or not to make the detention order, are not placed before the detaining authority, or are not considered by the detaining authority, it may vitiate the detention order itself - It is no answer to say that the exclusion of a relevant document did not affect the decision to detain a person.

E. Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, Section 3(1) - Order of Preventive Detention - A document is relevant for considering the case of a person for preventive Detention if it relates to or has a bearing on either of the following two issues : (a) Whether the detenu had indulged
in smuggling or other activities prejudicial to the State, which the COFEPOSA Act is designed to prevent; and (b) Whether the nature of the illegal and prejudicial activity and the manner in which the detenu had indulged in such activity, gave a reasonable indication that he would continue to indulge in such activity - In other words, whether he had the propensity and potentiality to continue the prejudicial activity necessitating an order of detention.

Though several contentions were raised in the special leave petition and the writ petition, during arguments the challenge to the detention was restricted to the following three grounds:

(i) The sponsoring authority had withheld from the detaining authority a relevant material (Order dated 15/20.4.2004 stopping EXIM benefits to Sandip Exports Ltd. made under Rule 7 of the Foreign Trade (Regulations) Rules, 1993). The detaining authority could not therefore apply his mind to all relevant material before making the order of detention.

(ii) Several sheets among the copies of the documents supplied to the detenu were illegible and this came in the way of the detenu making an effective representation for his release.

(iii) There was inordinate delay in considering the representation dated 7.2.2006 by the detenu submitted to the Central Government and communicating the decision to the detenu.

In this case we find that the first representation dated 16.1.2006 was disposed of by the Advisory Board, Detaining Authority and Central Government on 27.1.2006, 10.2.2006 and 13.2.2006. The second representation dated 7.2.2006 given to the Central Government is nothing but a reiteration of the representation that was given to the Advisory Board on 16.1.2006 copies of which were given to detaining authority and Central Government. The representation dated 16.1.2006 had already been considered and rejected by the Central Government by order dated 13.2.2006. Therefore applying the principle in *Abdul Razak Dawood Dhanani* (supra), any delay in disposing of the subsequent representation dated 7.2.2006 or any delay in communicating the decision on such representation will not vitiate the order of detention. The third contention is also therefore rejected.

As a result, we dismiss the appeal as also the writ petition as having no merit.

Appeal dismissed.
Rajinder Singh aka Rajinder Kumar v. State of Punjab (P&H),\(^{75}\) in this case Punjab and Haryana High Court pointed out that:

A. Prevention of Corruption Act, 1988, Sections 13(2) and 7 - Accused demanded Rs. 300/- for reducing electricity Bill - At the time of raid accused asked the complainant to hand over the amount to co-accused - Tainted currency notes recovered from co-accused - Both the accused held guilty and convicted - Held :

In some offices, sometimes corrupt officials make a joint pool to collect bribe money - One collects the bribe money and later on they share the booty - So the demand by one and recovery from another becomes irrelevant in such circumstances - Both appellants are liable as they have shared the common intention of each other.

B. Prevention of Corruption Act, 1988, Sections 7 and 13(2) - Accused demanded Rs. 300/- from complainant for reducing the amount of electricity Bill - Raid conducted and tainted currency notes recovered from accused - During trial, complainant, official witness, and another witness did not support the prosecution - The witness did not identify the accused in court and stated that their signatures were obtained an blank papers - Accused, however, convicted on the basis of evidence of Investigating Officer - It has come on record that he had no grudge against the accused.

C. Prevention of Corruption Act, 1988, Section 13(2) - On the complaint of complainant, accused was arrested handed by taking bribe money from the complainant - As per instructions of Punjab Government, a sum of Rs. 25,000/- had been awarded to the complainant vide Draft No. 707274 dated 11.9.1998 - As the complainant has not supported the prosecution case, the awarded money be recovered from him along with interest at the rate of 6.5 % per annum from the date it was credited in his account.

Central Bureau of Investigation v. Mustafa Ahmad Dossa (SC)\(^{76}\)

These appeals, at the instance of the Central Bureau of Investigation, are directed against the order of the Designated Court under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (herein called TADA) dated 26th February 2009 allowing the application of the respondent herein and directing that the evidence collected before 31st December 1997 in the Bombay Blast Case (BBC) No. 1 of

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\(^{75}\) See, 2011 (2) R.C.R.(Criminal) p.134  
\(^{76}\) See, 2011 (4) SCC p.418
1993 could not be used against him unless the witnesses already examined were allowed to be cross-examined by the respondent.

Criminal Procedure Code, 1973, Sections 273, 299, 220 and 223 - Terrorist and Disruptive Activities (Prevention) Act, 1987, Section 14(5) - Constitution of India, Article 14 - Trial of Co-accused - Parity between co-accused - Trial of two accused, arising out of the same incident, cannot proceed under different procedures - Bombay Blast case - C.B.I. challenged the order of Designated Court under T.A.D.A., which allowed the application of accused, who had absconded and was arrested later on, while trial against other accused proceeded, and presently undergoing separate trial - Trial Court, directing that evidence collected in main trial could not be used against respondent unless witnesses already examined were allowed to be cross-examined by respondent - Meanwhile, order passed in the case of other accused who were also arrested later for the same incident and undergoing separate trial, challenged up to Supreme Court - SLP was disposed of with a directions that accused would file statement before the Special Judge as to who were all the witnesses in main trial whom they proposed to cross-examine and thereafter prosecution would take further steps to produce those witnesses for cross-examination - Submission of C.B.I. that it would be satisfied if similar order was passed the instant case also - Directions in terms of the said earlier order.

C) Criminal Courts Proceeding and Judicial Interpretation

The trial Court Judge and Magistrates is one of the most important factors to ensure the efficient working of our judicial system. The quality of justice, it needs to be stressed, depends not merely upon having well worded codes and statute but much more so upon the way they are administered and enforced. In an evaluation is to be made of the role of the different functionaries who play their parts in the administration of justice, the top position would necessarily has assigned to the trial court. The image of the judiciary for the common man is projected by the trial court and this in turn depends upon their intellectual, moral and personal qualities.

i) Charge

Framing of charges is the concern of the court under the criminal justice system. However, it is generally complained that courts accept the charges framed by police in the report under Section 173 of Cr.P.C. Though the power to discharge is conferred on courts, it is seen that ordinarily courts do not discharge an accused as
they can find prima facie case against the persons reported upon by the police under Sec. 173 of Cr.P.C.

In Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya,77 after considering the provisions of Sections 227 and 228, Code of Criminal Procedure, the Court posed a question, whether at the stage of framing the charge, trial Court should marshal the materials on the record of the case as he would do on the conclusion of the trial?

The Supreme Court held that:

“At the stage of framing the charge inquiry must necessarily be limited to deciding if the facts emerging from such materials constitute the offence with which the accused could be charged. The Court may peruse the records for the limited purpose, but it is not required to marshal it with a view to decide the reliability thereof.”

The Supreme Court referred to earlier decisions78 in and held thus:

“It seems well settled that at the Sections 227-228 stage the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose shift the evidence as it cannot be expected even at the initial stage to accept all that the prosecution states as gospel truth even it is opposed to common sense or the broad probabilities of the case.”

If the Court is satisfied that a prima facie case is made out for proceeding further then a charge has to be framed. Per contra, if the evidence which the prosecution proposes to produce to prove the guilt of the accused, even if fully accepted before it is challenged by the cross-examination or rebutted by the defense evidence, if any, cannot show that accused committed the particular offence then the charge can be quashed.

In the case of Minakshi Bala v. Sudhir Kumar79, the Apex Court considered the question of quashing of charge by the High Court in invoking its inherent jurisdiction under Sec. 482, Code of Criminal Procedure. In that context, this Court made the following pertinent observations:

“…… To put it differently, once charges are framed under Sec. 240, Cr.P.C. the High court in its revisional jurisdiction would not be

77 See, AIR 1990 SC p.1962; 1990 CrLJ p.1869
79 See, 1994 (4) SCC p.142
Justified in relying upon documents other than those referred to in Sections 239 and 240, Cr.P.C; nor would it be justified in invoking its inherent jurisdiction under Sec. 482, Cr.P.C. to quash the same except in those rare cases where forensic exigencies and formidable compulsions justify such a course. We hasten to add even in such exceptional ashes the High court can look into only those documents which are unimpeachable and can be legally translated into relevant evidence.”

Apart from the infirmity in the approach of the High Court in dealing with the matter which the Supreme Court has already noticed, further find that instead of adverting to and confining its attention to the documents referred to in Sections 239 and 240, Cr.P.C. the High court has dealt with the rival contentions of the parties raised through their respective affidavits at length and on a threadbare discussion thereof passed the impugned order. The course so adopted cannot be supported; firstly, because finding regarding commission of an offence cannot be recorded on the basis of affidavit evidence and secondly, because at the stage of framing of charge the Court cannot usurp the functions of a trial Court to delve in to and decide upon the respective merits of the case.

In *State of M.P. v. Mohan Lal Soni*\(^{80}\), the High court in revision quashed the charges accepting the contentions raised by the accused after detailed consideration of material produced on record. Having regard to the facts and circumstances of the case and referring to earlier decisions of the Apex Court held thus:

“In our view, it is apparent that the entire approach of the High Court it illegal and erroneous; from the reasons recorded by the High court, it appears that instead of considering the prima facie case, the High Court has apprise dated and weighed the materials on record for coming to the conclusion that charge against the respondents could not have been framed. It is settled law that at the stage of framing the charges, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. It the Court is satisfied that a prima facie case is made out for proceeding further then a charge has to be framed. The charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebuted by the defense evidence, if any, cannot show that accused committed the particular offence.”

\(^{80}\) See, AIR 2000 SC p.2583
In Roy V. D. v. State of Kerala\textsuperscript{81}, the Supreme Court held that:

“It is well settled that the power under section 482 of the Cr.P.C. has to be exercised by the High Court, inter alia, to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. Where criminal proceedings are initiated based on illicit material collected on search and arrest which are per se illegal and vitiate not only a conviction and sentence based on such material but also the trial itself, the proceedings cannot be allowed to go on as it cannot be but amount to abuse of the process of the court in such a case not quashing the proceedings would perpetuate abuse of the process of the court resulting in great hardship and injustice to the accuse. In our opinion, cerise of power under section 482 of the Cr.P.C. to quash proceedings in a case like the one on hand, would indeed secure the ends of justice.”

In State of Delhi v. Gyani Devi\textsuperscript{82}, the Supreme Court, while quashing and setting aside the order passed by the High court, made the following observations:

“….. After considering the material on record, learned Sessions judge framed the charge as stated above. That charge in quashed by the High court against the respondents by accepting the contention raised and considering the details of the material produced on record. The same is challenged by filing these appeals. In our view, it is apparent that the entire approach of the High court is illegal and erroneous. From the reasons record by the High court, it appears that instead of considering the prima facie case, the High court has appreciated and weighed the materials on record for coming to the conclusion that charge against the respondents could not have been framed. It is settled law that at the stage of framing the charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a prima facie case is made out for proceeding further then a charge has to be framed. The charge can be quashed if the evidence which the prosecutor, proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by defense evidence, if any, cannot show that the accused committed the particular offence. In such case, there would be no sufficient ground for proceeding with the trial…..”

The court further judged in the light of the settled position of law as reiterated in the decisions noted above, the order under challenge in the present case does not stand the scrutiny. The High court has erred in its approach to the case as if it was evaluating the medical evidence for the purpose of determining the question

\textsuperscript{81} See, AIR 2001 SC p.137
\textsuperscript{82} See, AIR 2001 SC p.40; 2000 (8) SCC p.239
whether the charge under Sec. 304/34, I.P.C. framed against the accused respondents was likely to succeed or not. This question was to be considered by the trial Judge after recording the entire evidence in the case. It was not for the High court to pre-judge the case at the stage when only a few witnesses (doctors) has been examined by the prosecution and that too under the direction of the High Court in the revision petition filed by the accused. The High Court has not observed that the prosecution had closed the evidence from its side. There is also no discussion or observation in the impugned order that the facts and circumstances of the case make in an exceptional case in which immediate interference of the High Court by invoking its inherent jurisdiction under Sec. 482, Cr.P.C. is warranted in the interest of justice. On consideration of the matter we have no hesitation to hold that the order under challenge is vitiated on account of erroneous approach of the High Court and it is clearly unsustainable.

In Munna Devi v. State of Rajasthan\(^{83}\), the Apex Court held that:

“The revision power under the code of Criminal Procedure cannot be exercised in a routine and casual manner. While exercising such powers, the High Court has no authority to appreciate the evidence in the manner at the trial and the appellate courts are required to do. Revisional powers could be excursive only when it is shown that there is a legal bar against the continuance of the criminal proceedings or the framing of charge or the facts as stated in the first information report even if they are taken at the face value and accepted in their entirety do not constitute the offence for which the accused had been charged.”

In the instant case, the learned judge ignored the basic principles which conferred the jurisdiction upon the High Court for exercise of revisional powers. It was premature for the High Court to say that the material placed before the trial court was insufficient for framing the charge or that the statement of the prosecutrix herself was not sufficient to proceed further against the accused-respondent.

As the impugned order has been passed against the settled position of law, it is unsustainable and is accordingly set aside. The order of framing the charge passed by the trial court against the accused is upheld with directions to proceed with the trial of the case and dispose of the same on merits in accordance with law.

\(^{83}\) See, AIR 2002 SC p.107
In Ajoy Kumar Ghose v. State of Jharkhand, the Supreme Court observed that:

“A judgment passed by the High Court of Jharkhand, Ranchi, dismissing the writ petition and confirming the order of the Trial Court, refusing to discharge the accused-appellant, is in challenge here and the Apex court following observation:-
A. Criminal Procedure Code, Sections 245 and 246 - Criminal Procedure Code, Sections 190 and 204 - Complaint case - Accused filed an application for discharge under Section 245(2) Cr.P.C - Trial court rejected the application - After rejection of application, trial court cannot straightway proceed to frame charge under Section 246(1) Cr.P.C - Before framing charge court has to record evidence as required under Section 244 Cr.P.C. - It is only on the basis of any evidence that the Magistrate has to decide as to whether there is a ground to presume that the accused has committed an offence.
B. Criminal Procedure Code, Sections 190 and 200 - Criminal Procedure Code, Section 245(2) - Complaint case - Magistrate has power to discharge the accused under Section 245(2) Cr.P.C. even before the evidence is recorded under Section 244(1) Cr.P.C - An application for discharge at that stage is perfectly justifiable.
C. Criminal Procedure Code, Section 246 and 245 - Framing charge - Even with evidence of single witness, Magistrate could proceed to frame charge - Impact of words "at any stage of case" appearing in Section 245 and 246 Cr.P.C explained.
D. Criminal Procedure Code, Section 238, 239, 240 - Framing of charge - Warrant case instituted on Police report - Magistrate can frame charge if prima facie case is made out on basis of Police report and material on record - However in complaint case, before framing charge -Magistrate has to record evidence offered by complainant in support of complaint - When the evidence is offered under Section 244 Cr.P.C by the prosecution, the Magistrate has to consider the same, and if he is convinced, the Magistrate can frame the charge."

In Swaran Singh v. State through Standing Counsel, the Supreme Court pointed out that:

Calling a person `Chamar' amounts to intentionally insulting that person with intent to humiliate him - Offence under Section 3(1) (x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act made out.
A. Scheduled Castes and The Schedules Tribes (Prevention of Atrocities) Act, 1989, Section 3(1) (x) - Accused called the complainant "Chamar" - Calling a person `Chamar' ordinarily amounts to intentionally insulting that person with intent to

humiliate him - Offence under Scheduled Castes and The Schedules Tribes (Prevention of Atrocities) Act, 1989 made out - FIR lodged and charge framed - Petition for quashing of FIR dismissed - Held:-

At this stage court is not to see whether allegation in FIR were correct or not - Court have only to see whether treating the FIR allegations as correct an offence is made out or not - Further held :-

Treating the allegations in the FIR to be true - An offence under Section 3(1)(x) of the Act is prima facie made out.

B. Scheduled Castes and The Schedules Tribes (Prevention of Atrocities) Act, 1989, Section 3(1)(x) - Accused called a person "Chamar" - FIR lodged - FIR sought to be quashed on the ground that alleged act was not committed in a public place and hence does not come within the purview of section 3(1)(x) of the Act - Contention not tenable - Section 3(1)(x) does not use the expression 'public place', but instead the expression used is 'in any place within public view' - Meaning of word "Public view" explained.

C. Criminal Procedure Code, Section 482 - Scheduled Castes and The Schedules Tribes (Prevention of Atrocities) Act, 1989, Section 3(1)(x) - Quashing of FIR - FIR lodged in offence - Challan put up and charged framed - Petition under Section 482 Cr.P.C. for quashing the FIR - Held :-

(1) At this stage all that High Court can see is whether on a perusal of the FIR, treating the allegations to be correct, a criminal offence is prima facie made out or not or whether there is any statutory.

(2) At this stage the correctness or otherwise of the allegations in the FIR has not to be seen by the High Court, and that will be seen at the trial - It has to be seen whether on a perusal of the FIR a prima facie offence is made out or not. 2006(3) RCR (Crl.) 740: 2006(2) Apex Criminal 637 (SC) and 2006(1) RCR (Crl.) 324: 2006(1) Apex Criminal 63 (SC) relied.

D. Scheduled Castes and The Schedules Tribes (Prevention of Atrocities) Act, 1989, Section 3(1)(x) - Meaning or word "Chamar" - Whether calling a person "Chamar" amounts to intentionally insulting with intent to humiliate a member of the Scheduled Caste - The word "Chamar" is derived from the Hindi word peM+k which means leather - Further held :-
“Today the word "Chamar" is often used by people belonging to the so-called upper castes or even by OBCs as a word of insult, abuse and derision.”

E. Scheduled Castes and The Schedules Tribes (Prevention of Atrocities) Act, 1989, Section 3(1) (x) - Scope and object of Act - The Act was enacted to prevent indignities humiliation and harassment to the members of SC/ST community.

F. Scheduled Castes and The Schedules Tribes (Prevention of Atrocities) Act, 1989, Section 3(1) (x) - Whether calling a person "Chamar" amounts to intentionally insulting with intent to humiliate a member of the Scheduled Caste - Held:-

Calling a member of the Scheduled Caste "Chamar" with intent to insult or humiliate him in a place within public view is certainly an offence under Section 3(1) (x) of the Act.

G. Scheduled Castes and The Schedules Tribes (Prevention of Atrocities) Act, 1989, Section 3(1)(x) - Public view - Meaning of - Accused calling a person "Chamar" inside that building - If some members of the public are there (not merely relatives or friends) then also it would be an offence since it is in the public view.

In R.S. Mishra v. State of Orissa, the Supreme Court observed that:

A. Criminal Procedure Code, Sections 227 and 228 - Civil Procedure Code, Sections 302 and 304 – Charge sheet submitted before Judge under a particular Section - When the charge under a particular section is dropped or diluted, (although the accused is not discharged), some minimum reasons in nutshell are expected to be recorded disclosing the consideration of the material on record -

In the instant case sheet submitted under Section 302 IPC - The Sessions Judge framed charge under Section 304 IPC and declined to frame charge under Section 302 IPC and no reasons explained in the order - Order is not valid - Held :-

(i) When the charge under a particular section is dropped or diluted, (although the accused is not discharged), some minimum reasons in nutshell are expected to be recorded disclosing the consideration of the material on record.

(ii) It is also necessary for the reason that the order should inform the prosecution as to what went wrong with the investigation.


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B. Criminal Procedure Code, Sections 227 and 228 - Criminal Procedure Code, Section 245 Framing of charge – Charge sheet submitted before Judge in a criminal case - A discharge order is passed on an application by the accused on which the accused and the prosecution are heard - At the stage of discharging an accused or framing of the charge, the victim does not participate in the proceeding - While framing the charge, the rights of the victim are also to be taken care of as also that of the accused.

ii) Bail

As far as granting of bail is concerned the broad guidelines laid down in the Criminal Procedure Code, 1973, but the courts have evolved certain standards. For the purpose of cancellation of bail the courts have also evolved certain guidelines. These are generally found in judgments of various High Courts and Supreme Court.

In Shahzad Hasan Khan v. Ishtiaq Hasan Khan & another87, the Supreme Court observed as below:

“Had the learned Judge granted time to the complainant for filing counter-affidavit correct facts would have been placed before the court and it could have been pointed out that appear from the inherent danger of tampering with or intimidating witnesses and aborting the case, there was also the danger to the life of the main witnesses or to the life of the accused being endangered as experience of life has shown to the members of the profession and the judiciary, and in the event, the learned Judge would have been in a better position to ascertain facts to act judiciously. No doubt liberty of a citizen must be zealously safeguarded by court, nonetheless when a person is accused of a serious offence like murder and his successive bail applications are rejected on merit there being prima facie material, the prosecution is entitled to place correct facts before the court. Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in pirate retribution. Learned Judge was unduly influenced by the concept of liberty, disregarding the facts of the case.”

In Kashmira Singh v. Duman Singh88, The appellant, Kashmira Singh was arrested subsequent to the registration of an F.I.R. upon a complaint fled by the respondent, Duman Singh. The accused and his family members had been involved in a long standing dispute over a certain piece of land. Being apprehensive of a

87 See, 1987 (2) SCC p.684
88 See, AIR 1996 SC p.2176
quarrel, the local police had initiated proceedings under Section 145 of the Code of Criminal Procedure, 1973. In the F.I.R., the complainant alleges that he was led to believe that the accused and his family members had, on 28-5-1993, violated the Tehsildar’s order, not to interfere with the land and had ploughed the land and sown a paddy crop. To verify whether this was true the complainant and a few others went to the village of the accused. He alleges that after having confirmed the news, he and five others were returning in their vehicles when they came upon the accused, his three brothers and his fathers, who were armed and were standing near the village chowk. The complainant and his party stopped their vehicles and, one member of the complainant’s party, who was armed with a Dang, went up to the accused’s party to enquire why they had violated the Tehsildar’s order. According to the complainant, the accused’s brother reacted by attacking that person, whereupon an altercation ensued between both sides. The members of both parties were armed with Danfs, Sotis and rifles. The skirmish resulted in the death of some of the persons present. (The F.I.R. records the death of two members of the complainant’s party while the impugned judgment states that one member of the accused’s party was also killed).

In the impugned judgment, the learned Judge states that:

“while seeking bail, the accused had concealed material facts from the court in the he had only relied on the fact that Chamkaur Singh had not pressed his application for bail on 14-9-1993, without mentioning that Chamkaur Singh’s applications for bail were later rejected on two occasions. Moreover, the learned Judge stated that while granting bail, he had been under the impression that there were two cross versions and both parties had been challenged by the police whereas, in fact, only one challan, against the accused party, had been issued. For these reasons, the learned Judge saw it fit to cancel the bail granted to the accused.”

**In Kashi Nath Roy v. State of Bihar**

The Supreme Court held that:

“The criminal jurisprudence obtaining in this country, Court exercising bail jurisdiction normally do and should refrain from indulging in elaborate reasoning in their orders in justification of grant or non-grant of bail. For, in that manner, the principle of “presumption of innocence of an accused” gets jeopardized; and the structural principle of “not guilty till proved guilty” gets destroyed, even though all same elements have always understood that such views were tentative and not final, so as to affect the merit of the matter. Here, the appellant has been caught and exposed to a certain
adverse comment and action solely because in reasoning he had disclosed his mind while granting bail.”

In State of Maharashtra v. Ramesh Taurani\(^{90}\), the only evidence collected against the respondent was that he handed over an amount of Rs. 25 lacs to the contract killers (who according to the prosecution committed the murder of Gulshan Kumar). Apart from the fact that in the context of the prosecution case, the above circumstance incriminates the respondent in a large way, the Apex Court find that:

“The Investigating Agency has collected other incriminating material also against the respondent, to make out a strong prima facie case against him. It is trite that among other considerations which the court has to take into account in deciding whether bail should be granted in a non-bail able offence is the nature and gravity of the offence. The Supreme Court therefore was of the opinion that the High court should not have granted bail to the respondent considering the seriousness of the allegations leveled against him, particularly at a stage when investigation is continuing.”

In Dolat Ram v. State of Haryana\(^{91}\), the Supreme Court while drawing a distinction between rejection of bail in non-bail able case at the initial stage and the cancellation of bail already granted, opined:

“Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, broadly (illustrative and not exhaustive) are : interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the Court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once grated should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. These principles, it appears, were lost sight of by the High Court when it decided to cancel the bail, already granted. The High Court it appears to us overlooked the distinction of the factors relevant for rejecting bail in a non-bail able case in the first instance and the cancellation of bail already granted.”

In Ram Govind Upadhyay v. Sudarshan Singh\(^{92}\), undoubtedly, considerations applicable to the grant of bail and considerations for cancellation of

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\(^{90}\) See, AIR 1998 SC p.586  
\(^{91}\) See, 1995 (1) SCC p.349  
\(^{92}\) See, AIR 2002 SC p.1475 ; 2002 (3) SCC p.598
such an order of bail are independent and do not overlap each other, but in the event of non-consideration of consideration relevant for the purpose of grant of bail and in the event an earlier order of rejection available on the records, it is a duty incumbent on to the High Court to explicitly state the reasons as to why the sudden departure in the order of grant as against the rejection just about a month ago. The subsequent FIR is on record and incorporated therein are the charges under sections 323 and 504 IPC in which the charge-sheet have already been issued, the court ought o take note of the facts on record rather than ignoring it. In any event, the discretion to be used shall always have to be strictly in accordance with law and not de-hors the same. The High Court thought it fit not to record any reason for less any cogent reason as to why there should be a departure when in fact such a petition was dismissed earlier not very long ago. The consideration of the period of one year spent in jail cannot in the view of the Apex Court be a relevant consideration in the mater of grant of bail more so by reason of the fact that the offence charged is that of murder under Section 302 IPC having the punishment of death or life imprisonment. It is a heinous crime against the society and as such the Court ought to be rather circumspect and cautious in its approach in a mater which stands out to be a social crime of very serious nature.

The Apex Court held that:

“Grant of bail though being a discretionary order-but, however, calls for exercise of such discretion in a judicious manner and not as a mater of course. Order for Bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the mater being dealt with by the Court and facts however do always vary from case to case. While placement of the accused in the society, though may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same should and ought always be coupled with other circumstances warranting the grant of bail. The nature of the offence is on the basic consideration for the grant of bail- more heinous is crime, the greater is the chance of rejection of the bail, though, however, dependent on the factual matrix of the matter.”

The Court further held that:

“Apart from the above, certain other conditions which may be attributed to be relevant considerations may also be noticed at this juncture though however, the same are only illustrate and nor exhaustive neither there can be any. The considerations being:
(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if
the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.

(c) While it is not accepted to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the even to there being some doubt as to the gameness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.”

The Supreme Court in Uday Mohanlal Acharya v. State of Maharashtra93, held that:

“There is no provision in the Criminal Procedure Code authorizing detention of an accused in custody after the expiry of the period indicated in the proviso to sub-section (2) of S. 167 excepting the contingency not furnish the bail. It is in this since it can be stated that I after expiry of the period, an application for being released on bail is filed, and the accused offers to furnish the bail, and thereby avail of his indefeasible right and then and order of bail is passed on certain terms and conditions but the accused fails to furnish the bail, and at that point of time a challan is filed then possibly it can be said that the right of the accused stood extinguished., But so long as the accused files an application and indicates in the application to offer bail on being relapsed by appropriate orders of the court then the right of the accused on being released on bail cannot be frustrated on the oft chance of Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and challan is filed in interregnum. This is the only ways how a balance can be struck between the so-called indefeasible right of the accused on failure on the part of the prosecution to file challan within the specified period and the interest of the society at large, in lawfully preventing an accused for being released on bail on account of inaction on the part of the prosecuting agency.”

On the aforesaid premises, we would record our conclusions as follows:-

Under sub-section (2) of S. 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorize detention of the accused in such custody as the Magistrate thinks fit for a terms not exceeding 15 days in the whole.

93 See, Air 2001 SC p.1910
Under the proviso to aforesaid sub-section (2) of S. 167, the Magistrate may authorize detention of the accused otherwise than the custody of police for a total period not exceeding 90 days where the investigation releases to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the Investigating Agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnish the bail, as directed by the Magistrate.

When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/Court must dispose it of forthwith, on being satisfied the in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the Investigating Agency. Such prompt action on the part of the Magistrate/Court will not enable the prosecution on frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the Investigating Agency in completing the investigation within the period stipulated.

If the accused is unable to furnish bail, as directed by the Magistrate, then the conjoint reading of Explanation I and proviso to sub-section (2) of S. 167, the continued custody of the accused even beyond the specified period in paragraph (a) will not be unauthorized, and therefore, if during that period the investigation is complete and charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

The expression if not already availed of used by this court is Sanjay Dutt’s cases must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in paragraph (a) of proviso to sub-section (2) of S. 167 if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of his indefeasible right even though the

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court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

**State of Maharashtra v. Bharat Shanti Lal Shah**, the Supreme Court observed that:

In all these appeals the issue that falls for our consideration is the constitutional validity of the Maharashtra Control of Organized Crime Act, 1999 (for short the 'MCOCA' or the 'Act') on the ground that the State Legislature did not have the legislative competence to enact such a law and also that the aforesaid law is unreasonable and is violative of the provisions of Article 14 of the Constitution of India. Respondent Nos. 2 and 3 were arrested under the provisions of the MCOCA and cases were registered against them. Being aggrieved by the aforesaid arrest and registration of cases both of them filed separate writ petitions being Criminal Writ Petition No. 1738/2002 and Criminal Writ Petition No. 110/2003 respectively in the Bombay High Court challenging the constitutional validity of the MCOCA, particularly the provisions of Section 2(d), (e) and (f) and that of Sections 3, 4 and 13 to 16 and Section 21(5) of the MCOCA. Respondent no. 1 also filed a writ petition of similar nature being Criminal Writ Petition No. 27/2003. The supreme Court held:

A. Maharashtra Control of Organized Crimes Act, 1999, Section 2(d)(e) and (f) - Constitution of India, 1950, Article 13(2) and 14 - Constitutional validity - Determination - Section 2(d)(e) and (f) defines "continuing unlawful activity", "Organized Crime" and "Organized Crime Syndicate" - High Court upheld that constitutionality of said provisions - No appeal was filled by any of the respondents against the order of High Court - Only a passing reference is made on the said issue which was refused to be gone into by Supreme Court - No vagueness as definitions defined with clarity - Court found that there is no violation of Article 14 as said Section treat all definitions in like manner and does not suffer from the vice of class legislation.

B. Maharashtra Control of Organized Crimes Act, 1999, Section 3(3) and (5) - Organized Crime - Punishment - Determination of its constitutionality - Sections 3(3) and (5) challenged on the ground that requirement of mens rea is done away with - However in criminal law mens rea is always presumed as integral part of

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95 See, 2008(10) J.T. 77 : 2008(12) Scale 167
penal offence until specifically excluded - No such exclusion is found in said provisions - Held, aforesaid provisions are not ultra vires constitution - No reasons to interfere with findings of High Court.

C. Maharashtra Control of Organized Crimes Act, 1999, Section 4 - Prospective in nature - Punishment for possessing unaccountable wealth - Constitutional validity - Section 4 challenged on the ground that word "at any time" makes an act which was not a crime prior to enactment, a crime, thus makes the provision retrospective - Object and purpose of the enactment reveals that it is only prospective - High Court rightly held that words "at any time" should be read to mean at any time after coming into force of MCOCA - Provision not ultra vires - No interference warranted.

D. Interpretation of Statutes, Constitution of India, 1950, Schedule - Construction of entries in the lists - Rules of Interpretation - Legislative entries should be liberally interpreted and none of the items in the list is to be read in a restricted sense - Each general word should be held to extend to ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.

E. Constitution of India, 1950, Articles 254, 245 and 246 - Inconsistency - Question of repugnancy under Article 254 arise only in connection with subject enumerated in concurrent list - Mere possibility of repugnancy will not make a state law invalid - Repugnancy has to exist in fact and it must be shown clearly and sufficiently that state law is repugnant to Union law.

F. Maharashtra Control of Organized Crimes Act, 1999, Sections 13 to 16 - Constitution of India, 1950, Article 21 - Telegraph Act, 1885, Section 5(2) - Telegraph Rule, 1951, Rules 419-A(1) and 5 - Constitutionality of Provisions - Interception of conversation constitutes invasion of an individual right to privacy - However said right can be curtailed in accordance with established procedure - Object of MCOCA is to prevent the organized crime - Perusal of the provisions of Act of 1999 authorizes the interception of wire, electronic and oral communication either to prevent the communication either to prevent the commission of an organized crime or if it is intended to collect the evidence to the commission of such an organized crime - Moreover procedures authorizing interception also provided therein enough safeguard within the Act - Held, Sections 13 to 16 are not ultra vires of Article 21.
G. Maharashtra Control of Organized Crime Act, 1999, Sections 13 to 16 - Constitution of India, 1950, Articles 14, 245 and 246 - Schedule VII, List 1, Entry 31, List II, Entries 1 and 2 and List III Entries 2 and 12 - Constitutionality to Sections 13 to 16 - Subject matter of the Act of 1999 is maintaining public order and prevention by police of commission of serious offences affecting public order - Said Act deals the matters relatable to Entry 1 and 2 of State List and Entry 1, 2 and 12 of the Concurrent List - After enactment assent of the President was also obtained and received - Main purpose of the Act of 1999 is within purview of State list - Hence no reason to hold Sections 13 to 16 as ultra vires merely because said Act has an incidental encroachment upon scope of the Union list.

H. Telegraph Act, Section 5 - Temporary possession of telegraph - Pre-conditions - Section 5 gives power to Central as well as State Government or any authorized officer to take temporary possession of any telegraph - However pre-condition for such possession and preventing transmission of any message is that it should be done in case of public emergency or maintaining of Public Safety.

I. Telegraph Act, 1885, Section 4 - Telegraphs - Under Section 4 of 1885 Act Central Government has been given exclusive privilege in establishing, maintaining and working telegraphs.

J. Maharashtra Control of Organized Crimes Act, 1999, Section 21(5) - Constitution of India, 1950, Articles 14 and 21 - Constitutionality of Section 21(5) - Whether a person accused of an offence under MCOCA should be denied bail if on the date of the offence he is on bail for an offence under MCOCA or any other Act - High Court found the expression "or under any other Act" is arbitrary and accordingly struck down being violative of Articles 14 and 21 - Held object of MCOCA is to prevent organized crime - Restriction on the right to seek bail to a person who is on bail after being arrested for violation of law unconnected with MCOCA is against the object of the Act - Hence, Order of High Court upheld.

K. Constitution of India, 1950, Articles 245 and 246 and Schedule VII - Enactment - Legislative competence - Doctrine of Pith and Substance - Scope - Legislative competence of an enactment can be proved by the doctrine of pith and substance - Court has to look at the substance of the State Act - Held, State Act will not become invalid merely because there is incidental encroachment on any of the topics of the Union List.
State of Maharashtra v. Bhaurao Punjabrao Gawande, the Supreme Court held that:

The present appeal is filed by the State of Maharashtra and others against the sole respondent (original petitioner) against the judgment and order passed by the High Court of Judicature at Bombay (Nagpur Bench) on October 17, 2006 in Writ Petition No. 372 of 2006. By the impugned order, the High Court (partly) allowed the petition filed by the detenu-writ petitioner and set aside the order of detention dated July 27, 2006 passed by the Commissioner of Police (Nagpur City) under the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980.

The case of the appellants is that one Bhaurao Punjabrao Gawande (detenu) was running a business of transportation of petroleum products and had fleet of tankers for carrying on the said occupation. He was indulging in illegal purchase and sale of blue kerosene oil in black market since last five to six years. Certain cases were also registered against the said Bhaurao under the Essential Commodities Act, 1955 (hereinafter referred to as '1955 Act'). In view of continuous activities of Bhaurao in black-marketing of essential commodity (Kerosene), the Commissioner of Police (appellant No. 2 herein), in exercise of power conferred on him by subsection (1) read with Clause (b) of subsection (2) of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (hereinafter referred to as 'the Act') directed that the said Bhaurao be detained. Grounds of detention were sought to be served to the detenu on the same day.

Preventive Detention - Bail cannot be granted in habeas corpus proceedings directed against orders of detention.

Order Preventive detention - Court can interfere at prosecution stage, but in exceptional cases with extreme care and caution.

A. Constitution of India, Article 226 - Preventive detention - Order of Preventive detention cannot be set aside by Writ Court at pre-execution or pre-arrest stage unless then are exceptional - Circumstances specified in the case of 1991(1) RCR(Criminal) 677 (SC) which are as under :-

(i) Obligation to furnish to the detenu the grounds of detention;

(ii) Right to make representation against such action;
(iii) Constitution of Advisory Board consisting of persons who are or have been qualified to be appointed as Judges of the High Court;
(iv) Reference of the case of the detenu to the Advisory Board;
(v) Hearing of the detenu by the Advisory Board in person;
(vi) Obligation of the Government to revoke detention order if the Advisory Board so opines;
(vii) Maximum period for which a person can be detained;
(viii) Revocation of detention order by the Government on the representation by the detenu, etc.

Further held:-
Interference by a Court of Law at that stage must be an exception rather than a rule and such an exercise can be undertaken by a Writ Court with extreme care, caution and circumspection. 1991(1) RCR(Criminal) 677 (SC) relied.

B. Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, Section 3(1) - Indulging in Black Marketing of Kerosene which is an essential commodity - Several cases instituted against him - Authority passed an order with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies of commodities to the community" i.e. selling of kerosene in black market - Order upheld. 1991(1) RCR(Criminal) 677 (SC) relied.

C. Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, Section 3(1) - Preventive Detention - Order must be preventive and not punitive in nature.

D. Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, Section 3(1) - Preventive Detention - Satisfaction of the Detaining Authority is 'subjective' in nature and the Court cannot substitute its 'objective' opinion for the subjective satisfaction of Detaining Authority - That, however, does not mean that the subjective satisfaction of Detaining Authority is wholly immune from judicial reviewability - By judicial decisions, courts have carved out areas, though limited, within which the validity of subjective satisfaction can be tested judicially.

E. Constitution of India, Articles 226 and 227 - Personal liberty is a precious right - Writ of habeas corpus is writ of habeas corpus has been described as "a great constitutional privilege" or "the first security of civil liberty" - By this writ, the
Court directs the person or authority who has detained another person to bring the body of the prisoner before the Court so as to enable the Court to decide the validity, jurisdiction or justification for such detention.

F. Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, Section 3(1) - Constitution of India, Article 226 - Preventive Detention - Meaning and concept :-

(i) There is no authoritative definition of 'preventive detention' either in the Constitution or in any other statute - The expression, however, is used in contradistinction to the word 'punitive'.

(ii) It is not a punitive or penal provision but is in the nature of preventive action or precautionary measure.

(iii) Primary object of preventive detention is not to punish a person for having done something but to intercept him before he does it.

(iv) It is not a penalty for past activities of an individual but is intended to pre-empt the person from indulging in future activities sought to be prohibited by a relevant law and with a view to preventing him from doing harm in future.

(v) Power of detention is not a quasi-judicial power.

G. Constitution of India, Article 226 - Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, Section 3(1) - Essential Commodities Act, Section 7 - Petitioner selling Kerosene Oil in black market which is essential commodity - Activities ranged from year 2002 to 2006 - Several cases registered against him - Order of preventive detention passed against him - Petitioner absconded and did not surrender - Petitioner could challenge the order before execution if the order was for wrong purpose - Order of detention to prevent the petitioner from selling Kerosene Oil in black market was not a wrong purpose - Order could not be set aside at pre-execution stage. 1991(1) RCR (Criminal) 677 (SC) relied.

H. Preventive detention - Power of detention is not a quasi-judicial power.

I. Preventive detention - An order of detention can be challenged on certain grounds such as :-
(i) Order is not passed by the competent authority, condition precedent for the exercise of power does not exist;
(ii) Subjective satisfaction arrived at by the Detaining Authority is irrational
(iii) The order is mala fide; there is non-application of mind on the part of the Detaining Authority in passing the order; the grounds are, or one of the grounds is, vague, indefinite, irrelevant, extraneous, non-existent or stale; the order is belated;
(iv) Person against whom an order is passed is already in jail; the order is punitive in nature; the order is not approved by State/Central Government as required by law;
(v) Failure to refer the case of the detenu to the Board constituted under the statute;

J. Constitution of India, Article 226 - Essential Commodities Act, 1955, Section 7 - Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, Section 3(1) - Preventive detention - Petitioner was indulging in illegal activities of black marketing of kerosene which was an essential commodity - Several cases registered against him - Order of prevention - Petitioner not surrendering but filing writ before execution of order - It is not a case where writ could be maintained at pre-execution stage. 1991(1) RCR (Criminal) 677 (SC) relied.


L. Preventive detention and Punitive detention - Preventive detention is a precautionary measure and is intended to pre-empt a person from indulging in illegal or anti-social activities in order to safeguard the defence of India, public safety, maintenance of public order, maintenance of supplies and services essential to the life of the community, prevention of smuggling activities. (1966)3 SCR 344 relied.
In Savitri Goenka v. Kusum Lata Damant, the Supreme Court observed many points that:

“We find that the impugned order of the High Court cannot be maintained on one ground. Though it had issued notice to the appellant, the matter was disposed of without hearing the appellant. It appears that respondent no.1 had filed the bail application, that is, Criminal Misc. Petition No.2945/2004 on 10.12.2004. The court directed service on the appellant. There is no dispute that there was no service of notice on the appellant. According to the appellant, on learning about the proceedings, Criminal Misc. Application No.4653/05 was filed in Criminal Miscellaneous Application No.2945/04. The High Court was pleased to issue notice on 14.7.2005 on the said application and the High Court directed the accused to implead the appellant. Learned Additional Sessions Judge dismissed the bail application of the accused, respondent No.1 on the ground that relief had already been obtained by her from the High Court. On 22.9.2005, without service on the appellant, the High Court converted the application under Section 482 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.'), to one under Section 438 Cr.P.C. and granted interim protection. Learned counsel for the appellant submitted that several facts were suppressed. By giving wrong impression about the factual scenario, the appellant persuaded the High Court to pass the impugned order. In response, learned counsel for the respondent submitted that there is in fact no infirmity in the order. In any event, the charge sheet has been filed and respondent no.1-accused has already been granted regular bail. A copy of the order passed on the bail application has been filed for records.

It is to be noted that the practice of converting applications filed under Section 482 Cr.P.C. to one for bail in terms of Section 438 or 439 Cr.P.C. has not been approved by this Court. Additionally, direction was given for issuance of notice and service on the appellant which has not been done by respondent no.1-accused. The fact that the charge-sheet has been filed or bail has been granted is really of no consequence because of the fact that relief in the regular bail application appears to have been granted to respondent no.1 in view of the interim protection given by the High Court to the accused by the impugned order.”

A. Criminal Procedure Code, 1973, Sections 439, 438, 204, 228, 240 and 482 - Bail
- Notice – Trail Court dismissed the bail application on the ground that relief has already been obtained by her from the High Court - High Court, without service of the appellant, converted the application under Section 482 CrPC to one under Section 438 of Cr.P.C and granted interim protection and thereafter granted regular

bail after filing charge-sheet - Conversion of application under Section 482 to one for bail in terms of Section 438 or 439 has not been approved by the Supreme Court - The direction given by the Court for service of notice to appellant as not complied with - Filing of charge-sheet and grant of regular bail will be of no consequence since relief in regular bail application granted to the accused in view of interim protection granted by High Court to the accused by impugned order - Impugned order set aside - Matter remanded for fresh consideration by the High Court.

B. Criminal Procedure Code, 1973, Sections 482, 439 and 438 - Conversion of application under Section 482 to one for bail or anticipatory bail is not in terms of Section 438 or 439 is not proper.

In view of the aforesaid position, the impugned order is set aside and the matter is remanded for fresh consideration. We make it clear that we have not expressed any opinion on the merits of the case. To avoid unnecessary delay let the parties appear without further notice on 23rd November, 2007, before learned Single Judge. If any party does not appear on that day, needless to say learned Single Judge shall deal with the matter in accordance with law. Learned Chief Justice of the High Court is requested to direct listing of the matter before learned Single Judge according to the roaster.

The appeal is allowed to the aforesaid extent.

iii) Trial

A criminal trial is not like a fairy tale wherein one is free to give flight to one’s imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the Courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures.98

The Court taking the plea of the previous case **State of Maharashtra v. Chandra Prakash Kewalchand Jain**

99, in which Ahmadi, J, (as the Lord Chief Justice then was) speaking for the Bench summarized the position in the following words:

“A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in case of physical violence. The same degree of care and caution must attach in the valuation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge leveled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction of her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.”

As a result of the aforesaid discussion, the Apex Court held that:

“The prosecutrix has made a truthful statement and the prosecution has established the case against the respondents beyond every reasonable doubt. The trial court fell in error in acquitting them of the charges leveled against them. The appreciation of evidence by the trial court is not only unreasonable but perverse.”

**State of Punjab v. Gurmit Singh**

100, on 30th March, 1984 the sufferer girl was forcibly abdicated by four desperate persons who were out and out to molest her honour. It has been admitted by the prosecutrix that she was taken through the bus adda of Pakhowal via metalled road. It has come in the evidence that it is a busy

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99 See, AIR 1990 SC p.658
100 See, AIR 1996 SC p.1393
centre. In spite of that fact she has not raised any alarm, so as to attract persons that
she was being forcibly taken. The height of her own unnatural conduct is that she
was left by the accused at the same point on the next morning. The accused would
be the last person to extend sympathy to the prosecutrix. Had it been so, the natural
conduct of the prosecutrix was first to reach to the house of her maternal uncle to
apprise him that she had been forcibly abduced on the previous day. The witness
after her being left at the place of abduction lightly takes her examination. She does
not complaint to the lady teachers who were deployed to keep a watch on the girl
students because these students are to appear in the centre of Boys School. She does
not complain to anybody or her friend that she was raped during the previous night.
She prefers her examination rather than to go to the house of her parents or relations.
Thereafter, she goes to her village Mangal Kalan and informs for the first time her
mother that she was raped on the previous night. This part of the prosecution story
does not look to be probable.

The trial court, thus, disbelieved the version of the prosecutrix basically for
the reasons:-

“she is so ignorant about the make etc, of the care that entire story
that she was abducted in the car becomes doubtful” particularly
because she could not explain the difference between a Fiat car,
Ambassador Car or a Master Car;
the Investigating officer had “shown pitiable negligence” during the
Investigation by not tracing out the car and the driver,
that the prosecutrix did not raise any alarm while being abducted
even though she had passed through the bus adda of village Pakhowal
that the story of abduction” has been introduced by the prosecutrix or
by father or by the Thanedar just to give the gravity of offence and
that no corroboration of the statement of the prosecutrix was
available on the record and the story that the accused had left her
near the school next morning was not believable because the accused
could have no “sympathy” for her.”

In State of M.P. v. Mohan Lal Soni\textsuperscript{101}, the Supreme Court observed that:

“The object of providing such an opportunity as is envisaged in
Section 227 of the Code is to enable the Court to decide whether it is
necessary to proceed to conduct the trial. If the case ends there it
gains a lot of time of the court and saves much human efforts and
cost.

\textsuperscript{101} See, AIR 2000 SC p.2583; 2000 (6) SCC p.338
If the material produced by the accused even at that early stage would clinch the issue, why should the court shut it out saying that such documents need be produced only after waiting a lot more time in the name of trial proceeding? Hence, we are of the view that Sessions Judge would be within his power to consider even materials which the accused may produce at the stage contemplated in Section 227 of the code.”

In Shaliendra Kumar v. State of Bihar102, the Supreme Court was of the view that:

“In a murder trial it is sordid and repulsive matter that without informing the police station officer-in-charge, the matters are proceeded by the court and by the APP and tired to be disposed of as if the prosecution has not led any evidence. From the facts stated above, it appears that accused wants to frustrate the prosecution by unjustified means and it appears that by one way or the other the addl. Sessions judge as well as the APP has not taken any interest in discharge of their duties. It was the duty of the session’s judge to issue summons to the investigating officer if he failed to remain present at the time of trial of the case. The presence of investigating officer at the time of trial is must. It is his duty to keep the witnesses present, it is the duty of the court to take appropriate action including issuance of bail able/non-bail able warrants as the case may be. It should be well understood that prosecution cannot be frustrated by such methods and victims of the crime cannot be left in lurch.”

In Surender Singh Rautela v. State of Bihar103, the Supreme Court submitted that:

“The High Court was not justified in enhancing the punishment awarded against this appellant from imprisonment for life to death sentence as no appeal under section 377 of the Code of criminal procedure, 1973 was filed by the state for enhancement of sentence. It has been further submitted that no opportunity of hearing was afforded to appellant Surendra Singh Rautela against the enhancement of sentence. It is well settled that the High Court, suo Motu in exercise of revisional jurisdiction can enhance the sentence of an accused awarded by the trial court and the same is not affected merely because an appeal has been provided under section 377 of the Code for enhancement of sentence and no such appeal has been preferred.”

It has been settled by the Apex Court in previous cases104 that:

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102 See, AIR 2002 SC p.270
“the suo motu powers of enhancement under revisional jurisdiction can be exercised only after giving opportunity of hearing to the accused.”

In State of Karnataka v. M. Devendrappa and others\(^\text{105}\), the Supreme Court noted that:

“The powers possessed by the High Court under Section 482 of the code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage.

The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out.”

In some detail by the Apex court in State of Haryana and others v. Ch. Bhajan Lal and others\(^\text{106}\), a note of causation was, added by the Apex court that the power should be exercised sparingly and that too in rarest of rare cases. The illustrative categories indicated by this court are as follows:-

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

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

Where the uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

Where the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation

\(^{105}\text{See, AIR 2002 SC p.671; Also see , The Janata Dal etc. v. H.S. Chaudhary and ors etc AIR 1993 SC 892 ; Dr. Raghurib Sarwan v. State of Bihar and Anr, AIR 1964 SCp.1}

\(^{106}\text{See, AIR 1992 SC p.604}
is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

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

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

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

**In Noor Aga v. State of Punjab,¹⁰⁷**

The Apex Court lays down very important principal regarding trial in this famous case, Hon S.B. Sinha,J. discribed trial, the crush of the case under:-

Appellant is an Afghan national he was arrested and later on prosecuted under Sections 22 and 23 of the Act allegedly for carrying 1 kg 400 grams of heroin as a member of crew of Ariana Afghan Airlines. Appellant arrived at Raja Sansi Airport at about 6 p.m. on 1.08.1997.

He presented himself before the authorities under the Customs Act, 1962 (for short "the Customs Act") for customs clearance. He was carrying a carton with him said to be containing grapes. The cardboard walls of the said carton were said to have two layers. As some concealment in between the layers was suspected by one Kulwaint Singh, an Inspector of the Customs Department, the appellant was asked as to whether he had been carrying any contraband or any other suspicious item. Reply thereto having been rendered in the negative, a search was purported to have been conducted.

Several questions of grave importance including the constitutional validity of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act"), the standard and extent of burden of proof on the prosecution vis-a-vis accused are in question in this appeal which arises out of a judgment and order dated 9.06.2006 passed by the High Court of Punjab and Haryana in Criminal Appeal No. 810-SB of

2000, 2006(4) RCR(Crl.) 151 (P&H) whereby and where under an appeal filed by the applicant against the judgment of conviction and sentence dated 7.6.2000 under Section 22 and 23 of the Act has been dismissed.

Accused may be convicted on retracted confessional statement provided it was voluntary - Burden of proving that confession was voluntary is on prosecution. Custom Officer is a deemed Police Officer under NDPS Act - Confession made by accused before Custom Officer is hit by Section 25 of Evidence Act. Provisions of Sections 35 and 54 of NDPS Act are not ultra vires of constitution.

A. Narcotic Drugs and Psychotropic Substances Act, 1985, Section 53(2) - Evidence Act, Section 25 - Customs Act, 1962, Section 108 - Recovery of contraband made by Custom Officer - Confession made by accused before Custom Officer - Confession is hit by Section 25 of Evidence Act - Custom Officers have been invested with power of Police Officer under Section 53(2) of NDPS Act - Custom Officer would thus be a deemed Police Officer for purpose of Section 25 of Evidence Act - A legal fiction must be given full effect - Confession made under Section 108 of Customs Act cannot be the sole bases of conviction - Conviction in the instant case set aside.

B. Narcotic Drugs and Psychotropic Substances Act, 1985, Sections 35 and 54 - Provision of Sections 35 and 54 are not ultra vires the Constitution of India - It was submitted that provisions of Sections 35 and 54 of the Act being draconian in nature imposing reverse burden on an accused be held to be ultra vires Articles 14 and 21 of the Constitution of India - Contention repelled - Held :-

The Act contains draconian provisions - It must, however, be borne in mind that the Act enacted having regard to the mandate contained in International Conventions on Narcotic Drugs and Psychotropic Substances - Only because the burden of proof under certain circumstances is placed on the accused, the same, by itself, would not render the impugned provisions unconstitutional.

C. Narcotic Drugs and Psychotropic Substances Act, 1985, Sections 22 and 23 - Recovery of contraband - There were number of discrepancies with regard to weight contraband and sample - Samples and case property not produced in court - Conviction set aside taking into consideration cumulative effect of discrepancies.

D. Customs Act, 1962, Section 168 - Evidence Act, Section 25 - Retracted confession - A confession made by accused but retracted - Evidentiary value of retracted confessional statement - Held :-

A retracted confessional statement may be relied upon if it is made voluntary - The burden of proving that such a confession was made voluntarily would be on the prosecution. 2007(1) R.C.R.(Crl.) 468 : 2007(1) R.A.J. 24 (SC) relied.

E. Customs Act, 1962, Sections 108, 138-B - Confessional statement of an accused made under Section 108 - Cannot be made use of in any manner under Section 138B of the Customs Act - Even otherwise such an evidence is considered to be of weak nature. 1985(2) BomCR 499 approved.

F. Narcotic Drugs and Psychotropic Substances Act, 1985, Sections 22 and 23 - Physical evidence - Recovery of heroin from accused by custom officers at airport - Following discrepancies found in the case :-

(i) Sample set to laboratory - Original weight of sample was 5 grams but weight of the sample in the laboratory was recorded as 8.7 grams.

(ii) Initially color of the sample as recorded was brown, but as per chemical examination, colour of powder was recorded as white.

(iii) Sample had been kept at the airport for a period of three days - They were not deposited at the malkhana.

(iv) The bulk was kept in cotton bags as per the Panchnama, while at the time of receiving them in the malkhana, they were packed in tin as per the deposition of PW.

(v) The seal was not even deposited in the malkhana - As no explanation whatsoever has been offered in this behalf, it is difficult to hold that sanctity of the recovery was ensured.

(vi) Physical evidence of a case of this nature being the property of the court should have been treated to be sacrosanct - Non-production thereof would warrant drawing of a negative inference within the meaning of Section 114(g) of the Evidence Act - While there are such a large number of discrepancies, if a cumulative effect thereto is taken into consideration on the basis whereof the permissive inference would be that serious doubts are created with respect of the prosecution's endeavour to prove the fact of possession of contraband

G. Narcotic Drugs and Psychotropic Substances Act, 1985, Sections 52A and 53 - Customs Act, 1962, Section 110(IB) - Physical evidence - Case Property - Recovery of heroin from accused - Case property destroyed and not produced - Physical evidence relating to three samples taken from the bulk amount of heroin were also not produced - Bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52A of the Act.

H. Customs Act, 1962, Section 108 - Narcotic Drugs and Psychotropic Substances Act, 1985, Sections 22 and 23 - Scope of Section 108 of Customs Act - Enquiry contemplated under Section 108 of Customs Act is for the purpose of Customs Act and not for the purpose of convicting an accused under any other statute including the provisions of NDPS Act.

I. Evidence Act, Sections 101, 102, 103, 106 - Burden of proof - Doctrine of res ipsa loquitur providing for a reverse burden has been applied not only in civil proceedings but also in criminal proceedings.

J. Evidence Act, Section 114 - Evidence Act, Section 41 - Presumption of innocence of accused - Presumption of innocence is a human right - Presumption of innocence being a human right cannot be thrown aside, but it has to be applied subject to exceptions - Independence of judiciary must be upheld - The superior courts should not do something that would lead to impairment of basic fundamental and human rights of an accused.

K. Narcotic Drugs and Psychotropic Substances Act, 1985, Section 50 - Recovery of 1.40 Kgs of heroin - Prosecutions version that accused was given option of search before Magistrate or Gazetted Officer before two independent witnesses - Independent witness not examined - Nothing on record to show why they could not be produced - Their status in life or location had also not been stated - Nothing on record to show that the said witnesses had turned hostile - Examination of the independent witnesses was all the more necessary inasmuch as there exist a large number of discrepancies in the statement of official witnesses in regard to search and seizure - Accused has been greatly prejudiced by their non examination - In the instant case conviction set aside as there were number of other discrepancies.
L. Constitution of India, Article 21 - Narcotic Drugs and Psychotropic Substances Act, 1985, Section 15 – Fair trial - A fair trial is a human right - Every action of the authorities under the Act must be construed having regard to the provisions of the Act as also the right of an accused to have a fair trial - The courts, in order to do justice between the parties, must examine the materials brought on record in each case on its own merits - Marshalling and appreciation of evidence must be done strictly in accordance with the well known legal principles governing the same; where for the provisions of the Code of Criminal Procedure and Evidence Act must be followed - Appreciation of evidence must be done on the basis of materials on record and not on the basis of some reports which have nothing to do with the occurrence in question.

M. Narcotic Drugs and Psychotropic Substances Act, 1985, Section 50 - Recovery contraband - Statement of Investigating Officer that accused was given option of search before Magistrate or Gazetted officer - This fact was not mentioned in Panchnana - Independent witness before whom option was made not examined - Not believed that option was given.

N. Customs Act, Section 108 - Narcotic Drugs and Psychotropic Substances Act, 1985, Sections 53, and 54 - Narcotic Drugs and Psychotropic Substances Act, 1985, Sections 22 and 23 - Recovery of contraband by Custom Officer at confession made by accused under Section 108 of Customs Act, but retracted - Confession under Section 108 of Customs Act cannot be made sole basis of conviction - Conviction set aside on the instant case.

In State of Maharashtra v. Sujay Mangesh Poyarekar, the Supreme Court held that:

Acquittal of accused - Revision against acquittal by de facto complainant dismissed - Even after dismissal of revision State is competent to file appeal. Order of acquittal - State filing application before High Court for grant of leave to file appeal - High Court rejected the application by a brief order that order of trial court was not perverse - Such a brief order of High Court set aside - High Court should give reasons for rejection:-

A. Criminal Procedure Code, Section 378(3) - Acquittal of accused by trial court - State filing application before High Court under Section 378(3) of Cr.P.C. for leave

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to prefer appeal - In deciding question whether leave should or should not be
granted, the High Court must apply its mind, consider whether prime facie case has
been made out or arguable points have been raised and not whether the order of
acquittal would or would not be set aside - Further held:-
Court would not enter into minute details of the prosecution evidence and refuse
leave observing that the judgment of acquittal recorded by the trial Court could not
be said to be 'perverse' and, hence, no leave should be granted.
B. Indian Penal Code, Section 378 - Criminal Procedure Code, Section 401 - Appeal
and revision - Accused acquitted in a criminal offence registered by Police - De
facto complainant filing revision - Revision dismissed - State can still file appeal
under Section 378 Cr.P.C.
C. Constitution of Indian, Article 21 - Duty of State when criminal offence is
committed - Held:-
Now, every crime is considered as an offence against the Society as a whole and not
only against an individual even though it is an individual who is the ultimate sufferer
- It is, therefore, the duty of the State to take appropriate steps when an offence has
been committed.
D. Criminal Procedure Code, Section 378 - Appeal against order of acquittal - High
Court has full power to re-appreciate, review and reweigh at large the evidence on
which the order of acquittal is founded and to reach its own conclusion on such
evidence - Both questions of fact and of law are open to determination by the
appellate Court - If appellate court passed order of conviction such conviction
cannot be said to be contrary to law - Following principles may be followed while
dealing will an appeal against order of acquittal:-

(i) An appellate Court has full power to review, re-appreciate and
reconsider the evidence upon which the order of acquittal is founded;
(ii) The Code of Criminal Procedure, 1973 puts no limitation, restriction
or condition on exercise of such power and an appellate Court on the
evidence before it may reach its own conclusion, both on questions of
fact and of law;
(iii) Various expressions, such as, 'substantial and compelling reasons',
'good and sufficient grounds', 'very strong circumstances', 'distorted
conclusions', 'glaring mistakes', etc. are not intended to curtail
extensive powers of an appellate Court in an appeal against acquittal -
Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

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

(v) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court. 2007(2) RCR (Criminal) 92: 2007(1) RAJ 841 (SC) relied.

E. Criminal Procedure Code, Section 378 - Appeal against order of trial Court – Right to file appeal lies in the doctrine of human fallibility that 'Men are fallible' and 'Judges are also men'.

F. Indian Penal Code, Section 307 - Criminal Procedure Code, Section 378 - Criminal Procedure Code, Section 401 - Acquittal of accused in an FIR under Section 307 IPC - It was a Police case - De facto complainant can file revision, but not an appeal - Further held :-

Revisional jurisdiction can be exercised sparingly and only in exceptional cases - A revisional Court cannot convert itself into a regular Court of Appeal.

G. Criminal Procedure Code, Section 378 - Appeal against the order of acquittal - High Court has full power to re-appreciate, review and reweigh at large the evidence on which the order of acquittal is founded and to reach its own conclusion on such evidence. 2007(2) RCR (Criminal) 92: 2007(1) RAJ 841 (SC) relied.

State of West Bengal v. Kailash Chandra Pandey,109

The Supreme Court held in this case:

A. Prevention of Corruption Act, 1988, Sections 7 and 16 - Accused demanded Rs. 5000/- from contractor for passing his bills - Trap laid and currency notes of said amount recovered from accused - Prosecution case duly proved by cogent evidence - It is no ground to disbelieve the prosecution story that the bills in question were passed prior to the alleged tender of the money to the accused - It was only meant to facilitate smooth release of the money as per the bills.

B. Prevention of Corruption Act, 1988, Sections 16 and 7 - A trap laid and currency notes recovered from accused - Just because the notes were not sent for F.S.L. examination, it cannot be a ground to disbelieve the prosecution story.

C. Prevention of Corruption Act, 1988, Sections 16 and 7 - Accused received the currency notes by right hand, but put the same in left side pocket of his pant – Right hand and left side pocket of pant were put in water which turned pink - When a man accepts anything in the right hand in normal course of human conduct and if he has kept the money in the left hand pocket the prosecution cannot be held responsible.

D. Prevention of Corruption Act, 1988, Sections 7 and 16 - A trap laid by police and bribe money recovered from accused - Accused refused to sign the seizure list - No accused can be forced to put his signature and the prosecution cannot force him to append his signature on the seizure memo if he refused to sign - Therefore, just because the accused did not append the signature on the seizure memo that cannot be a ground to improbablise the prosecution story.

E. Criminal - Cosmetic contradictions in statements of witnesses cannot improbablise the prosecution story.

F. Prevention of Corruption Act, 1988, Sections 7 and 16 - Trap laid and bribe money recovered from accused - Accused acquitted by High Court on following ground, but Supreme Court set aside order of acquittal:

(i) Currency notes were not sent to the Forensic Laboratory for chemical examination.
(ii) Pyjama which was given to the accused to wear after taking the pant, the same was not produced.
(iii) Money was kept in the left hand pocket but the hand wash was taken of the right hand.
(iv) Amount covered by the impugned bills had already been released prior to the alleged tender of the money.
(v) Envelope containing the alleged money was not produced.
(vi) Supreme Court set aside order of acquittal and found that above infirmities did not improbablise the prosecution when prosecution proved its case by cogent evidence.

G. Criminal Procedure Code, Section 378 - Appeal against acquittal - Appellate Court should be slow in re-appreciating the evidence – Trial Court which has the occasion to see the demeanour of the witnesses and it is in a better position to appreciate it, the appellate Court should not lightly brush aside the appreciation done by the trial Court except for cogent reasons. AIR 1974 SC 1168 and 2003(3) RCR (Crl.) 875 (SC) relied.

D) **Correctional Institutions and Judicial Interpretation**

You cannot rehabilitate a man through brutality and disrespect…. If you treat a man like an animal, then you must expect him to act like one. For every action there is a reaction …. And in order for an inmate, to act like a human being you must trust him as such…. You can’t spit in his face and expect him to smile and say thank you.

The problem of law, when it is called upon to defend persons hidden by the law is to evolve a positive culture and higher consciousness and preventive mechanisms, sensitized strategies and humanist agencies will bring healing balm to bleeding hearts. Indeed, counsel on both sides carefully endeavored to help the court to evolve remedial processes and personal within the framework of the Prisons Act and the parameters of the Constitution\(^{110}\).

i) **Prison**

Prisons are built with stones of law and so it behaves the court to insist that, in the eye of law, prisoners are persons, not animals, and punish the deviant ‘guardians’ of the prison system where they go berserk and defile the dignity of the human inmate. Prison houses are part of Indian earth and the Indian Constitution cannot be held at bay by jail officials ‘dressed in a little, brief authority’, when part-III is invoked by a convict. For when a prisoner is traumatized, the Constitution suffers a shock. And when the court takes cognizance of such violence and violations, it does like the hound of Heaven, ‘But with unhurrying chase. And

\(^{110}\) See, Sunil Batra v. Delhi Administration, AIR 1980 SC p.1579
unperturbed pace, deliberate speed and Majestic instancy, follow the official offender and frown down the outlaw adventure.111

In Gopal Vinayak Godse v. State of Maharashtra112, the Supreme Court decided that:

“The Prisons Act does not confer on any authority a power to commute or remit sentences; it provides only for the regulation of prisons and for the treatment of prisoners confine therein. Section 59 of the Prisons Act confers a power on the state Government to make rules, inter alia, for rewards for good conduct. Therefore, the rules made under the Act should be construed within the scope of the ambit of the Act. The rules, inter alia, provide for three types of remissions by way of rewards for good conduct, namely, (i) ordinary, (ii) special and (iii) State. For the working out of the said remissions, under rule 1419 (c) transportation for life is ordinarily to be taken as 15 years’ actual imprisonment. The rule cannot be construed as a statutory equation of 15 years’ actual imprisonment for transportation for life. The equation is only for a particular purpose, namely, for the purpose of “remission system” and not for all purposes. The word “ordinarily” in the rule also supports the said construction. The non obstante clause in sub rule (2) of rule 1447 reiterates that notwithstanding anything contained in rule 1419 no prisoner who has been sentenced to transportation for life shall be released on completion of his term unless orders of Government have been received on a report submitted to it. This also indicates that the period of 15 years’ actual imprisonment specified in the rule is only for the purpose of calculating the remission and that the completion of the term on that basis does not ipso facto confer any right upon the prisoner to release. The order of Government contemplated in rule 1447 in the case of a prisoner sentenced to transportation for life can only be an order under S. 401 of the code of criminal procedure, for in the case of a sentence of transportation for life the release of the prisoner can legally be effected only by remitting the entire balance of the sentence. Rules 934 and 937 (c) provide for that contingency. Under the said rules the orders of an appropriate Government under S. 401 Criminal Procedure Code, are a pre-requisite for a release. No other rule has been brought to our notice which confers an indefeasible right on a prisoner sentence to transpiration for life to an unconditional release on the expiry of a particular term including remissions. The rules under the Prisons Act o not substitute a lesser sentence for a sentence of transportation for life.’’

In Maneka Gandhi v. Union of India113, the ‘meaning of life’ given by the filed J. bears exception that:

111 See, Ibid
112 See, AIR 1961 SC p.600
113 See, 1978(1) SCC p.248; AIR 1978 SC p.597
“Something more than mere animal existence. The inhibition against
its deprivation extended to all those limbs and faculties by which life
is enjoyed. The provision equally prohibits the mutilation of the body
by the amputation of an arm or leg. Or the putting out of an eye or the
destruction of any other organ of the body though which the soul
communicates with the outer world.
Therefore, inside prisons are persons and their personhood, if
crippled by law keepers turning law-breakers, shall be forbidden by
the writ of this court from such wrong-doing. Fair procedure, in
dealing with prisoners, therefore, calls for another dimension of
access of law-provision, within easy reach, of the law which limits
liberty to persons who are prevented from moving out of prison
gates.”

In Bhuvan Mohan Patnaik v. State of A. P.\textsuperscript{114}, Chandrachud, J., spelt out
the position of prisoners and affirmed that:

“Convicts are not, by mere reason of the conviction, denuded of all
the fundamental rights which they otherwise posses. A compulsion
under the authority of law, following upon a conviction, to live in a
prison house entails by its own force the deprivation of fundamental
freedoms like the right to move freely throughout the territory of
India or the right to practice’ a profession . A man of profession
would thus stand stripped of his right to hold consultations while
serving out his sentence. But the Constitution guarantees other
freedoms like the right to acquire hold and dispose of property for the
exercise of which incarceration can be no impediment. Likewise,
even a convict is entitled to the precious right guaranteed by Article
21 of the Constitution that he shall not be deprived of his life or
personal liberty except according to procedure established by law”.

In Sunil Batra v. Delhi Administration\textsuperscript{115}, the Supreme Court stated and
directed to constitute the mandatory part of the judgment and shall be complied with
by the State. But implicit in the discussion and conclusions are certain directives for
which it did not fix any specific time limit except to indicate the urgency of their
implementation. The Apex Court spelt out four such quasi-mandates:-

(i) The State shall take early steps to prepare a Hindi; a Prisoner’s Handbook
and circulates copies to bring legal awareness home to the inmates.
Periodical jail bulletins stating how improvements and facilitative
programmes are brought into the prison may create a fellowship which will
ease tensions. A prisoner’s wall paper, which will freely ventilate grievances,

\textsuperscript{114} See, AIR 1974 SC p.2092
\textsuperscript{115} See, AIR 1980 SC p.1579
will also reduce stress. All these are implementary of S. 61 of the Prisons Act.

(ii) The State shall take steps to keep up to the Standard Minimum Rules of treatment of Prisoners recommended by the United nations, especially those relating to work and wages, treatment with dignity, community contact and correctional strategies. In this later aspect the observations we have made of holistic development of personality shall be kept in view.

(iii) The Prisons Act needs rehabilitation and the Prison Manual total overhaul, even the Model Manual being out of focus with healing goals. A correctional-cum-orientation course is necessitous for the prison staff inculcating the constitutional values, therapeutic approaches and tension-free management.

(iv) The prisoners’ rights shall be protected by the court by its writ jurisdiction plus contempt power. To make this jurisdiction viable, free legal services to the prisoner programmes shall be promoted by professional organizations recognized by the court such as for e.g. Fee Legal Aid (Supreme Court) society. The District Bar shall, we recommend, keep a cell for prisoner relief.

On the question whether a sentence of transportation for life could be executed in jails within the country or the same was executable only beyond the seas. The position has been clearly enunciated by the Privy Council in Pt. Kishori Lal’s case. After considering the history of the sentence of transportation, the relevant provisions of the Penal Code, the Code of Criminal Procedure and the Prisoners Act, the Privy Council came to the conclusion that the said provisions clearly showed threat a sentence of transportation was not necessarily executable beyond the seas. It observed thus:

“These sections make it plain that when a sentence of transportation has been passed it is no longer necessarily a sentence of transportation beyond the seas. Nowhere is any obligation imposed on the Government either of India or of the provinces to provide any places overseer for the reception of prisoners. It appears that for many years the only place to which they have been sent is the Andaman Islands are now in Japanese occupation. Their Lordship have been referred to various orders and directions of an administrative and not a legislative character showing what prisoners are, and are not regarded as fit subjects for transportation thereto and

116 See, AIR 1945 PC p.641
showing also that now-a-days only such of those prisoners sentenced to transportation ‘as may volunteer to undergo, transportation overseas are sent to those islands…………… But at the present day transportation is in truth but a name given in India to a sentence for life and in a few special cases for a lesser period, just as in England the term imprisonment is applied to all sentences which do not exceed two years and penal servitude to those of 3 years and upwards……… So in India, a prisoner sentenced to transportation may be sent to the Andaman’s or may be kept in one of the jails in India, appointed for transportation of prisoners.117”

It may be pointed out that:

“Even thereafter there is no dearth of judicial precedents where, in the matter of nature of punishment. Imprisonment or life has been regarded as equivalent to rigorous imprisonment for life.”

In State of Madhya Pradesh v. Ahmadulla118, the Apex Court after reversing the judgment of acquittal recorded by the High Court on a charge of murder imposed the following sentence:

“But taking into account the fact that the accused has been acquitted by the Session Judge-an order which was affirmed by the High Court-we consider that the ends of justice would be met if we sentence the accused to rigorous imprisonment of life.”

In K.M. Nanavati v. State of Maharashtra119, the Bombay High Court had sentenced the accused expressly to rigorous imprisonment for life and the Supreme Court while dismissing the appeal upheld the sentence as being correctly awarded.

State of Haryana v. Ghaseeta Ram120, in the instant case, the respondent was admittedly convicted and sentenced by the Additional Sessions Judge for committing various offences under the Indian Penal Code; while he was undergoing sentence for a previous conviction vides judgment dated 22-2-1986. An order of cancellation of remission under para. 633-A of the Punjab Jail Manual could, therefore, be made only after 22-2-1986. It could not precede his conviction. The punishment of forfeiture of remission as already noticed. Was imposed by the superintendent of Jail on the respondent on 17-09-1984, much before his conviction had been recorded by the trial court. This certainly was not permissible under para 633-A of the Punjab Jail Manual. The order of punishment dated 17-09-1984 is,
thus, not sustainable on the plain language of para 633-A of the Punjab Jail Manual. The respondent appears to have been punished by the Superintendent Jail under Para 613 of the Punjab Jail Manual for commission of the prison offence and not under para 633-A of the Punjab Manual. The respondent has, therefore, been punished for the same offence twice-once by the Superintendent of the Jail and the second time by the trial court on his conviction for the same offence. It could not be done in view of the bar contained in Section 52 of the Prison Act read with Para 627 of the Punjab Jail Manual. The High Court, therefore, committed no error in quashing the order of the superintendent of Jail dated 17-9-1984.

**In State of Punjab v. Nihal Singh**\(^{121}\), the respondent Nihal Singh was a convict under section 32 Indian Penal Code sentenced by Court Marital to undergo imprisonment for life and incarcerated in civil jail, Sangrur (Punjab). Nihal Singh filed a writ petition in the High court of Punjab and Haryana seeking to be classified as class-B prisoner and being allowed the facilities available to such prisoners in accordance with para 576-A of the Punjab Jail Manual. Punjab Jail Manual is a compilation of statutory Provisions, rules and executive instructions, referable to prison and prisoners, issued from time to time and is meant to guide the jail administration and the jail officers. Para 576-A contemplates classification of convicted persons into 3 categories, namely, classes A, B and C and catalogues the factors which would be relevant for classification and enumerates the benefits and facilities to which the prisoner would be entitled depending on the classification. The petition came up for hearing before a learned single judge o the High Court of Punjab & Haryana, who formed an opinion that the classification of prisoners into classes A, B and C was violative of Articles 14 and 15(1) of the Constitution, and therefore, declared such classification ultra vires of the Constitution. Consequent upon such declaration the petition filed by the respondent was directed to be dismissed.

It is pertinent to note that the question of ultra vires of para 576-A of Punjab Jail Manual was not raised by anyone before the High court. The High court also, before formulating its opinion as expressed in the impugned order, did not give any indication of its mind that adjudication upon the constitutional validity of the provision was proposed. None was put on notice. Nobody was afforded an

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\(^{121}\) See, 2002 (7) SCC p.513
opportunity of bringing on record material relevant for adjudication an opportunity of bringing on record material relevant for adjudication upon such validity. The advocate general of the State was not put on notice. The procedure adopted by the High court.

While invalidating para 576-A of the Punjab Jail Manual was wholly unsatisfactory and unsustainable.

“Judgment under appeal was set aside by the Supreme Court and writ petition filed by respondent restored as fresh for hearing again. The Apex court disposed of other two appeals on the ground that other two appeals emerged after decision of High Court. Therefore, as High Court orders were set aside, these appeals become anfractuous & disposed of accordingly.”

**In State of Maharashtra v. Asha Arun Gawali**122, doubts at times were entertained about the authenticity of such news having regard to the moral good faith to be reposed in the regularity of officials’ activities. But the admissions made in the affidavits filed by the Jail Authorities and the officials, accept it as a fact. What is still more shocking is that persons have entered the jail, met the inmates and if the statements of the officials are seen hatched conspiracies for committing murders. The High Court was therefore justified in holding that without the active cooperation of the officials concerned these things would not have been possible. The High Court appears to have justifiably felt aghast at such acts of omissions and commissions of the jail official which per se constituted offences punishable under various provisions of the Indian Penal Code and has, therefore, necessarily directed the launching of criminal prosecution against them, besides mulcting them with exemplary costs.

The Apex Court observed that the High Court noticed correctly that:

“When the names of visitors who allegedly were a part of the conspiracy warranting detention of the detent were not in the list of visitors during the concerned period, there is a patent admission about people getting unauthorized entry into the jails without their names being recorded in the official records something which would be impossible except with the connivance of those who otherwise should have prevented such things happening. It was noted by the High Court there was no explanation as to how somebody could gain entry in the jail and meet the detenu and yet no entry would be made therefore. It is not possible unless the jail officials are themselves a party to the same. If the criminal activities of the detenu were to be

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122 See, AIR 2004 SC p.2223
prevented and the recurrence of lapses which are serious on the part of those concerned were to be averted, firm action was necessary which yet was not even taken for reasons best known to themselves. In the aforesaid background the concern exhibited by the High Court as a necessary corollary by imposition of costs cannot at all be found fault with.”

In R.D. Upadhyay v. State of A.P., the Chief Justice of India Y.K. Sabharwal pointed out that:

Concerned by the plight of the under trial prisoners languishing in various jails in the country, various directions were issued by this Court from time to time. Presently, we are considering mainly the issue of directions for the development of children who are in jail with their mothers, who are in jail either as under trial prisoners or convicts. Children, for none of their fault, but per force, have to stay in jail with their mothers. In some cases, it may be because of the tender age of the child, while in other cases, it may be because there is no one at home to look after them or to take care of them in absence of the mother. The jail environment is certainly not congenial for development of the children.

A. Constitution of India, Articles 21-A, 39-C and 45 - Woman prisoner - Welfare of children of woman prisoners:-
   i. If a woman prisoner is expecting delivery it should be arranged outside prison.
   ii. If a female prisoner gives birth to child in prison, birth shall be registered in local birth Registration office - The fact that child was born in prison shall not be recorded on certificate.
   iii. Female prisoners shall be allowed to keep their children with them up to the age of six years - They will not be treated as under trials.
   iv. Such a child is entitled to food shelter, medical care, education and recreational facilities as a matter of right.

B. Constitution of India, Articles 21-A, 39(c) and 45 - Children of women prisoners living in prison - Guidelines to look after interest of children, p Regulation ncy of female prisoners, children born in prison, Education and recreation for children of female prisoners:-

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(i) A child shall not be treated as an under trial/convict while in jail with his/her mother. Such a child is entitled to food, shelter, medical care, clothing, education and recreational facilities as a matter of right.

(ii) Regulation ncy:

(a) Before sending a woman who is pregnant to a jail, the concerned authorities must ensure that jail in question has the basic minimum facilities for child delivery as well as for providing pre-natal and post-natal care for both, the mother and the child.

(b) When a woman prisoner is found or suspected to be pregnant at the time of her admission or at any time thereafter, the lady Medical Officer shall report the fact to the superintendent - As soon as possible, arrangement shall be made to get such prisoner medically examined at the female wing of the District Government Hospital for ascertaining the state of her health, pregnancy, duration of pregnancy, probable date of delivery and so on. After ascertaining the necessary particulars, a report shall be sent to the Inspector General of Prisons, stating the date of admission, term of sentence, date of release, duration of pregnancy, and possible date of delivery and so on.

(c) Gynecological examination of female prisoners shall be performed in the District Government Hospital - Proper pre-natal and post-natal care shall be provided to the prisoner as per medical advice.

(ii) Child birth in prison:

(a) As far as possible and provided she has a suitable option, arrangements for temporary release/parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the prison. Only exceptional cases constituting high security risk or cases of equivalent grave descriptions can be denied this facility.

(b) Births in prison, when they occur, shall be registered in the local birth registration office - But the fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued - Only the address of the locality shall be mentioned.

(c) As far as circumstances permit, all facilities for the naming rights of children born in prison shall be extended.
(vi) Female prisoners and their children:
(a) Female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years.
(b) No female prisoner shall be allowed to keep a child who has completed the age of six years - Upon reaching the age of six years, the child shall be handed over to a suitable surrogate as per the wishes of the female prisoner or shall be sent to a suitable institution run by the Social Welfare Department - As far as possible, the child shall not be transferred to an institution outside the town or city where the prison is located in order to minimize undue hardships on both mother and child due to physical distance.
(c) Such children shall be kept in protective custody until their mother is released or the child attains such age as to earn his/her own livelihood.
(d) Children kept under the protective custody in a home of the Department of Social Welfare shall be allowed to meet the mother at least once a week - The Director, Social Welfare Department, shall ensure that such children are brought to the prison for this purpose on the date fixed by the Superintendent of Prisons.
(e) When a female prisoner dies and leaves behind a child, the Superintendent shall inform the District Magistrate concerned and he shall arrange for the proper care of the child - Should the concerned relative(s) be unwilling to support the child, the District Magistrate shall either place the child in an approved institution/home run by the State Social Welfare Department or hand the child over to a responsible person for care and maintenance.

(v). Food, clothing, medical care and shelter:
(a) Children in jail shall be provided with adequate clothing suiting the local climatic requirement for which the State/U.T. Government shall lay down the scales.
(b) State/U.T. Governments shall lay down dietary scales for children keeping in view the calorific requirements of growing children as per medical norms.
(c) A permanent arrangement needs to be evolved in all jails, to provide separate food with ingredients to take care of the nutritional needs of children who reside in them on a regular basis.
(d) Separate utensils of suitable size and material should also be provided to each mother prisoner for using to feed her child.
(e) Clean drinking water must be provided to the children. This water must be periodically checked.
(f) Children shall be regularly examined by the Lady Medical Officer to monitor their physical growth and shall also receive timely vaccination. Vaccination charts regarding each child shall be kept in the records. Extra clothing, diet and so on may also be provided on the recommendation of the Medical Officer.

(g) In the event of a woman prisoner falling ill, alternative arrangements for looking after any children falling under her care must be made by the jail staff.

(h) Sleeping facilities that are provided to the mother and the child should be adequate, clean and hygienic.

(i) Children of prisoners shall have the right of visitation.

(j) The Prison Superintendent shall be empowered in special cases and where circumstances warrant admitting children of women prisoners to prison without court orders provided such children are below 6 years of age.

(vi) Education and recreation for children of female prisoners:

(a) The child of female prisoners living in the jails shall be given proper education and recreational opportunities and while their mothers are at work in jail, the children shall be kept in crèches under the charge of a matron/female warder. This facility will also be extended to children of warders and other female prison staff.

(b) There shall be a crèche and a nursery attached to the prison for women where the prisoner children of women prisoners will be looked after. Children below three years of age shall be allowed in the crèche and those between three and six years shall be looked after in the nursery. The prison authorities shall preferably run the said creche and nursery outside the prison premises.

(vii) In many states, small children are living in sub-jails that are not at all equipped to keep small children. Women prisoners with children should not be kept in such sub-jails, unless proper facilities can be ensured which would make for a conducive environment there, for proper biological, psychological and social growth.

(viii) The stay of children in crowded barracks amidst women convicts, under trials, offenders relating to all types of crimes including violent crimes is certainly harmful for the development of their personality. Therefore, children deserve to be separated from such environments on a priority basis.

(ix) Diet:

Dietary scale for institutionalized infants/children prepared by Dr. A.M. Dwarkadas Motiwala, MD (Pediatrics) and Fellowship in Neonatology (USA) has been
submitted by Mr. Sanjay Parikh - The document submitted recommends exclusive breast-feeding on the demand of the baby day and night - If for some reason, the mother cannot feed the baby, undiluted fresh milk can be given to the baby - It is emphasized that "dilution is not recommended; especially for low socio-economic groups who are also illiterate, ignorant, their children are already malnourished and are prone to gastroenteritis and other infections due to poor living conditions and unhygienic food habits - Also, where the drinking water is not safe/reliable since source of drinking water is a question mark - Over-dilution will provide more water than milk to the child and hence will lead to malnutrition and infections - This in turn will lead to growth retardation and developmental delay both physically and mentally -" It is noted that since an average Indian mother produces approximately 600 - 800 ml. milk per day (depending on her own nutritional state), the child should be provided at least 600 ml. of undiluted fresh milk over 24 hours if the breast milk is not available - The report also refers to the "Dietary Guidelines for Indians - A Manual," published in 1998 by the National Institute of Nutrition, Council of Medical Research, Hyderabad, for a balanced diet for infants and children ranging from 6 months to 6 years of age - It recommends the following portions for children from the ages of 6-12 months, 1-3 years and 4-6 years, respectively: Cereals and Millets - 45, 60-120 and 150-210 grams respectively; Pulses - 15, 30 and 45 grams respectively; Milk - 500 ml (unless breast fed, in which case 200 ml); Roots and Tubers - 50, 50 and 100 grams respectively; Green Leafy Vegetables - 25, 50 and 50 grams respectively; Other Vegetables - 25, 50 and 50 grams respectively; Fruits - 100 grams; Sugar - 25, 25 and 30 grams respectively; and Fats/Oils (Visible) - 10, 20 and 25 grams respectively - One portion of pulse may be exchanged with one portion (50 grams) of egg/meat/ chicken/fish - It is essential that the above food groups to be provided in the portions mentioned in order to ensure that both macronutrients and micronutrients are available to the child in adequate quantities. (x) Jail Manual and/or other relevant Rules, Regulations, instructions etc. shall be suitably amended within three months so as to comply with the above directions - If in some jails, better facilities are being provided, same shall continue. (xi) Schemes and laws relating to welfare and development of such children shall be implemented in letter and spirit - State Legislatures may consider passing of necessary legislations, wherever necessary, having regard to what is noticed in this judgment.
(xii) The State Legal Services Authorities shall take necessary measures to periodically inspect jails to monitor that the directions regarding children and mother are complied with in letter and spirit.

(xiii) The Courts dealing with cases of women prisoners whose children are in prison with their mothers are directed to give priority to such cases and decide their cases expeditiously.

(xiv) Copy of the judgment shall be sent to Union of India, all State Governments/Union Territories, and High Courts.

(xv) Compliance report stating steps taken by Union of India, State Governments, Union territories and State Legal Services Authorities shall be filed in four months where after matter shall be listed for directions.

ii) Parole

In our country, there are no statutory provisions dealing with the question of grant of parole. The Code of Criminal Procedure does not contain any provision for grant of parole. By administrative instructions, however, rules have been framed in various States, regulating the grant of parole. Thus, the action for grant of parole is generally speaking an administrative action124.

In Poonam Lata v. M.L. Wadhwa125, the Supreme Court observed that:

“There is abundance of authority that High Court in exercise of their jurisdiction under Art. 226 of the constitution do not release a detenu on bail or parole. There is no reason why a different view should be taken in regard to exercise of jurisdiction under Art.32 of the constitution particularly when the power to grant relief to a detenu in such proceedings is exercisable on very narrow and limited grounds.”

In State of Bihar v. Rambalak Singh126, a Constitution Bench laid down that:

“The release of a detenu placed under detention under Rule 30 of the Defense of India Rules, 1962, on bail pending the hearing of a petition for grant of a writ of habeas corpus was an improper exercise of jurisdiction. It was observed in that case that if the High court was of the view that prima facie the impugned order of detention was patently illegal in that there was a serious defect in the order of detention which would justify the release of the detenu, the proper and more sensible and reasonable course would invariably be to expedite the hearing of the writ petition and deal with the merits without any delay rather than direct release of the detenu on bail.”

126 See, AIR 1966 SC p.1441
The learned Judge observed as under:

“It is appropriate for a democratic Government not merely to confine preventive detention to serious cases but also to review periodically the need or the continuance of the incarceration. The rule of law and public conscience must be respected to the maximum extent risk-taking permits, and it is hoped that the petitioner and others permit, and it is hoped that the petitioner and others like him will not languish in prison cells for a day longer than the administration thinks is absolutely necessary for the critical safety of society.”

In State of Uttar Pradesh v. Jairam127, a three Judges Bench speaking through Chandrachud, C. J., referred to Rambalak Singh’s case and set aside the order passed by the learned single judge of the High Court admitting the detenu to bail on the ground that:

“It was an improper exercise of jurisdiction. As to grant of parole, it is worthy of note that in none of the cases this court made a direction under Art. 32 of the constitution for grant of parole to the detenu but left it to the executive to consider whether it should make an order in terms of the relevant provision for temporary release of the person detained as under Section 12 of the COFEPOSA, in the facts and circumstances of a particular case.”

In Samir Chatterjee v. State of West Bengal128, the court set aside the order of the Calcutta High Court releasing on parole a person detained under Sec. 3(10 of the Maintenance of Internal Security Act. 1971 and viewed with disfavor the observations made by the High Court that:

“It was not often that the State Government lost sight of Sec. 15 of the Act providing for temporary release in such situations’ as in its view’ long term preventive detention can be self-defeating or criminally counter-productive’ and that ‘it was fair that persons kept incarcerated and embittered without trial should be given some chance to reform themselves by reasonable recourse to the parole power under Sec. 15.’”

Alagiriswamy, J. Speaking or the Court, said that there was no occasion for the High Court to have made these observations, and added:

“We fail to see that these observations lay down any principal of law. Section 15 merely confers a power on the Government. The power and duty of this court is to decide cases coming before it according to law. In so doing it may take various considerations into account. But take advice the Government as to how they should exercise their functions or powers conferred on them by statute is not one of this

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127 See, AIR 1982 SC p.942
128 See, 1975 (1) SCC p.80; AIR 1975 SC p.1165
court’s functions. Where the court is able to give effect to its view in
the form of a valid and binding order that is a different matter.
Furthermore, S. 15 deals with release on parole and there is nothing is
show that the petitioner applied for to be released on parole for any
specific purpose. As far as we are able to see, release on parole is
made only on the request of the party and for a specific purpose.”

In Sunil Fulchand Shah v. Union of India129, Apex court observed that:

“Release on parole is only a temporary arrangement by which a
detenu is released for a temporary fixed period to meet certain
situations, it does not interrupt the period of detention and, thus,
needs to be counted towards the total period of detention unless the
rules, instructions or terms for grant of parole, prescribe otherwise.
The period during which parole is availed of is not aimed to extent
the outer limit of the maximum period of detention indicated in the
order of detention. The period during which a detenu has been out of
custody on temporary release on parole, unless otherwise prescribed
by the order granting parole, or by rules or instructions, has to be
included as a part of the total period of detention because of the very
nature of parole. An order made under Section 12 of the temporary
released of a detenu on parole does not bring the detention to an end
for any period – it does not interrupt the period of detention – it only
changes the mode of detention by restraining the movement of the
detenu in accordance with the conditions prescribed in the order of
parole. The detenu is not a free man while out on parole. Even while
on parole he continues to serve the sentence or undergo the period of
detention in a matter different that from being in custody. He is not a
free person. Parole does not keep the period of detention in a state of
suspend animation. The period of detention keeps ticking during this
period of temporary release of a detenu also because a parolee
remains in legal custody of the State and under the control of its
agents, subject to any time, for breach of condition, to be returned to
custody.”

It was further observed by the Apex Court that:

“Personal liberty is one of the most cherished freedoms, perhaps
more important than the other freedoms guaranteed under the
Constitution. It was for this reason that the Founding Fathers enacted
the safeguards in Article 22 in the Constitutional so as to limit the
power of the state to detain a person without trial, which may
otherwise pass the test of Article 21, by humanizing the harsh
authority over individual liberty. Since, preventive detentions a form
of precautionary State action, intended to prevent a person from
indulging in a conduct, injurious to the society or the security of State
or public order, it has been recognized as “a necessary evil, and is
tolerated in a free society in the larger interest of security of State and
maintenance of public order. However, the Power being drastic, the

129 See, AIR 2000 SC p.1023
restrictions placed on a person to preventively detain must, consistently with the effectiveness of detention, are minimal. In a democracy governed by the Rule of Law, the drastic power to detain a person without trial for security of the state and/or maintenance of public order must be strictly constructed. This Court, as the guardian of the Constitution, though not be only guardian, has zealously attempted to preserve and protect the liberty of a citizen. However, where individual liberty comes into conflict with an interest of the security of the State or public order, then the liberty of the individual must give way to the larger interest of the nation.”

In Dadu v. State of Maharashtra\textsuperscript{130}, the Supreme Court held that:

“Parole is not a suspension of the sentence. The convict continues to the sentence despite granting of parole under the Statute, Rules, Jail Manual or the Government Orders. “Parole” means the release of a prisoner temporarily for a special purpose before the expiry of a sentence, on the promise of good behavior and return to jail. It is a release from jail, prison or other internment after actually been in jail serving part of sentence. Grant of parole is essentially an Executive function to be exercised within the limits prescribed in that behalf. It would not be open to the court to reduce the period of detention by admitting a detenu or convict on parole. Court Cannot substitute the period of detention either by abrading or enlarging it.”

Dealing with the concept of parole and its effect on period of detention in a preventive detention matter this court \textit{in Poonam Lata v. M.L. Wadhawan}\textsuperscript{131} held:

“There is no denying of the fact that preventive detentions not punishment and the concept of serving out a sentence would not legitimately be within the purview of preventive detention. The truant of parole is essentially an executive function and instances of release of detenu on parole were literally unknown until this court and some of the High Courts in India in recent years made orders of release on parole on humanitarian considerations. Historically ‘parole’ is a concept known to military law and denotes release of a prisoner of war on promise to return. Parole has become an integral pat of English and American systems of criminal justice intertwined with the evolution of changing attitudes of the society towards crime and criminals as a consequence of the introduction of parole into the penal system, all fixed terms sentences of imprisonment of above 18 months are subject to release on license, that is, parole after a third of the period of sentence has been served. In those countries, parole is taken as an act of grace and not as matter of right and the convict prisoner may be released on condition that he abides by the promise. It is a provisional release from confinement, but is deemed to be a

\textsuperscript{130} See, AIR 2000 SC p.3203
\textsuperscript{131} See, AIR 1987 SC p.1383 : 1987 Cr.L.J p.1130
part of the imprisonment. Release on parole is a wing of the reformative process and is expected to provide opportunity to the prisoner to transform himself into a useful citizen. Parole is this grant of partial liberty of lessening of restrictions to a convict prisoner, but release on parole does not change the status of the prisoner. Rules are framed providing supervision by parole authorities of the convicts released on parole and in case of failure to perform the promise, the convict released on parole is directed to surrender to custody. It follows that parole is the release of a very long term prisoner from a penal or correctional institution after he has served a part of his sentence under conditions that permit his incarceration in the event of misbehavior.”

In Feroze Varun Gandhi v. Dist. Magistrate Pilibhit, U.P., the Supreme Court described bail and parole that:

Varun Gandhi's case - Detenue detained under NSA Act - Released on bail/parole on giving an undertaking that he will not make inflammatory speeches. Constitution of India, Article 226 - Criminal Procedure Code, 1973, Section 439 - National Security Act, 1980, Section 3(2) - Election - Petitioner who proposes to contest election for parliamentary constituency detained under Section 3(2) - Allegation that he made inflammatory speech inciting communal hatred, promoting ill-will between classes and communities and disharmony between groups of communities - Petitioner released on temporary bail/parole on his giving an undertaking that he will not make such speeches and shall execute a bond for Rs. 50,000 with two solvent sureties.

The petitioner herein Feroze Varun Gandhi S/o late Shri Sanjay Gandhi R/o 14, Ashoka Road, New Delhi has been detained under Section 3(2) of the National Security Act pursuant to the Order dated 29.3.2009 passed by the District Magistrate, Pilibhit. He is imprisoned at Etah Jail. The petitioner challenged his detention on various grounds which are mentioned in the writ petition. It is stated that petitioner proposes to contest the next election from Pilibhit Parliamentary Constituency and the date of submitting nomination commences on 17.4.2009. The main reason for his detention is that he made inflammatory speeches on 7th and 8th March, 2009. It is alleged that he delivered an inflammatory speech inciting communal hatred, promoting ill-will between classes and communities and disharmony between groups of communities. As the petitioner proposes to contest

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the ensuing election and due to the peculiar facts and circumstances it is suggested that the petitioner would be in a position to give an undertaking that he will not make such speeches which would create disharmony between the communities.

However, having regard to the relevant facts, we are inclined to release him on temporary bail/parole initially up to 1.5.2009, on condition that he will make an undertaking before the Superintendent of Jail, Etah, that I, Feroze Varun Gandhi undertake that I will not -

“by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings or enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturb the public tranquility; during the period of interim bail/parole.”

On filing such an undertaking, he shall be released on condition that he shall execute a bond for Rs. 50,000/- with two solvent sureties for the like amount to the satisfaction of Superintendent of Jail, Etah Dist. Jail, Etah. He shall also furnish his whereabouts to the District Magistrate, Pillibhit. He shall also file a similar undertaking in this Court by 20.4.2009. This interim order is without prejudice to the rights of both the parties.

In Lalit Kumar v. State of Nct of Delhi, the Delhi High Court observed that:

“Constitution of India, 1950, Article 226 - Criminal Procedure Code, 1973, Section 482 - Indian Penal Code, 1860, Section 364-A & 34 - Conviction for kidnapping for ransom - Prayer for parole for filing appeal to the Supreme Court - Order rejecting application for grant of parole - Quashing of - Sole ground for rejection of parole application was non-verification of the address which has been verified and found to be correct - Petitioner held entitled to grant of parole for preferring S.L.P. to the Supreme Court - Petition allowed.”

The present writ petition is filed by the petitioner under Article 226 of the Constitution of India read with Section 482 of the Cr.P.C praying inter alia for quashing of the orders dated 17.06.2010 & 1.9.2010 passed by the Govt. of NCT of Delhi, rejecting the application of the petitioner for grant of parole on the ground of non-verification of the address given by him. The petitioner has also sought his

133 See, 2011 (2) AD(Delhi) p.469
release for a period of three months to engage a counsel for drafting and filing a SLP in the Supreme Court against the judgment dated 11.02.2010 passed by a Division Bench in Crl. Appeal No.674/2005 arising out of FIR No.313/2003 under Sections 364A/34 IPC. As the sole ground for rejection of the parole application of the petitioner was non-verification of the address which has now been verified and found to be correct, this Court is satisfied that the petitioner is entitled to grant of parole for preferring a SLP in the Supreme Court against the impugned judgment dated 11.2.2010 passed in Crl. Appeal No.674/2005. Accordingly, the present petition is allowed. The petitioner is granted parole for a period of four weeks, subject to the following conditions:-

(i) The petitioner shall furnish a personal bond in the sum of `10,000/- with one local surety of the like amount to the satisfaction of the trial court.

(ii) The petitioner shall report to the SHO of local Police Station once a week on every Sunday at 10:00 AM and shall not leave the National Capital Territory of Delhi during the period of parole.

(iii) The petitioner shall furnish a telephone number to the Jail Superintendent on which he can be contacted, if required. After his release, he shall also inform his telephone number to the SHO of the police station concerned.

(iv) Immediately upon the expiry of period of parole, the petitioner shall surrender himself before the Jail Superintendent.

(v) The petitioner shall furnish a copy of the SLP filed in the Supreme Court to the Superintendent Jail at the time of surrendering.

(vi) The period of parole shall be counted from the day after the date when the petitioner is released from jail.

iii) **Probation**

The legislation for consideration to given effect to this penal philosophy of probation recommends rehabilitation of the criminals so they come out of the prison to return to society as law abiding citizens. Certain classes of prisoners which appear to the Government from their antecedents and their conduct in the prison as likely to abstain from crime and lead a peaceable life, can be released on a “license” but their conduct outside prison shall be supervised by specified individuals or institutions. The period of release on license or probation granted to them would give them
opportunity to lead a crime free and peaceable life. Such period shall be counted towards the sentence of imprisonment imposed on them. Such licensed releases legislatively sanctioned have been recognized as valid law by the Supreme Court in the case of *Maru Ram v. Union of India*, release on license is an experiment with prisoners for open jails or as the Court describes it is an “imprisonment of loose and liberal type.”

**In Dalbir Singh v. State of Haryana**, the Supreme Court has indicated that:

“Benefit of Probation of Offenders Act should not normally be afforded in respect of the offences under Section 304-A IPC when it involves rehash or negligent driving. Those are instances for showing how the nature of the offence could dissuade the Court to give the benefit. However, in a case of trivial nature as the respondent is stated to have committed and keeping in view its peculiar circumstances, we find it to be a fit case where powers under Section 3 of the Probation of Offenders Act can be exercised.”

**In Chandra Prakash Shahi v. State of U.P.**, the Supreme Court held that:

“The period of probation is two years. The Regulation is silent as to the maximum period beyond which the period of probation cannot be extended. In the absence of this prohibition, even if the appellant complete two years of probationary period successfully and without any blemish, his period of probation shall be treated to have been extended as a ‘permanent’ status can be acquired only by means of a specific order of confirmation.”

**In State of Orissa v. Ram Narayan Das**, the Supreme Court observed that:

“Where it is proposed to terminate the employment of a probationer, whether during or at the end of the period of probation, for any specific fault or on account of his unsuitability for the service, the probationer shall be apprised of the grounds of such proposal and given an opportunity to show case against it, before orders are passed by the authority competent to terminate the employment.”

**In Commandant 20 BN ITB Police v. Sanjay Binjoa**, the Supreme Court held that probation of offenders Act has been enacted in view of the increasing emphasis on the information and rehabilitation of the offenders as a

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135 See, 1981(1) SCC p.100
137 See, AIR 2000 SC p.1706
138 See, AIR 1961 SC p.177
139 See, AIR 2001 SC p.2058
useful and self-reliant member of society without subjecting them to deleterious effects of jail life. The Act empowers the Court to release son probation, in all suitable cases, an offender found guilty of having committed an offence not punishable with death or imprisonment for life or for the description mentioned in Sections 3 and 4 of the said Act.

Section 3 of the Probation of offenders Act provides:

“Power of Court to release certain offenders after admonition—When any person is found guilty of having committed an offence punishable under Section 379 or section 380 or Section 381 or Section 404 or Section 420 of the Indian Penal Code (45 of 1860), or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under Section 4 release him after due admonition.”

Explanation –For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or Section 4.

The Court further said that:

“It is not disputed that for an offence punishable under Section 19 of the Act, the sentence provided is one year with fine entitling the respondent, to claim the benefit of section 3 of the probation of offenders Act. It transpires that both the appellate as well as the High Court, after passing the order of conviction and sentence and having regard to the circumstances of the case including the nature of the offence and character of the offender, thought it expedient to take a lenient view and instead of sending him to jail opted to pass a sentence till the rising of the court.”

On the point of sentence, the appellate court observed:

“I think it justified to consider leniently because the accused Sanjay Binjoa is a young boy and he just took excessive liquor on the alleged liquor day. It is also to be kept in mind that in the para military forces liquor is provided comparatively cheaper to the para military personals, hence I find that the punishment given to the accused for sentences of 3 months is server consequently, I reach at the conclusion that the sentence awarded by the lower court is modified accordingly.”

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A. Probation of Offenders Act, 1958, Section 4 - Punjab Excise Act, Section 61(1) - Reduction in sentence - Recovery of 2000 liters of rectified spirit from accused - Accused convicted and sentenced to one year - High Court released the accused on probation on the ground that accused faced protracted trial for 19 years - Order of High Court set aside. High Court does not rest its decision on any legal principle - No sufficient or cogent reason has been assigned - High Court committed serious error - Accused sentenced to 6 months SI and a fine of Rs. 5000/- imposed.

B. Criminal Procedure Code, Sections 235(2), 248(2), 325 and 360 - Guidelines in matter of awarding sentence - In India legal principles regarding awarding of sentence have not developed. Courts while imposing sentence must take into consideration the principles applicable thereto - It requires application of mind - The purpose of imposition of sentence must also be kept in mind.

C. Criminal Procedure Code, Sections 235, 248 and 325 - Quantum of sentence - Whether the court while awarding a sentence would take recourse to the principle of deterrence or reform or invoke the doctrine of proportionality, would no doubt depend upon the facts and circumstance of each case.

D. Criminal Procedure Code, Sections 235, 248 and 325 - Quantum of sentence - It would depend upon the circumstances in which the crime has been committed and his mental state - Age of the accused is also relevant.

E. Criminal Procedure Code, Section 235(2), 248(2), 325 and 360 - Conviction and sentence - Meaning of word sentence - A sentence is a judgment on conviction of crime - It is resorted to after a person is convicted of the offence - Provisions of Sections 235(2), 248, 325, 360 and 361 of Cr.P.C. have laid down certain principles - The said provisions lay down the principle that the court in awarding the sentence must take into consideration a large number of relevant factors; sociological
backdrop of the accused being one of them. In our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts except making observations with regard to the purport and object for which punishment is imposed upon an offender, had not issued any guidelines. Other developed countries have done so. At some quarters, serious concerns have been expressed in this behalf. Some Committees as for example Madhava Menon Committee and Malimath Committee have advocated introduction of sentencing guidelines.

Before, however, we delve into the said question; we may notice the fact of the matter.

Respondents herein were convicted for commission of an offence under Section 61(1) of the Punjab Excise Act for carrying 2000 litres of rectified spirit. They were sentenced to undergo an imprisonment for a period of one year.

The High Court, however, by reason of the impugned judgment purported to be upon taking into consideration the fact that the offence was committed in the year 1987 and the appeal was dismissed in the year 1992, thought it fit to give an opportunity to the respondents to reform themselves, observing:

"...The accused have suffered lot of agony of protracted trial. They having joined the main stream must have expressed repentance over the misdeed done by them about 19 years back. In the aforesaid circumstances and in the absence of any of their bad antecedents, it will not be appropriate to deny them to the benefit of probation under the Probation of Offenders Act, 1958 and to send them to jail at this stage."

On the said premise, the respondents were directed to be released on probation on their executing a bond of Rs. 20,000/- with one surety each of the like amount to the satisfaction of the Trial Judge.

No report of the Probation Officer was called for. The social background of the respondent had not been taken into consideration. What was their occupation was not noticed.

Whether the court while awarding a sentence would take recourse to the principle of deterrence or reform or invoke the doctrine of proportionality, would no doubt depend upon the facts and circumstance of each case.

While doing so, however, the nature of the offence said to have been committed by the accused plays an important role. The offences which affect public
health must be dealt with severely. For the said purpose, the courts must notice the object for enacting Article 47 of the Constitution of India.

There are certain offences which touch our social fabric. We must remind ourselves that even while introducing the doctrine of plea bargaining in the Code of Criminal Procedure, certain types of offences had been kept out of the purview thereof. While imposing sentences, the said principles should be borne in mind.

A sentence is a judgment on conviction of a crime. It is resorted to after a person is convicted of the offence. It is the ultimate goal of any justice delivery system. The Parliament, however, in providing for a hearing on sentence, as would appear from Sub-section (2) of Section 235, Sub-section (2) of Section 248, Section 325 as also Sections 360 and 361 of the Code of Criminal Procedure, has laid down certain principles. The said provisions lay down the principle that the court in awarding the sentence must take into consideration a large number of relevant factors; sociological backdrop of the accused being one of them.

Although a wide discretion has been conferred upon the court, the same must be exercised judiciously. It would depend upon the circumstances in which the crime has been committed and his mental state. Age of the accused is also relevant.

What would be the effect of the sentencing on the society is a question which has been left unanswered by the legislature. The Superior Courts have come across a large number of cases which go to show anomalies as regards the policy of sentencing. Whereas the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where same sentence is imposed, the principles applied are found to be different. Similar discrepancies have been noticed in regard to imposition of fine.

The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that:

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"State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.”

Don M. Gottfredson in his essay on "Sentencing Guidelines" in "Sentencing: Hyman Gross and Andrew von Hirsch" opines:

"It is a common claim in the literature of criminal justice - and indeed in the popular press - that there is considerable "disparity" in sentencing. The word "disparity" has become a prerogative and the concept of "sentencing disparity" now carries with it the connotation of biased or insidious practices on the part of the judges. This is unfortunate in that much otherwise valid criticism has failed to separate justified variation from the unjustified variation referred to as disparity. The phrase "unwarranted disparity" may be preferred; not all sentencing variation should be considered unwarranted or disparate. Much of it properly reflects varying degrees of seriousness in the offense and/or varying characteristics of the offender. Dispositional variation that is based upon permissible, rationally relevant and understandably distinctive characteristics of the offender and of the offense may be wholly justified, beneficial and proper, so long as the variable qualities are carefully monitored or consistency and desirability over time. Moreover, since no two offenses or offenders are identical, the labeling of variation as disparity necessarily involves a value judgment that is, disparity to one person may be simply justified variation to another. It is only when such variation takes the form of differing sentences for similar offenders committing similar offenses that it can be considered disparate.”

[Emphasis supplied]

The learned author further opines:

"In many jurisdictions, judicial discretion is nearly unlimited as to whether or not to incarcerate an individual; and bound only by statutory maxima, leaving a broad range of discretion, as to the length of sentence."


"All guideline jurisdictions have found it necessary to create rules that identify the factual issues at sentencing that must be resolved under the guidelines, those that are potentially relevant to a
sentencing decision, and those viewed as forbidden considerations that may not be taken into account by sentencing courts. One heated controversy, addressed differently across jurisdictions, is whether the guideline sentence should be based exclusively on crimes for which offenders have been convicted ("conviction offenses"), or whether a guideline sentence should also reflect additional alleged criminal conduct for which formal convictions have not been obtained ("non-conviction offenses"). Another difficult issue of fact-finding at sentence for guideline designers has been the degree to which trial judges should be permitted to consider the personal characteristics of offenders as mitigating factors when imposing sentence. For example: Is the defendant a single parent with young children at home? Is the defendant a drug addict but a good candidate for drug treatment? Has the defendant struggled to overcome conditions of economic, social or educational deprivation prior to the offense? Was the defendant's criminal behavior explicable in part by youth, inexperience, or an unformed ability to resist peer pressure? Most guideline states, once again including all jurisdictions with voluntary guidelines, allow trial courts latitude to sentence outside of the 'guideline ranges based on the judge's assessment of such offender characteristics. Some states, fearing that race or class disparities might be exacerbated by unguided consideration of such factors, have placed limits on the list of eligible concerns. (However, such factors may indirectly affect the sentence, since judges are permitted to base departures on the offenders particular "amenability" to probation (Frase, 1997).)"

Andrew von Hirsch and Nils Jareborg have divided the process of determining sentence into stages of determining proportionality while determining a sentence, namely:

(i) What interest are violated or threatened by the standard case of the crime - physical integrity, material support and amenity, freedom from humiliation, privacy and autonomy.

(ii) Effect of violating those interests on the living standards of a typical victim - minimum well-being, adequate well-being, significant enhancement.

(iii) Culpability of the offender

(iv) Remoteness of the actual harm as seen by a reasonable man.

Guidelines in United Kingdom originated from two separate sources in the 1980s. The first was the Magistrates' Association, which took the first steps in producing road traffic offence guidelines for the lower courts. This process has widened and deepened, so that the latest set of sophisticated guidelines, effective from 2004, covers all the main offences likely to be encountered in those courts. The second source of guidelines was the Court of Appeal which, of its own initiative,
developed guideline judgments as a means of providing assistance to Crown Court sentences in the disposal of particular types of offence, mainly the most serious forms of crime which attract long prison sentences. The Crime and Disorder Act 1998 created the Sentencing Advisory Panel (SAP), a body with a diverse membership, to assist and advise the Court of Appeal in the promulgation of sentencing guidelines. The Panel and the Court of Appeal worked together effectively in this way from 1999 to 2003, at which point the Sentencing Guidelines Council (SGC) was established. One of the most significant innovations introduced by the Criminal Justice Act 2003 was the setting up of the Sentencing Guidelines Council. The Council, composed mainly but not exclusively of sentences, took over the task of issuing sentencing guidelines, with the Panel performing much the same function as before, but now advising the Council rather than the Court of Appeal. The personnel on the SGC/SAP all work on guidelines in a part-time capacity, but supported by a joint full-time secretariat.

The idea of a "commission on sentencing" can be traced to Marvin's Frankel's influential writings of the early 1970's, most notably his 1973 book *Criminal Sentences: Law Without Order*. He also advocated:

"Greater uniformity in punishments imposed upon similarly situated offenders, with a concomitant reduction in inexplicable disparities, including racial disparities in punishment and widely varying sentences based simply on the predilections of individual judges"


The Sentencing Reform Act of 1984 created the U.S. Sentencing Commission to promulgate binding sentencing guidelines in response to a regime of indeterminate sentencing characterized by broad judicial discretion over sentencing and the possibility of parole. The Act sought to create a transparent, certain, and proportionate sentencing system, free of "unwarranted disparity" and able to "control crime through deterrence, incapacitation, and the rehabilitation of offenders" by sharing power over sentencing policy and individual sentencing outcomes among Congress, the federal courts, the Justice Department, and probation officers.

The heart of the Guidelines is a one-page table: the vertical axis is a forty-three-point scale of offense levels, the horizontal axis lists six categories of criminal history, and the body provides the ranges of months of imprisonment for each
combination of offense and criminal history. A sentencing judge is meant to use the guidelines, policy statements, and commentaries contained in the Guidelines Manual to identify the relevant offense and history levels, and then refer to the table to identify the proper sentencing range. Though in all cases a sentence must be at or below the maximum sentence authorized by statute for the offense, in certain circumstances the Guidelines allow for both upward and downward departures from the sentence that would otherwise be recommended.

In `THE FAILURE OF THE FEDERAL SENTENCING GUIDELINES: A STRUCTURAL ANALYSIS' [III 105 Colum.L. Rev. 1315], Frank O. Bowman criticized the Federal Sentencing Guidelines in the following terms:

"(1) the severity and frequency of punishment imposed by the federal criminal process during the guidelines era is markedly greater than it had been before. 
(2) For most crimes it is difficult, and perhaps impossible, to isolate the effect of federal prosecutorial and sentencing policies from effects of state policies and practices, not to speak of the broader economic, demographic, and social trends that influence crime rates. 
(3) The federal process of making sentencing rules and imposing sentences on individual defendants has gone astray."

In United States v. Booker [125 S. Ct. at 757] Booker found the federal guidelines unconstitutional as previously applied, but upheld them as a system of "effectively advisory" sentencing rules.

In the recent United States Supreme Court decision of Gall v. United States [552 U.S. 2007], the court had to determine the correctness of the decision of the Eight Circuit court that reversed the decision of the district court on sentencing Gall to 36 months probation period on the ground that a sentence outside the Federal sentencing Guidelines range must be and was not in this case, supported by extraordinary circumstances. Reversing the decision of the court, it was opined:

" While the extent of the difference between a particular sentence and the recommended Guidelines range is relevant, courts of appeals must review all sentences - whether inside, just outside, or significantly outside the Guidelines range - under a deferential abuse-of-discretion standard. 
(a) Because the Guidelines are now advisory, appellate review of sentencing decisions is limited to determining whether they are "reasonable," United States v. Booker, 543 U.S. 220, and an abuse-of-discretion standard applies to appellate review of sentencing decisions. A district judge must consider the extent of any departure
from the Guidelines and must explain the appropriateness of an unusually lenient or harsh sentence with sufficient justifications. An appellate court may take the degree of variance into account and consider the extent of a deviation from the Guidelines, but it may not require "extraordinary" circumstances or employ a rigid mathematical formula using a departure's percentage as the standard for determining the strength of the justification required for a specific sentence.

(b) A district court should begin by correctly calculating the applicable Guidelines range. The Guidelines are the starting point and initial benchmark but are not the only consideration. After permitting both parties to argue for a particular sentence, the judge should consider all of 18 U. S. C. '3353(a)'s factors to determine whether they support either party's proposal. He may not presume that the Guidelines range is reasonable but must make an individualized assessment based on the facts presented. If he decides on an outside-the- Guidelines sentence, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of variation."

Andrew von Hirsch in "The Sentencing Commission's functions", The Sentencing Commission and its Guidelines (Northeastern University Press, 1987), Ch.1.] more than twenty years ago summarized the central tasks of a sentencing commission by observing that the function

"(1) to decide the future direction of sentencing policy, informed by the study of past sentencing practice;
2) to structure judicial discretion, rather than to eliminate it, allowing judges to interpret and apply the guidelines and to deviate from them in special circumstances; and
(3) to select a predominant rationale for sentencing, and to base guidelines upon it, so as to promote consistency in sentencing and to reduce disparity."

The High Court does not rest its decision on any legal principle. No sufficient or cogent reason has been arrived.

We have noticed the development of law in this behalf in other countries only to emphasize that the courts while imposing sentence must take into consideration the principles applicable thereto. It requires application of mind. The purpose of imposition of sentence must also be kept in mind. Although ordinarily, we would not interfere the quantum of sentence in exercise of our jurisdiction under Article 136 of the Constitution of India, but in a case of this nature we are of the opinion that the High Court having committed a serious error, interest of justice would be sub-served if the decision of the High Court is set aside and the respondent
is sentenced to undergo simple imprisonment for a period of six months and a fine of Rs. 5,000/- is imposed, in default to undergo imprisonment for a further period of one month.

The Appeal is allowed to the extent mentioned hereinbefore.

**In Arvind Yadav v. Ramesh Kumar,**

By the impugned common judgment, the High Court allowed number of Letters Patent Appeals and directed the authorities to release all the appellants, who were before the Division Bench, from prison within a period of 15 days. In criminal appeal arising out of SLP (Crl.) No. 3759/02, the judgment of the High Court directing release of Ramesh Kumar who was found guilty of offence under Section 302 IPC for murder of deceased Jitendra, has been challenged by his brother - Arvind Yadav on permission granted to him to file the Special Leave Petition. The State has also filed appeal challenging the direction of the High Court for release of Ramesh Kumar (Crl. A. arising out of SLP (Crl.) No. 4379/02). The Apex Court laid down following principles:

A. Prisoner's Release on Probation Act (M.P) 1954 - Premature release - Convict seeking release on license - The manner of commission of crime is a relevant consideration - In a given case, the manner of commission of offence may be so brutal that it by itself may be good sole ground to decline the license to release.

B. Prisoner's release on Probation Act (M.P), 1954 - Premature release - Convict seeking release on license - State Government and the Board have to take into consideration not only the conduct of the convict but also his criminal antecedents; the effect of such release on the victims of their family, the propensity of the convict to commit further criminal act and other similar factors which may be considered relevant - The order of the State Government cannot be interfered with only because another view is possible.

C. Prisoner's Release on Probation Act (M.P.) 1954 – Re-mature release - Convict seeking release on license - Mere fact that the family members of the victim were not objecting or were supporting release may not be sufficient, by itself, so as to direct the release of the convict on that basis alone. In yet another case, by itself, it may be a very strong factor.

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D. Prisoner's Release on Probation Act (M.P.) 1954 - Premature release - Order passed by Authority without application of mind - Appropriate course for court is to remand the case for fresh decisions by the Authorities except, if in given exceptional case, for strong cogent reasons, the High Court may have examined itself the relevant facts and quashed the order declining the release.

**In Ram Chander v. State of Haryana,**142 the Punjab and Haryana High Court held that:

The petitioner-accused, Ram Chander, was convicted by Sub Divisional Judicial Magistrate, Loharu, for the offences under Sections 323 and 325 IPC, vide judgment dated 18.11.2003 and he preferred appeal against that conviction and sentence. His conviction was upheld by the Sessions Judge, Bhiwani, vide judgment dated 16.7.2005, but the sentence imposed upon him under Section 325 IPC was reduced from 1 years rigorous imprisonment to six months rigorous imprisonment. The present revision petition has been preferred by him against that conviction and sentence.

Criminal Procedure Code, Section 360 & 361 – Probation of Offenders Act, 1958, Section 4 (1) - No grievous injury was found on any vital part of the injured - No previous conviction of the accused - No such special reasons were recorded by the trial court for not allowing that benefit Probation - Section 361 Cr.P.C. required to record the special reasons for not allowing the benefit of Probation, whereas the offence under Section 325 IPC is punishable with imprisonment for less than seven years - Accused released on probation. Criminal Procedure Code, Section 357 - Indian Penal Code, Sections 325 and 323 – Probation of Offenders Act, 1958, Section 4 (1) - Protracted trial for a period of more than 10 years - Accused Petitioner attained the age of 67 years and he is having the liability of maintaining his children - Compensation of Rs. 15000/- to the injured - Accused released on probation.

The Supreme Court of India has opened new vistas on ‘human rights’ movement by liberally interpreting and expanding the meaning of criminal justice system. Apex court under constitutional scheme is guardian, and protector of fundamental rights of the citizen, to enforce the right, to ensure justice to all and protect the individual rights without encroachment on individual liberty and with

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142 See, 2011 (1) R.C.R.(Criminal) p.829
human dignity. Efforts have been made to protect and guard the pre-trial detainees. From the very initial stage of First Information Report, investigation, arrest, search, seizure, bail, legal aid, custodial violence and compensation to the victims, the Supreme Court has always played a key role.

Protections of rights are the cardinal importance to the process of criminal justice at all levels of investigation, trial, and punishment. The Code of Criminal Procedure in India contains salient features in this respect. In the face of new and divergent crime trends, the public trends have mixed feeling towards crime prevention, control, and punishment. While there appears to be widespread demand for making the criminal justice more fair. There is also a push for stronger deterrents and justice rendered on those responsible for disrupting public order, peace and tranquility or restricting them from criminal acts at the cost of injury to human life.