CHAPTER 1
General Principles of a Fair Trial Applicable in all Stages

Introduction

All principles discussed in this chapter are relevant to ensure a fair trial and are required to be upheld by all parties at every stage of the judicial proceedings – the pre-trial, trial and post-trial stages. Illustratively, fair trial norms include the right to be presumed innocent, the right to be defended by a lawyer, the right to be informed of charges. The rules that ensure protection of all parties – defence, prosecution, accused, victim and witnesses – are laid down in the Code of Criminal Procedure and the Evidence Act. The system is not perfect but is designed with the specific idea of creating a level playing field, arriving at the truth and delivering justice, as nearly as it is humanly possible to do.

As the judge has complete control of a case as soon as it comes to court, it is his paramount duty to ensure that fair trial norms that have been assured by the Indian Constitution as well as internationally agreed to are adhered to. Non-compliance with any single norm at any stage can subvert all further proceedings, taint the entire process and gravely impinge on the rights of all parties before the court.

> A trial primarily aimed at ascertaining truth has to be fair to all concerned which includes the accused, the victims and society at large. Each person has a right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as it is to the victim and society.

1.1 Right to Be Presumed Innocent

"It is better that ten guilty escape than one innocent suffers."[1] *This quote reflects the principle, known in criminal law as Blackstone's Formulation named after English jurist William Blackstone, "that there is hardly anything more undesirable in a legal system than the wrongful conviction of an innocent person". This is because the consequences of convicting an innocent person are so significantly serious that its reverberations are felt throughout a civilised society.*[2] *For example, the sentence served by an innocent person cannot be erased by any subsequent act of annulment.*[3] *Thus, to ensure as far as possible that no court will wrongfully convict an innocent person, an accused person is presumed innocent until proven guilty, with the prosecution bearing the burden of establishing the facts necessary to prove guilt.*

[1] Letter from Benjamin Franklin to Benjamin Vaughan, 14 March 1785.
[2] *Kali Ram v State of Himachal Pradesh* 1973 AIR SC 2773.
[3] Ibid., para. 28.

1.1.1 Domestic Law

All criminal trials are based on the principle that the accused is innocent till proved guilty. The presumption of innocence is a cardinal principle of our legal system and a basic right of the accused person. The presumption must stand and be the guiding principle right from the moment of suspicion, through investigation, throughout the trial process and till the delivery of the verdict.

Criminal procedure is built around the principle of "innocent until proven guilty" and is designed to protect this right. When it is said that a defendant to a criminal charge is presumed to be innocent, what is really meant is that the burden of proving his guilt lies on the prosecution."[4] This means that it is the duty of the accuser to show not merely the general probability of guilt in the circumstances, but requires him to prove every element of the offence beyond reasonable doubt.

It is frequently argued that the rights afforded to the accused are somehow bought at the cost of the victim, the state and society at large, but that is not so. The scheme of the Evidence Act and the codes of procedure are designed not to favour one party over the other, but to create a balance between all parties, that will eventually help lead as closely as possible to discovering the truth and delivering justice.

Arguments that there is nothing wrong per se in shifting the burden of proof on to the accused, especially where grave offences are involved, have not found favour in our legal system, where the notion of being innocent until proven guilty is considered as important as the liberty of the individual. Shifting the burden would create a presumption of guilt which the individual accused would have to displace. If not the judge would be bound to convict, creating a greater risk of innocent persons being convicted simply because they are without resources to fight their cases well. This is particularly necessary to factor in, in countries such as India, where most of the population is not in a position to mount a serious challenge to the state's accusations. In addition, the state sets the rules by which the game is to be played, and is better equipped to play the game. Finally, the state has at its disposal various resources for evidence collection and gathering which the individual cannot possibly have.

The state, in the form of its law enforcement agencies and prosecution machinery wields the sword of justice when it acts on behalf of the victim and must investigate, prepare and present its case to the fullest, to satisfy that trust. On the other hand, fair trial norms, including the presumption of innocence, are the individual's shields of justice provided by law to protect the accused against any unfair, biased or illegal acts of a powerful state. The judge's role is to hold the scales balanced by his assessment of what is brought before him, and active interventions when he suspects or knows of danger to any of these rights by the flouting of these rules.

Over time, the pronouncements of the Supreme Court have consistently reaffirmed that the presumption of innocence is a human right. [5] That the accused, however unpleasant and unattractive he or she may be and however deplorable the alleged crime is, must be afforded *all* the protections required for the realisation of this right.

[4] William Glanville, *The Proof of Guilt*; edn. 3, Stevens, 1963, pp. 184 -85.
[5] *Narendra Singh and Anr. v State of Madhya Pradesh*, (2004) CrLJ (2842), para. 31.

This presumption of innocence must condition his/her treatment and the procedure of the trial throughout.

The Apex Court in *P.N. Krishna Lal v Government of Kerala*[6] clarified that the principle of presumption of innocence is entrenched in the Indian Constitution, the Universal Declaration of Human Rights and the Civil and Political Rights Convention, to which India is a member, guarantee fundamental freedom and liberty to an accused person. The *procedure prescribed for trial must also stand the test of the rights guaranteed by those fundamental human rights.*[7] In criminal jurisprudence, the settled law is that the prosecution must prove all the ingredients of the offences for which the accused has been charged. The proof of guilt of the accused is on the prosecution and must be beyond reasonable doubt. At no stage of trial is the accused under an obligation to disprove his innocence. "Unlike in a trial of civil action, the burden of proof of a case always rests on the prosecution and it never gets shifted....To place the entire burden on the accused to prove his innocence, therefore, is arbitrary, unjust and unfair infringing, violating the guarantee under Article 21."

Section 101 of the Indian Evidence Act further reinforces this right, by providing that whoever desires a court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts.[8] Thus, if the state wishes to convict an individual of an alleged crime, the state carries the burden of firmly establishing and proving the defendant's guilt.

To protect this right to be presumed innocent, Section 161(2) of the Code of Criminal Procedure permits persons questioned by the police to refrain from answering questions which might expose them to criminal penalty.[9] Imprisonment without regard to procedures intended to protect the right to remain silent is unconstitutional under Article 21.

It is often wrongly believed that the burden of proof has been implacably reversed in those cases where state policy has required in introduction of stringent legislation to deal with well-recognised evils, illustratively, dowry killings. Here the statute clearly states: "When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry; the court shall presume that such person had caused the dowry death." Even here, the Law Commission and several Supreme Court cases have clarified that it is the prosecution that must show to a high level of proof that each element that makes up what amounts to a dowry death is in fact made out. It is only after this that the presumption arises that the accused has "caused the dowry death", but even this is just a rebuttable presumption and the accused has every right to show that there were other circumstances that displace the prosecution's case. In the words of the Law Commission: "Under the Section, it is first necessary to prove that such woman has

[6] 1995 Supp(2) SCC 187, para. 23.
[7] Author's emphasis.
[8] The Indian Evidence Act, 1872, Section 101.
[9] Regarding police questioning: "Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture." Code of Criminal Procedure, 1973, Section 161(2).

been subjected by such person to cruelty or harassment and secondly, such cruelty should have been or in connection with any demand for dowry and thirdly that this must have been soon before her death. If these are proved, the court 'shall presume' the person caused the dowry death. Of course, the words 'shall presume' mean that the court is, in such circumstances, bound to presume that such person had caused the dowry death but still the presumption is rebuttable."

***Ram Gopal v State of Maharashtra* (1972) 4 SCC 625**

Facts: The appellant Ram Gopal was charged with the murder of Zingrooji Sita Ram. It was established that Sita Ram was poisoned and died on his way to the hospital. The prosecution argued that Ram Gopal had administered the victim some insecticide in kerosene oil either with tea or in water and it was a result of the poisonous insecticide that Sita Ram died. The post-mortem report suspected death by poisoning and a chemical analyst's report confirmed the presence of an organo-chloro compound in the viscera of the deceased. The prosecution argued that the defendant's motive to murder Sita Ram was established by the fact that prior to his death Sita Ram had sold a piece of land to Ram Gopal. However Ram Gopal had not paid him anything but had promised to pay the amount within six weeks of the execution of the sale deed. Despite constant pestering, Ram Gopal kept putting off Sita Ram on some pretext or the other. Case History:The prosecution's case relied on the post-mortem chemical analysis of the viscera which showed the presence of an organo-chloro compound. It argued that the deceased had sickened and died after a visit to the accused. Opportunity and the means of death had been established. Ram Gopal was sentenced to death by the Sessions Judge Nagpur and this was confirmed by the High Court of Bombay (Nagpur Bench). In appeal to the Supreme Court against the death sentence the Apex Court stated that the prosecution's case had too many gaps. There was no evidence to show that the accused was ever in possession of any organo-chloro compound. It was improbable that such a large dose of a kerosene-based poison that was fatal could have been consumed by the victim without noticing it and other possibilities like suicide had not been ruled out. This was sufficient to give the accused the benefit of doubt and the Apex Court reversed the verdict of the lower courts. The case is illustrative of the need to keep in mind that not only must every fact be established along with the *mens rea* required, but that the prosecution must be able to link the sequence of events and rule out other probable causes for the occurrence. Here the Supreme Court felt that there may have been other causes for the death of the victim and therefore the beyond reasonable doubt degree of proof had not been met.

***Kali Ram v State of Himachal Pradesh* AIR 1973 SC 2773**

Kali Ram was convicted of two murders. He appealed his conviction in the Supreme Court. The prosecution's case rested on three pieces of evidence. First, a witness testified that Kali Ram had spent the night near the victims' residence, and on the evening of the crime was seen heading toward the victims' house. Second, the prosecution asserted that they had a written confession from Kali Ram which he had mailed to the police station. Third, the prosecution asserted

that Kali Ram made an oral confession to a witness. Noting that the accused was entitled to the presumption of innocence requiring the prosecution to establish guilt beyond a reasonable doubt, the Supreme Court reviewed the prosecution's evidence. First, the Court concluded that the evidence that Kali Ram was headed toward the victims' house on the night of the crime was unreliable because the testifying witness had waited for over two months to come forward, despite knowing of the incident, since the crime's occurrence. The Court found that the prosecution did not offer a cogent explanation as to why the witness was silent for so long. Second, the Court held that the prosecution had not verified the authenticity of the letter of confession nor displaced the possibility that it could have been fabricated. It was necessary for the prosecution to do that before the letter of confession had evidentiary value. Third, the Court found the testimony of the witness regarding the oral confession highly questionable, as the police had hired this witness to testify. Having found all the prosecution's primary evidence questionable, the Court reversed the conviction, explaining that the prosecution did not rebut the accused's presumption of innocence.

1.1.2 International Law

India is part of the international community of nations. It has contributed significantly to the building of international norms and has long accepted their validity. In fact, its Constitution mirrors many of the fundamental rights and norms agreed to at international law.

In the last five decades, a considerable amount of international law has developed, which has resulted in the creation of internationally accepted standards and guarantees for human rights. The Universal Declaration of Human Rights (UDHR) adopted by the United Nations in 1948 was intended to set *a common standard* that ought to be met by all nations. The rights and dignities contained in the UDHR should be a standard for every nation to follow and achieve.

Although the UDHR is not a legally binding document, it represents the will of the international community that human rights and dignity must be protected. Many of its principles have been turned into binding norms, reflected in specific multilateral covenants and treaties that obligate states to bring their own policy, practice and legal standards into conformity with them.

The main instrument dealing with the pre-eminent international legal standards on the subject of fair trial rights is the International Covenant on Civil and Political Rights (ICCPR). The ICCPR is a United Nations treaty created in 1966 and entered into force on 23 March 1976. Nations that ratified this treaty are bound by it. The ICCPR is monitored by the Human Rights Committee, a group of 18 experts who meet thrice a year to consider periodic reports submitted by member states on their compliance with the treaty.[10]

[10] The Human Rights Committee is a body of independent experts that monitors the implementation of the International Covenant on Civil and Political Rights by its state parties. All states parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the state party in the form of "concluding observations".

India ratified the ICCPR in 1979, meaning that India is committed to upholding all the rights it guarantees. Many of the rights contained in the ICCPR relate to the criminal justice system – whether in relation to the pre-trial, trial or post-trial stage. Many of the safeguards provided in Indian law are also mandated by international law.

Treaties, agreements and covenants signed and ratified by the Government of India do not automatically become a part of our domestic law unless incorporated into our laws by our legislatures. Nevertheless, judges have often discussed the effect of the international covenants or agreements signed and ratified by India and whether these are enforceable in Indian courts. In relation to human rights norms, our courts have adopted a progressive line and have declared that insofar as the rights declared in such international instruments are consistent with the fundamental rights guaranteed by Part Three of the Constitution, they can be read as facets of, and to elucidate, the content of the fundamental rights guaranteed by our Constitution.[11] Any international convention consistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantees.

The Universal Declaration of Human Rights (UDHR) lays down the common standard to be met by all nations. Article 11(1) states: *"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."* Indian law is precisely in line with Article 14(2) of ICCPR which states: *"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."*

In its General Comment No 13 the Human Rights Committee reiterates in unambiguous terms that the presumption of innocence is fundamental to the protection of human rights. "By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused gets the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt." Further, all accused persons must be treated in accordance with this principle and it is the duty of all public authorities to refrain from prejudging the outcome of a trial.[12] This is particularly important for adjudicating authorities to keep at the forefront of their minds, and indicates once again the need to ensure that procedure is meticulously followed so that there is little room for the play of private prejudice, personal bias, socialisation, or public pressure to invade or colour a trial's outcome.

1.1.3 Guide for Judicial Enforcement

Judges need to bear in mind that ***suspicion, however grave, cannot take the place of proof, and strong pieces of circumstantial evidence cannot establish guilt unless each piece links to another and every link in the chain is proved.***

Judgements require that in coming to a verdict the Court evidences in its rationale that it: has recognised that the burden of proof lies with the prosecution; has satisfied itself of the degree to which the burden of proof has been shown to be beyond reasonable

[11] *People's Union for Civil Liberties v. Union of India* (1997) SC 1203 and *Vishakha v State of Rajasthan* (1997) 6 SCC 241.
[12] General Comment No. 13 (Article 14), in *UN Compilation of General Comments*, p. 124.

doubt or been left wanting; indicates the point in the trial when the onus of proof shifted, if at all it did, and the extent to which the other side could displace it; and the effect of the whole on the outcome of the trial.

The cardinal rules are:

- The burden of proof rests on the prosecution.
- The prosecution must establish guilt beyond reasonable doubt.
- The benefit of doubt belongs to the accused.
- High probability is not enough to convict – where there are several possible accounts, the account supporting the accused should be upheld.

The Supreme Court in *Sharad Birdhichand Sarda v State of Maharashtra* stressed the following "five golden principles" [13] that must be fulfilled before the case against an accused can be said to be fully established and called it the Panchsheel of the proof of a case based on circumstantial evidence:

"The circumstances from which the conclusion of guilt is to be drawn should be fully established." The Court stressed that the circumstances concerned "must or should" and not "may be" established. "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

"The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty."

The circumstances should be of a conclusive nature and tendency.

They should exclude every possible hypothesis except the one to be proved.

There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

Judges must always honour this right of the accused person. Their own predilections, the force of prosecutions arguments or the weakness of the defence is not adequate to ground a conviction. These elements may factor in but it is not sufficient proof of guilt. The objective evidence that is put forward, the unbroken chain of events that lead to an irresistible conclusion are factors for grounding a conviction. Extraneous factors such as public pressure, media reports, the judge's own biases or popular opinion cannot influence the judicial verdict.[14] Sometimes cases may appear to present a clash between the public's outcry for conviction and the rights of the accused individual. However, the benefit of reasonable doubt cannot be withheld from the accused.[15] The decision of the court can only be based on the facts and evidence proved before it.

[13] (1984) 4 SCC 116, para. 153.
[14] *Kali Ram v State of Himachal Pradesh* AIR 1973 SC 2773, para. 27.
[15] Ibid.

Trial by Media

"Trial by media" refers to the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt or innocence regardless of an objective evaluation of the case before the court. The media have a right to report topical events, but in recent times the sensational nature and intensity pose a danger of creating exceptional pressures on judges, which they must resist.

A week after the 20 December 2001 attack on Parliament the police went so far as to call a press conference in the course of which the prime accused "incriminated himself" in front of the national media even before the matter went to trial.

Similarly, a co-defendant was initially sentenced to death for his alleged involvement, despite an overwhelming lack of evidence. Large sections of the Indian media portrayed him as a dangerous and trained terrorist. On appeal, the Delhi High Court overturned the conviction and described the prosecution's case as "at best, absurd and tragic".

Jayendra Saraswati, head of Kanchi Kamakoti, was accused of killing two mill workers as sacrifice, based solely on newspaper reports. The Andhra Pradesh High Court in *Labour Liberation Front v State of Andhra Pradesh* held that the writ petition filed to force the authorities to investigate relied on incorrect facts that should have been verified. The Court observed that "once an incident involving a prominent person or institution takes place, the media is swinging into action and virtually leaving very little for the prosecution or the Courts..."

1.2 Right to Equality before the Law and Equal Treatment by the Law

The principle of equality encompasses all areas of India's governance and society. The Constitution is unequivocal that equality is a fundamental mandate by which both state and individual are bound. In one stroke of the pen it removes immoral and iniquitous practices such as untouchability and begar. Through positive discrimination, it makes clear that there is no place for discriminatory societal divisions or practices such as caste, the historic disadvantages of sections such as women, and the vulnerability of minorities and children. It decrees that "we the people" shall be equal in our freedoms, have equality of opportunity and shall, first and foremost, be equal before the law. Furthering this principle and making equality a reality, is part of the judge's mandate. Equality before the law requires that there must be equal access to the law and equal treatment before the law.

The right to equality before the law and equal treatment by the law means that discrimination is prohibited throughout the judicial proceedings. Judges and officials may not act in a discriminatory manner when enforcing laws and they must ensure that the rights of all are equally protected.

1.2.1 Domestic Law

Article 14 of the Constitution states: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."[16] Article 15 lays down the principle of non-discrimination according to which: "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."[17]

In terms of justice delivery, the principle of equality basically has two aspects: equal access to the courts and equal treatment at law. In its application, this means that irrespective of religious identity, gender, caste, class, or regional identity, every citizen appearing before a court has a right not to be discriminated against in the course of the proceedings or the manner in which the law is applied.

Equality however, does not always mean the same treatment to everyone, but recognises that there are pertinent differences which require that persons be treated differently to the extent that there is a relevant difference between them. It is also settled law that discrimination can arise through the application of different rules to comparable situations or the application of the same rule to different situations. To treat persons the same when they are in fact already unequal is to perpetuate rather than to eliminate inequality. "*Sometimes the greatest discrimination can lie in treating things that are different as though they were exactly alike.*"[18]

Equality, therefore, prohibits both direct and indirect discrimination. The European Court of Justice (ECJ) has explained these concepts of direct and indirect discrimination in the following terms:[19]

> Direct discrimination thus involves treating people differently when they are in a comparable situation and should be treated the same. It occurs when someone is disadvantaged or favoured in comparison to someone else by reference to some characteristic such as colour or religion when there is no good reason for distinguishing between them on this basis or the distinguishing characteristic does not justify the extent of the disadvantage or favour. Indirect discrimination involves treating people the same when they are in different situations and should be treated differently. It is determined by the differential impact of the same treatment on the members of one group of persons in comparison to the members of another. If such differential impact operates to the advantage or disadvantage of the members of one group rather than the other, then, unless such differential is capable of objective justification, the apparent equal treatment amounts to indirect discrimination. Both these dimensions of discrimination have been acknowledged by courts and other bodies in their interpretation of constitutional and international guarantees of equality before the law.

Equality is, however, more than the absence of discrimination, whether direct or indirect. The statement of equality is not solely a matter of individual effort. It involves

[16] Constitution of India, Article 14.
[17] Constitution of India, Article 15(1).
[18] *Jenness Fortsom* 403 (1971) US 431.
[19] C-279/93 *Finanzamt Köln-Altstadt v Schumacker* (1995) ECR 1-225.

the development of strategies which would actively promote a civil society based on principles of social, economic and political inclusion. This embraces taking positive measures to enable a person to overcome disadvantage and to afford them real equality of opportunity; and it is important to recognise that such measures do not constitute discrimination, but rather, promote equality.

The Supreme Court explained in *Mrs Maneka Gandhi v. Union of India (UOI) and Anr.* that the right to equality articulated in Article 14 not only prohibits the state from discriminatorily applying the law, but also mandates that the law is not applied unreasonably, arbitrarily, fancifully or oppressively.[20] The Court explained that Article 14 interacts with Article 21, thereby making any unreasonable or arbitrary proceeding a violation of Article 21.[21] The Court also characterised the right to equality before the law as a fundamental right, thus attaching to every human being, everywhere, at all times.[22]

***Mrs Maneka Gandhi v Union of India (UOI) and Anr.* (1978) 1 SCC 248**

Mrs. Gandhi had her passport impounded by the Indian Passport Authority pursuant to the Passports Act, 1967. However, in contravention of the Act, the Authority did not provide Mrs. Gandhi with any reason why her passport was impounded, nor did the state permit her a hearing to challenge the decision.

Although the Court disposed the matter without passing any formal judgement due to the Attorney General's subsequent independent efforts to remedy the matter, the Court's opinion noted that the Passport Authority's conduct violated Articles 14 and 21 of the Constitution.

1.2.2 International Law

Although domestic law is consistent with international law on this standard, international law is more descriptive, articulating specific types of discrimination that are prohibited. Article 26 of the ICCPR states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[23]

The specific right to equality before the courts is expressly provided in Article 14(1) of the ICCPR which states: "All persons shall be equal before the courts and tribunals.

[20] *Mrs. Maneka Gandhi v. Union of India (UOI) and Anr.* (1978) 1 SCC 248, para. 56.
[21] Ibid.
[22] Ibid., para. 20.
[23] ICCPR, *supra* note 47, Article 26.

1.2.3 Guide for Judicial Enforcement

A major challenge before any judge is the existence, risk or even appearance of bias in the courtroom. This segment is restricted to indicating some of the common concerns at court from the point of view of the court user. It does not study all aspects of equality; just a few which district judges and magistrates might benefit from whilst on the bench.

It is not out of place to say that the adage "justice must not only be done, it must be seen to be done" has stood the test of time. Nothing done by the judge or in his court must damage the integrity of the proceedings. Firstly, no justifiable doubts must arise on the impartiality of the judge himself. Occasionally, bias is open; it manifests on the face of the record and is clear for all to see.

> Bhanwari Devi was a grass roots government worker whose job included reporting on child marriages. She duly reported the marriage of the one-year-old daughter of a Women's Development Programme official to the authorities. Though the police tried to stop the marriage the family proceeded secretly with the ceremony. A few months later, in retaliation for her intervention, Bhanwari was gang raped in the presence of her husband. The trial judge acquitted the accused on the reasoning that "...rape is usually committed by teenagers, and since the accused are middle aged and therefore respectable, they could not have committed the crime. An upper caste man could not have defiled himself by raping a lower caste woman".

At other times, it is important for the judge to be aware that religious, class, caste, gender, language and other group identities in India are deep-seated and considerably more difficult to recognise in the self and in officers of the court, as it is unconscious and not reflected on. Personal prejudice often goes unnoticed by the ones holding them and remains unchallenged because it reflects commonly held stereotypes, or is assertive of one's own group identity, social orientation or personal proclivity. If allowed – however unwittingly – to come into play or go unchecked, it can taint the proceedings and skew outcomes to the disadvantage of one or the other protagonist in the case.

> *Being free from personal prejudice or bias must necessarily include detachment from one's own inner prejudices. If in reality this is difficult to apply, the judge or magistrate should recuse himself or herself.*

Being aware of one's own socialisation and those of others towards lay people who come to court, accepting how the court appears to others, and understanding the circumstances of those who come to court can go a long way to create a sense of confidence and fairness. For instance, simple considerations, such as recognising that some witnesses and victims will lose vital daily wages each time they are required to be in court, and designing dates and times to minimise ineffective hearings, indicates fairness and an understanding of economic differentials that if unattended can affect the outcome of a case.

In guarding against bias, judges are not expected to treat every person in the same manner. In fact, ensuring fairness and equality of access and a level playing field at court may mean providing special or different treatment where these are merited. Judicial decision-making must be informed by objectivity. However, this objectivity should be tempered by the constitutional premise that every person has the right to be treated equally and that individuals and groups that are historically and socially disadvantaged should be provided equal opportunities and their rights secured.

> *Bias – if ever it is to exist – must be for constitutionalism, protection of human rights and the interests of the poor and underprivileged.*

Women, minority communities, Dalits, Scheduled Castes and Scheduled Tribes, and the poor in general, as well as those such as children, require the court's special consideration as a protector of rights. Many who come to court may suffer multiple disadvantages. People who are socially and economically disadvantaged have a more difficult time coming to court as witness, victim or accused. It is far more difficult for them to comprehend the proceedings and find legal counsel of quality, or at all. It is important for the judge to notice these things and remedy them, so that traditional disadvantage does not turn into serious obstacles to achieve fair outcomes. Judges have a duty to ensure that a disadvantage is not permitted to become an obstacle to the attainment of justice.

> *Violence against women remains rife across all communities. Despite significant law reform in this area and other interventions, justice cannot be ensured without a change in mindset of those who make up the criminal justice system. Women are often wrongly accused of misusing penal provisions that address cruelty towards them – both mental and physical – and for making unwarranted demands for maintenance and matrimonial rights. In cases of rape and sexual molestation, women often find themselves being objectified and treated with disdain. Instead of being treated with consideration and sensitivity, they are sometimes blamed – even by the court – for having contributed to the commission of the offence. This, coupled with the low rate of conviction in crimes against women, leaves a large majority of women unable to secure effective protection from the criminal justice system.*

One way to maximise the integrity of the proceedings is to ensure that procedures are strictly adhered to, as procedures are designed to assure an even playing field between contesting parties. The responsibility for adhering to due process rests on everyone involved in the administration of justice. Nevertheless, the judge, because he has absolute control of his court, has a paramount responsibility to ensure that the process inspires confidence, ensures impartial treatment and is seen as transparently fair by all who approach it.

Awareness of "where people are coming from" – their background, culture, special needs and concerns, and the potential impact of these on each person, whether a party in a suit, a victim, witness, or accused will nuance the judge's response.

While civil suits carry an element of voluntarism this is not present in criminal cases where the state makes the choice of prosecuting on behalf of the victim and society. The victim may be traumatised, witnesses afraid and uncertain, and the accused in the captivity of the state. While the rights of the victim are protected by the state, the accused is often completely dependent on the judge to ensure his rights. Witnesses too, may be looking for assurances of safety from the court. But ultimately, they all rely on the judge on his bench to assure the protection of their rights.

The majority of those who appear before the courts, whether in civil suits or criminal proceedings, know little law and less about proceedings. The hierarchies of the court, its officers and their duties, the local language and the language of law are alien, the very structures and physical set-up engender fear and anxiety and are deeply intimidating. An accused, for instance, will often not know the duty of care his lawyer owes him, or that the prosecution must aid the court in arriving at the truth, or that the judge is not a punishing authority, but an active umpire bound to make sure that the playing field is level, and that fairness and impartiality rule. Indeed, given the profile of most undertrials lodged in jails across the country, it is safe to assume that few know how to differentiate the court clerks from the bar and the bench as all appear alien and fearsome. The fine points of procedure, the right to silence, challenging charges, mounting the best defence, insisting on disclosure, the concepts of shifting evidentiary burdens, balance of probabilities, reasonable doubt, interim applications, right to bail, parole and probation, are all foreign to most people hauled up before the courts. Initially, even knowing why he is before a court may be totally outside the ken of the accused, and later, awareness of the importance of being brought to court within certain strict time limits, or at all, may not be in his knowledge. In these common situations, it is the judge's duty to ensure that the underprivileged, in particular, are provided with information and assistance to access their fair trial rights.

Where procedures are strictly followed and challenged when breached at the correct stages and when they are expected to be taken account of, they work to ensure fairness. Sloppy procedures lower general standards and create bad practice. Allowing habitual slippage and breaches of safeguards written into law incentivises illegality in policing and poor standards in prosecution and defence. It wastes court time, ensures that the victim is kept away from remedies or the accused is severely prejudiced by overlong incarceration and deprived of just treatment. Lax procedures also affect the functioning of the state by creating cascading obstacles to the administration of justice that in turn generate huge backlogs and unnecessary appeals, wasting taxpayers' money in trials that are bound to fail in the end owing to early infirmities.

This is why the court is expected to inquire and challenge the police in relation to the necessity of an arrest, the fullness of investigations, the rationale for remand and the custodial treatment of the accused. Given the well-known poverty of lawfulness in policing, the judge is required to go beyond merely noting the presence of the accused, to carefully inquire about the presence of ill-treatment, making sure his questions rule it out or take steps to prevent and punish ill-treatment. Given the asymmetry of power between police and prisoner, mere silence in the face of a judge's quick questions or even seeming acquiescence cannot be taken to mean there has been no ill-treatment in custody when the norm of ill-treatment is well known and widely documented. Nor

are routine questions asked in the presence of the police by a busy judge sufficient fulfilment of his duty to inquire into the custodial situation of the accused.

Similarly, explaining carefully to the accused that he has the right to a competent lawyer of his choice and assisting him in getting one through legal aid if necessary is a vital early part of fulfilling the fairness doctrine. Absence of this knowledge and right in the accused immediately deprives him of the ability to mount an effective defence and contaminates the proceedings at the very outset.

If liberty is to be treated as a prime constitutional value it is also important for trials to come to quick outcomes. The willing practice of granting maximum remands of 15 days without questioning its necessity reinforces police laxity in investigation. Similarly, the arbitrary setting of next dates for appearance once the trial has begun and habitually agreeing to adjournments, favours court authorities and legal professionals over litigants, witnesses, victims and accused and under-values their freedom and the cardinal, constitutional principle of liberty.

Trials that continue for long periods of time severely prejudice at least one party. Constant adjournments favour and therefore privilege lawyers over litigants or one party over the other. Routinely agreeing to pass over dates and accepting excuses for non-production of the accused because of lack of adequate police escort, favours the police over undertrials and creates an uneven playing field, so that malfunctioning systems are perpetuated. The judge is the king of his court. Any lack of action in the face of procedural breach and misbehaviour is an indication of bias. Recognising this and remedying it is the judge's duty.

1.3 Right to Remain Silent

It is a generally accepted principle that the suspect/accused cannot be forced to incriminate him/herself. Therefore any coercion exerted by the authorities with the aim of compelling the suspect/accused to make a statement or confess guilt is prohibited during all stages of the proceeding. The right to be presumed innocent is impaired if authorities draw adverse inferences from the silence of the suspect/accused. Under no circumstances may the silence of the accused be considered as proof of guilt. The burden of proof rests solely on the prosecution. The right to remain silent is supported by three related underlying policies. First, it ensures that the government is according respect and dignity to its citizens.[24] *"To adequately respect the inviolability of the human personality, an accusatory system of criminal law requires that the government attempting to punish an individual must do so by producing its own evidence through its own independent efforts, rather than by the cruel, shortcut, practice of compelling inculpatory statements from the accused's mouth."*[25] *Second, the right to remain silent safeguards the accused by deterring police coercion and forced statements.*[26] *Third, by deterring coerced statements, the right to remain silent helps ensure that the statements made by the accused are reliable.*[27]

[24] *Miranda v Arizona*, 384 US 436 (1966).
[25] Ibid. *See also* 8 Wigmore, *Evidence* (1961).
[26] *Miranda*, 384 US 436.
[27] Ibid.

1.3.1 Domestic Law

1.3.1.1 Protection in Respect of Conviction of Offences/Privilege Against Self-Incrimination

Article 20(3) of the Constitution protects the right of the accused to remain silent by providing that: "No person accused of any offence shall be compelled to be a witness against himself."

1.3.1.2 Examination of Witnesses by Police

Section 161(2) of the Code of Criminal Procedure leaves no room for doubt when it states that an accused is bound to answer all questions of a state official truthfully except "questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture".

1.3.1.3 Further Statements of the Accused to the Court

The Code of Criminal Procedure, Section 313 further protects the right to silence. It protects the accused from liability for refusing to answer or falsely answering questions by a judge during a court proceeding. It says: "the accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them."

1.3.1.4 The Accused is a Competent Witness for the Defence

During a trial, the accused can be arraigned as a witness for the defence but cannot be called on to give evidence except at their own request.[28] If the accused chooses not to give evidence, the court cannot draw any adverse presumption against him.[29] Additionally, the accused can choose not to answer questions put to them by the court.[30] Except as a condition requisite to a tender of pardon, no influence by means of any promise or threat or otherwise can be used on the accused to induce them to disclose or withhold any matter within their knowledge.[31]

Thus Sections 161, 313, 315 and 316 of the Code raise a presumption against guilt and in favour of innocence, grant a right to silence both at the stage of investigation and trial and also preclude any party or the court from commenting on the silence.

The Supreme Court views Section 161(2) as a type of "parliamentary commentary"[32] on Article 20(3). Along with many other jurisdictions, Indian courts recognise the right of persons not to answer questions that would tend to lead to a criminal charge against them. This protection is closely linked to ensuring that there is no incentive to the police to coerce or torture confessions and will "prevent police interrogations

[28] Code of Criminal Procedure, 1973, Section 315.
[29] Ibid.
[30] Code of Criminal Procedure, 1973, Section 313.
[31] Code of Criminal Procedure, 1973, Section 316.
[32] *Nandini Satpathy v P.L. Dani* AIR 1978 SC 1025, para. 46.

from devolving into an antagonistic inquisition".[33] The Court has also said that no adverse inference against the accused can be drawn because he refuses to answer.

***Nandini Satpathy v P.L. Dani* AIR 1978 SC 1025**

Ms Nandini Satpathy was accused of embezzling funds while serving as Chief Minister of Orissa. She was made to present herself before the Deputy Superintendent of Police (Vigilance) and provide answers to written questions. She refused to answer the questionnaire on the grounds that it was a violation of her fundamental right against self-incrimination. Upon refusing to answer, Ms Satpathy was charged under Section 179 of the Indian Penal Code, 1860, which prescribes a punishment for refusing to answer any questions asked by a public servant authorised to ask that question.

The issue before the Supreme Court was whether Ms Satpathy had a "right to silence" and whether people can refuse to answer questions during investigation that would point towards guilt.

The Supreme Court held that Ms Satpathy had to answer all questions that did not materially incriminate her. For questions she refused to answer, she was required to provide, without disclosing details, her reasons for fearing that answering such questions would result in self-incrimination. Her reasons for invoking her right to remain silent would then be examined and she would be liable for prosecution under Section 179 if it was determined that she refused to answer a question under the false pretence of self-incrimination.

The Supreme Court accepted that there is a rivalry between social interest in crime detection and the constitutional rights of an accused person. However, the protection of fundamental rights enshrined in the Constitution is of utmost importance and in the interest of protecting these rights "we cannot write off fear of police torture leading to forced self-incrimination".

Simply put, the protection against self-incrimination is undoubtedly quite extensive in criminal law, extending as it does to almost all people, at nearly all stages of a criminal trial. It is this wide armour that must be kept in mind.

1.3.2 International Law

Similar to domestic law, ICCPR Article 14(3)(g) guarantees the right of the accused "not to be compelled to testify against himself or to confess guilt".[34] This protection is also to be found in the UN Body of Principles for the Protection of All Persons and under the Rome Statute of the International Criminal Court.

1.3.3 Guide for Judicial Enforcement

The right to silence has various facets. One is that the burden is on the state, or rather the prosecution, to prove that the accused is guilty. Another is that an accused

[33] Ibid., para. 45.
[34] ICCPR, *supra* note 47, Article 14 (3)(g).

is presumed to be innocent till he is proved guilty. The third is the right of the accused against self-incrimination, namely, the right to be silent and that he cannot be compelled to incriminate himself. There are also exceptions to the rule. An accused can be compelled to submit to investigation by allowing his photographs to be taken, voice recorded, blood sample tested, hair or other bodily material used for DNA testing, etc.

The Supreme Court has laid down the following directives with regard to the right to silence:

- An accused person cannot be coerced into giving a statement pointing to his/her guilt.
- The accused person must be informed of his/her right to remain silent and also of the right against self incrimination.
- No adverse inference may be drawn from anyone availing this right to silence.
- An accused person must be informed of his/her right to consult a lawyer at the time of questioning, irrespective of whether he/she is under arrest or in detention.
- The person being interrogated has the right to have a lawyer by his/her side during the interrogation but not throughout.

This right is violated if the following four elements are satisfied:

(i) The individual must be accused of a crime.
(ii) The individual must be asked a question the answer to which would incriminate the accused.
(iii) Such a question can be asked at any stage of the process including during the investigation.
(iv) The individual must be *compelled* to answer such a question.

Given these elements, many issues arise regarding the breadth of the right to remain silent.

(1) To What Individuals Does the "Accused of a Crime" Standard Apply?[35]

- Individuals formally charged of an offence.
- Suspects who have been accused of an offence.
  - The scope and nature of the inspector's inquiry must indicate that an accusation has been made.
  - The right thus does not apply merely during the beginning of the general investigatory stage.
- The person must have been accused before he is asked to make a statement. It is not sufficient that he became an accused after the statement was made. The statement of a person who is brought in for questioning but is not yet an accused, is not affected by Article 20(3). A general enquiry has no specific accusation before it and therefore, Article 20(3) stands excluded. A person stands in the character of an accused when a First Information Report is lodged against him in respect of an offence before an officer competent to investigate it, or when a complaint is made relating to the commission of an offence

[35] *Satpathy*, para. 50.

before a Magistrate competent to try or send the accused to another Magistrate for trial of the offence.

(2) To What Statements/Questions Does the Right Apply?[36]

- An accused has the right of silence only for confessions or statements, the answer to which would incriminate the accused. Remanding the accused to custody for securing recovery under Section 27 of the Evidence Act is violative of the right to silence.
- The right would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against the accused.
- To be witness against oneself is not confined to the particular offence regarding which the questioning is made. It extends to other offences about which the accused has reasonable apprehension of implication from his answer. This conclusion also flows from the "tendency to be exposed to a criminal charge". "A criminal charge" covers any criminal charge other than those under investigation or trial or imminently threatens the accused.
- Incriminatory statements:
    - Statements which have a reasonable tendency to point to the guilt of the accused.
    - Statements which will furnish a real and clear link in the chain of evidence to bind the accused with the crime, become incriminatory and offend Article 20(3) if drawn by pressure from the accused.
    - Answers that would, in themselves, support a conviction are confessions. But answers which have a reasonable tendency to strongly point to the guilt of the accused are incriminatory. An answer acquires confessional status only if all the facts which constitute the offence are admitted by the offender. If a statement also contains self-exculpatory matter it ceases to be a confession. Article 20(3) strikes at confessions and self-incriminations but leaves other relevant facts untouched.

For example, A dies and B is suspected of the murder. In such a case, B is asked several questions. B may describe the scene giving relevant evidence of the landscape. This may be relevant but has no incriminatory force. However, an answer stating that B was at or near the scene, at or about the time of the occurrence or had blood on his clothes would be incriminatory.

(3) At What Stage Does the Right to Silence Apply?[37]

- The right to remain silent is not merely restricted to the trial stage and courtroom proceedings where the accused is a witness.
- The right also applies to pre-court, police and custodial interrogations and other elements of the investigation process that might compel incriminating information.

[36] Ibid., paras. 57-61.
[37] Ibid., para. 55.

(4) What is Compulsion?[38]

- Duress:
  - Statements obtained through physical threats or violence. It also includes threatening, beating or imprisonment of any family member of the accused.
  - Statements obtained through psychological torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidating methods.
- Compulsion does not include the prospect of prosecution.
- A police officer investigating a crime against a certain individual merely telling the person to do a certain thing is not compulsion.
- Merely being in police custody is not compulsion. However it is open to an accused person to show that while he was in police custody he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was, in fact, exercised. It will be a question of fact in each case to be determined by the court on weighing the facts and circumstances disclosed in the evidence before it.

A lawyer's presence is a constitutional guarantee and in the context of the right to silence, it is an assurance of awareness and observance of this right. Given the various elements surrounding the right to remain silent, the Supreme Court had stated that it would be "prudent", but not required, for the police to permit the accused's legal counsel to be present during police examinations.[39] However, moving on from Satpathy, the Supreme Court in *D.K. Basu v State of West Bengal* went on to say that the arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

Courts must be especially aware that many accused, including indigents and illiterates, can often be confused or tense by the police process, and thus unable to protect themselves against overbearing questioning.[40] Thus, courts should carefully protect a citizen's right to remain silent in the face of compulsive police questioning tactics. In determining whether a statement was given out of compulsion, all the circumstances surrounding the questioning should be considered, including the manner in which the question was asked.[41]

The setting of the case will be critical in determining whether an accused's response to questions should be viewed as incriminatory. The court should not focus on whether the accused subjectively perceived that his answer would be incriminatory, but whether the setting and circumstances surrounding the questioning objectively indicate that the accused's response would serve to incriminate him.[42]

[38] Ibid., paras. 68-69.
[39] Ibid., para. 74.
[40] *Satpathy*, para. 5.
[41] Ibid., para. 69.
[42] Ibid., para. 62.

Narco Analysis

Narco Analysis, polygraph and brain mapping tests have been hotly contested legal issues in India. Various High Courts have given conflicting rulings on these issues. It is no longer so. The Supreme Court has now held that these tests cannot be administered on any accused without their consent. Further, the courts should not take the process of obtaining the consent of the accused lightly. The courts must ensure that the "consent" of the accused for such tests is in fact voluntary. For this purpose, the Supreme Court has not only endorsed the guidelines issued by the National Human Rights Commission in this regard but has held them as binding.

The Supreme Court in *Selvi and others v State of Karnataka*[43] held that: "The compulsory administration of the impugned techniques violates the 'right against self-incrimination'. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence."

The Court also stated that: "Forcing an individual to undergo any of the impugned techniques violates the standard of 'substantive due process' which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose, since the test results could also expose a person to adverse consequences of a non-penal nature."

The Court further said: "The protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion."

Upholding the right to remain silent, guaranteed by Article 20(3) of the Constitution, the Supreme Court held that the forcible "conveyance of personal knowledge that is relevant to the facts in issue" violates Article 20(3) of the Constitution.

In the concluding paragraph of the Selvi case, the Supreme Court held the "Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused" issued by the National Human Rights Commission in 2000, as binding. The Court said that these guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the "narco analysis technique" and the "brain electrical activation profile" test. These guidelines were reproduced in the Selvi judgement. They are:

1. No lie detector tests should be administered except on the basis of the consent of the accused. An option should be given to the accused whether he wishes to avail such a test or not.

[43] AIR 2010 SC 1974.

2. If the accused volunteers for a lie detector test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.
3. The consent should be recorded before a Judicial Magistrate.
4. During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.
5. At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a "confessional" statement to the Magistrate but will have the status of a statement made to the police.
6. The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.
7. The actual recording of the lie detector test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.
8. A full medical and factual narration of the manner of the information received must be taken on record.

1.4 *Nullum Crimen Sine Lege*: Principle of Non-Retroactivity

"No crime, no punishment, without a previous penal law." The simple proposition is that no one can be investigated tried or punished for something which was not a crime when the event or actions took place. The paramount importance of this principle has been universally recognised. The principle also extends to law making. It is considered oppressive and unfair to make laws which operate retrospectively, i.e. make some action performed in the past into a crime in the present. The principle also accords with another universally recognised rule that it is the duty of any law maker to declare the law and make it known so that it can be obeyed. These principles are universally accepted as absolutely necessary to underpin the rule of law and because it is recognised that the state is much more powerful than the individual and its power must be conditioned in order to protect individual liberties against arbitrary and unwarranted intrusions by the state.

1.4.1 Domestic Law

1.4.1.1 Protection Against *Ex-Post Facto* Law

Article 20(1) of the Constitution states: "No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."[44] This Article not only prohibits laws purporting to create an *ex post facto* application, but also prohibits convictions or sentences based on laws not yet enacted when the charged offence occurred.[45] So for example, when a newly enacted sentencing guideline calls

[44] Constitution of India, Article 21.
[45] *Rao Shiv Bahadur Singh v State of Vindhya Pradesh* AIR 1953 SC 394, para. 11.

for harsher penalties for the same crime, the court cannot apply these newer penalties to crimes committed before they entered into force.[46] However, courts can still apply repealed criminal statutes if the accused committed the crimes prior to such statute's repeal.[47] Illustratively, persons charged under the Terrorism and Disruptive Activities Act (TADA) and Prevention of Terrorism Act (POTA) continue to languish in jail even though the laws have been repealed, and they will be tried and sentenced under those laws. Courts can as well, apply a repealed statute to crimes committed after to the repeal if by trial time a new statute is in force that revives the earlier statute's rule.[48]

***G.P. Nayyar v State (Delhi Administration)* AIR 1979 SC 602**

Two public officials were tried in 1973 for criminal conspiracy and illegal gratification under the Prevention of Corruption Act, 1947, for allegedly accepting bribes from 1955 to 1961. The accused appealed to the Supreme Court claiming that the burden of proof applied to their trial mandating that the court presume the accused guilty unless proved otherwise was in violation of Article 20(1), as in 1964 the legislature had repealed the relevant statute which applied this standard. The Supreme Court denied the appeal, explaining that repealed statutes remain applicable to crimes committed before the statute's repeal. Also, here, the repealed statute was revived by a subsequent statute in 1967, thus further allowing for application of the rule even during the repeal period for acts committed before the repeal.

***Kedar Nath Bajoria v West Bengal* AIR 1953 SC 404**

Defendant Chatterjee committed an offence in 1947 under the Prevention of Corruption Act which then prescribed a punishment of imprisonment or fine or both. In 1949, by an amendment of the law, the punishment was enhanced.

Chatterjee was fined Rs. 50,000, for accepting Rs. 47,550 from the government as compensation for damages that he falsely claimed the government inflicted on his property. He claimed that the Rs. 50,000 fine violated Article 20(1) of the Constitution because, in 1947, the relevant criminal law only allowed for a fine equal to the amount of money the accused obtained from the commission of the crime. However, at the time of his trial in 1950, the relevant statute, enacted in 1949, allowed for increased fines.

Agreeing with Chatterjee's claim and setting aside the excess fine, the Supreme Court held that the enhanced punishment would not be applicable to the offence committed in 1947 because of the prohibition contained in Article 20(1).

[46] *Kedar Nath Bajoria v West Bengal* AIR 1953 SC 404.
[47] *G.P Nayyar v State (Delhi Administration)* AIR 1979 SC 602.
[48] Ibid., para. 13.

1.4.2 International Law

Article 15(1) of the ICCPR states: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby." In addition to the ICCPR espousing this principle, several international criminal statutes have adopted non-retroactivity, including the Rome Statute of the International Criminal Court.[49]

1.4.3 Guide for Judicial Enforcement

When presented with the claim that the application of a law violates Article 20(1), judges should note that retroactivity cannot be cured by the statute at issue merely containing a clause stating that such a law shall be in force as of some back-dated time. The phrase "law in force" in Article 20(1) demands that the law *actually* is in operation at the time of the commission of the offence, not *deemed* to be in operation at that time by a statute *enacted at a later date*.[50]

[49] Rome Statute of the International Criminal Court, Art. 22, UN Doc. A/CONF. 183/9 (17 July 1998).
[50] *Bahahur*, para. 13.

WHAT IS A FAIR TRIAL?

A Basic Guide to Legal Standards and Practice

March 2000

Lawyers Committee for Human Rights

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Lawyers Committee for Human Rights

Since 1978 the Lawyers Committee for Human Rights has worked to promote international human rights and refugee law and legal procedures in the United States and abroad. The Chairman of the Lawyers Committee is William Zabel. Michael H. Posner is its Executive Director. George Black is Research and Editorial Director.

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PREFACE

This guide deals with two separate but linked issues that the Lawyers Committee for Human Rights and other NGOs face in their trial monitoring activities. The first is the question of what are the basic legal standards that should be used in evaluating the fairness of a trial. The second is how a trial observation mission should be prepared and carried out in practice. Since trial observers may be—but often are not—litigation lawyers, this guide has been written and structured so as to provide brief yet clear guidelines on how to conduct a trial observation mission, in both substantive and practical terms. It does not deal with the additional issues that may arise when a trial takes place in a military tribunal.

The main purpose of this guide is to assist Lawyers Committee trial observers. We hope, however, that it will be of use to other NGOs engaged in trial monitoring, some of which have sought the assistance of the Lawyers Committee in this area. We would very much welcome any suggestions for improvements that NGOs and individuals with trial monitoring experience may wish to make.

New York, New York
March 2000

I. INTRODUCTION

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR),[1] which provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated but, most recently, by a proposal to include it in the non-derogable rights provided for in Article 4(2) of the ICCPR.[2] The right to a fair trial is applicable to both the determination of an individual's rights and duties in a suit at law and with respect to the determination of any criminal charge against him or her. The term "suit at law" refers to various types of court proceedings—including administrative proceedings, for example—because the concept of a suit at law has been interpreted as hinging on the nature of the right involved rather than the status of one of the parties.[3] For the purposes of this guide only proceedings involving criminal charges will be considered since non-governmental organizations (NGOs) typically monitor criminal trials or, more precisely, criminal trials involving "political" offenses.[4]

Due to the specifics of each individual case and the interests of monitoring organizations, a detailed rendition of trial observation aims is not feasible. The key general goals may be summarized as follows:

- to make known to the court, the authorities of the country and to the general public the interest in and concern for the trial in question;
- to encourage a court to give the accused a fair trial. The impact of an observer's presence in a courtroom cannot be evaluated with mathematical precision. However, both observers and defense attorneys have pointed out that a monitor's

[1] International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976 [hereinafter ICCPR].

[2] *See* Draft Third Optional Protocol to the ICCPR, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy, Annex I, in: "The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening," Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Session, E/CN.4/Sub.2/1994/24, June 3, 1994 [hereinafter The Final Report], at 59-62. (http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/d8925328e178f8748025673d00599b81?Opendocument).

[3] *See* Dominic McGoldrick, *The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press, Oxford: 1994), at 415.

[4] There is, at present, no positive definition of what constitutes a "political offense" and therefore little guidance on which proceedings may be deemed "political" in nature. In this context it should be noted that trial observation is a very useful mechanism for the prevention of human rights abuses but one that, necessarily, depends on the willingness of a government to conduct a trial in the first place. As is well known, in many areas of the world individuals are still being arrested, imprisoned and executed without any trial at all.

presence often changes the atmosphere in the courtroom and facilitates defense by, *inter alia*, making the court more cognizant of the defense's arguments, encouraging defense counsel and the defendant to be more forceful in contesting the prosecution's claims, in attracting media attention to the trial, etc;

- to obtain more information about the conduct of the trial, the nature of the case against the accused and the legislation under which s/he is being tried; and
- to collect general background information about the political and legal circumstances leading to the trial and possibly affecting its outcome.[5]

In the broader sense, trial monitoring consists not only of an observer's physical presence in the courtroom during at least part of the proceedings but, just as importantly, of the duty promptly to prepare a report for the organization he or she represents, with conclusions on the fairness of the trial observed. The publicity which this report receives may serve in the short term to enhance a defendant's chances of having his/her case fairly reviewed on appeal. The lasting aim is to inform the government and the general public of possible irregularities in criminal procedure and to prompt action to bring practice into line with international human rights standards. The basic criteria according to which the fairness of a trial may be assessed is the first issue that will be dealt with in this review. The second is how a trial observation mission is typically carried out.

II. BASIC FAIR TRIAL CRITERIA

The standards against which a trial is to be assessed in terms of fairness are numerous, complex, and constantly evolving. They may constitute binding obligations that are included in human rights treaties to which the state is a party. But, they may also be found in documents which, though not formally binding, can be taken to express the direction in which the law is evolving.[6] In order to avoid possible challenges to the legal nature of the standards employed

[5] *See* International Commission of Jurists (ICJ), "Guidelines for ICJ Observers to Trials" (ICJ, Geneva: 1978).

[6] Non-binding documents of relevance to the conduct of criminal proceedings and to ascertaining fair trial standards include: the Basic Principles for the Treatment of Prisoners, UN General Assembly resolution 45/111, December 14, 1990 [hereinafter Basic Principles on Prisoners]; Standard Minimum Rules for the Treatment of Prisoners, UN Economic and Social Council resolution 663 C (XXIV), July 31, 1957 and resolution 2076 (LXII), May 13, 1977 [hereinafter Standard Minimum Rules]; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, December 9, 1988 [hereinafter Body of Principles]; Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990 [hereinafter Basic Principles on Lawyers]; Basic Principles on the Independence of the Judiciary, UN General Assembly resolution 40/32, November 29, 1985 and resolution 40/146, December 13, 1985 [hereinafter Basic Principles on the Judiciary]; UN Standard Minimum Rules for the Administration of Juvenile Justice, UN General Assembly resolution 40/33, November 29, 1985; Code of Conduct for Law Enforcement Officials, UN General Assembly resolution 34/169, December 17, 1979; Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990; Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, UN Economic and Social Council recommended resolution 1989/65, May 24, 1989; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990; UN Rules for the Protection of Juveniles Deprived of Their Liberty, UN General Assembly

in evaluating the fairness of a trial, monitors should refer to norms of undisputedly legal origin. These are:

(i) the laws of the country in which the trial is being held;
(ii) the human rights treaties to which that country is a party, and
(iii) norms of customary international law.[7]

Before observing a trial, a monitor should read relevant materials pertaining to domestic legislation. Due to the various legal systems and legal orders involved, as well as the differing stages of their development, it is not possible to devise a comprehensive list of essential texts. A minimum list would comprise: i) a state's Constitution, especially its provisions on human rights and the judicial system; ii) its Criminal Code and Code of Criminal Procedure; statutes on the establishment and jurisdiction of the courts and on the public prosecutor's office, and iii) landmark court decisions pertaining to human rights, particularly in common law countries. The aim of an observer at this level of examination is to assess whether the applicable provisions of domestic law guaranteeing a fair trial have been implemented and, if so, to what extent. It is well known that while constitutions and statutes generally provide for some measure of fairness in criminal proceedings, implementation by the courts is often not adequate.

Before undertaking a trial observation mission, a monitor should find out to which human rights treaties the respective state is a party. The most important of these is the ICCPR, which contains several relevant articles in assessing the fairness of a trial.[8]

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resolution 45/113, December 14, 1990; etc. Also relevant is the Draft Body of Principles on the Right to a Fair Trial and a Remedy, Annex II, in The Final Report, *supra* note 1. For trial observation in OSCE countries the human rights provisions of the final documents from review conferences would also be important as a source of standards (see www.osce.org). See the Appendix to this report: "Note on Sources" for hints on how to find these documents.

[7] The provisions of the Universal Declaration of Human Rights, (UN General Assembly resolution 217A (III), December 10, 1948 [hereinafter UDHR]), are for the most part considered declarative of customary international law and may be of paramount importance if a state has not ratified or acceded to the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (UN General Assembly resolution 39/46, December 10, 1984, entered into force June 26, 1987 [hereinafter Torture Convention]), or any regional human rights instrument. The most directly relevant articles of the UDHR are 5, 9, 10 and 11. As customary international law will most probably be used as a supplementary source of a state's obligations in ensuring the right to a fair trial, it will not be further considered.

[8] The web site of the UN High Commissioner for Human Rights has a list of those nations that have ratified the ICCPR at http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_4.html. Depending on the regional human rights instrument(s) that a state is bound by, the corresponding provisions of such treaties should be taken into account as well. For European states the most important instrument would be the European Convention for the Protection of Human Rights and Fundamental Freedoms, November 5, 1950 [hereinafter European Convention] (http://www.coe.fr/eng/legaltxt/5e.htm). For Latin and North American states it would be the American Convention on Human Rights, November 22, 1969 [hereinafter American Convention] (http://www.cidh.oas.org/Básicos/Basic%20Documents/enbas3.htm), while for the African states it would be the African Charter on Human and People's Rights, adopted June 27, 1981, entered into force October 21, 1986 [hereinafter African Charter] (http://www.oau-oua.org/oau_info/rights.htm).

The right to a fair trial on a criminal charge is considered to start running not "only upon the formal lodging of a charge but rather on the date on which State activities substantially affect the situation of the person concerned."[9] This could obviously coincide with the moment of arrest, depending on the circumstances of the case. Fair trial guarantees must be observed from the moment the investigation against the accused commences until the criminal proceedings, including any appeal, have been completed. The distinction between pre-trial procedures, the actual trial and post trial procedures is sometimes blurred in fact, and the violation of rights during one stage may well have an effect on another stage. However the most relevant articles of the ICCPR can be loosely divided into those three categories and the separation is sometimes helpful for the purposes of identifying which issues will be of particular interest during different time periods of the trial process.

A. PRE-TRIAL RIGHTS

1. The prohibition on arbitrary arrest and detention

Article 9(1) of the ICCPR[10] provides that "everyone has the right to liberty and security of person." The liberty of a person has been interpreted narrowly, to mean freedom of bodily movement, which is interfered with when an individual is confined to a specific space such as a prison or a detention facility.[11] Security has been taken to mean the right to be free from interference with personal integrity by private persons. Under Article 9(1) "No one shall be subjected to arbitrary arrest or detention" and "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." The principle of legality embodied in the latter sentence both substantively ("on such grounds") and procedurally ("in accordance with such procedure") mandates that the term "law" should be understood as referring to an abstract norm, applicable and accessible to all, whether laid down in a statute or forming part of the unwritten, common law. The prohibition of arbitrariness mentioned in the previous sentence serves to ensure that the law itself is not arbitrary, i.e. that the deprivation of liberty permitted by law is not "manifestly unproportional, unjust or unpredictable, and [that] the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case."[12]

[9] Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (N.P. Engel, Arlington: 1993) [hereinafter Nowak Commentary], at 244.

[10] *See also* European Convention, *supra* note 8, Article 5(1); African Charter, *supra* note 8, Article 6; American Convention, *supra* note 8, Article 7(1)-(3); and Statute of the International Criminal Court [hereinafter ICC Statute], Article 55(1)(d). The ICC Statute establishes a permanent institution for the purposes of trying persons for the most serious international crimes (including genocide, crimes against humanity and war crimes) where a national legal system has failed to do so. The Statute was approved on July 17, 1998 but will not come into force until 60 nations have ratified. As of February 16, 2000, 94 countries had signed the Statute but only seven countries had ratified it.

[11] The ensuing interpretation of the ICCPR is primarily based on the Nowak Commentary, *supra* note 9.

[12] Nowak Commentary, *supra* note 9, at 173.

2. The right to know the reasons for arrest

Article 9(2) of the ICCPR[13] provides that "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." These provisions have been interpreted to mean that anyone who is arrested must be informed of the general reasons for the arrest "at the time of arrest," while subsequent information, to be furnished "promptly," must contain accusations in the legal sense.[14] However there must be sufficient information to permit the accused to challenge the legality of his or her detention.[15] A written arrest warrant is not unconditionally required, but the lack of a warrant may, in some cases, give rise to a claim of arbitrary arrest.

The reasons for arrest, and the explanation of any other rights (for example, the right to legal counsel), must be given in a language that the person arrested understands.[16] Accordingly, the accused has a right to a competent interpreter in the event that he or she does not understand the local language.[17] This right extends to all pre-trial proceedings.[18]

3. The right to legal counsel

The right to be provided and communicate with counsel is the most scrutinized specific fair trial guarantee in trial observation practice, because it has been demonstrated to be the one that is most often violated. Principle 1 of the Basic Principles on Lawyers states that "[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings." This right is particularly relevant in case of pre-trial detention[19] and is discussed in that context in this section. However the right to counsel is also an important element of the right to adequate

[13] *See also* European Convention, *supra* note 8, Article 5(2); American Convention, *supra* note 8, Article 7(4); Body of Principles, *supra* note 6, Principle 10; 1992 Resolution on the Right to Recourse Procedure and Fair Trial of the African Commission on Human and Peoples' Rights [hereinafter African Commission Resolution], Paragraph 2(B) (http: //www1.umn.edu/humanrts/africa/achpr11resrecourse.html).

[14] *See infra* notes 73-76 and accompanying text.

[15] For example, the European Court of Human Rights has held that Article 5(2) of the European Convention means an arrested person should "be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness…." However, the Court also held that it was not necessary to give a full description of the charges at the moment of arrest (*Fox, Campbell and Hartley* (18/1989/178/234-236), August 30, 1990, para 40).

[16] European Convention, *supra* note 8, Article 5(2); Human Rights Committee General Comment No. 13/21 of April 12, 1984 [hereinafter General Comment 13], para 8; African Commission Resolution, *supra* note 13, Paragraph 2(B); Body of Principles, *supra* note 6, Principle 14; and ICC Statute, *supra* note 10, Article 67(1)(a).

[17] Principle 14 of the Body of Principles sets out the right to an interpreter in all legal proceedings subsequent to arrest. Article 67(1)(f) of the ICC Statute guarantees the right to a "competent" interpreter.

[18] Body of Principles, *supra* note 6, Principle 14.

[19] The Human Rights Committee has stated that "all persons who are arrested must immediately have access to counsel." (Concluding Observations of the Human Rights Committee, Georgia, UN Doc. CCPR/C/79 Add.75, April 1, 1997 para 27) [hereinafter Concluding Observations of the HRC]. *See also* the Report of the Special Rapporteur on the Independence of Judges and Lawyers regarding the Mission of the Special Rapporteur to the United Kingdom, UN Doc E/CN.4/1998/39/Add.4, March 5, 1998, para 47.

facilities for the preparation of a defense[20] and the right to a defense which will be discussed later in this paper.[21]

Principle 5 of the Basic Principles on Lawyers and Principle 17 of the Body of Principles specifically provide that when a person is arrested, charged or detained he or she must be promptly informed of the right to legal assistance of his or her choice. Article 7 of the Basic Principles on Lawyers requires governments to ensure that all persons arrested or detained should have access to a lawyer within 48 hours from arrest or detention.[22] An individual's right to choose counsel thus begins to run when a suspect or accused is first taken into custody, regardless of whether s/he is formally charged at that moment. Furthermore, if the accused cannot afford his or her own counsel, the relevant authorities must provide a lawyer free of charge if the interests of justice so require.[23] Whether or not the interests of justice require such an appointment depends primarily on the seriousness of the offence and the severity of the potential penalty.[24]

Principle 8 of the Basic Principles on Lawyers requires the authorities to ensure that all arrested, detained or imprisoned persons have adequate opportunities to be visited by and to communicate with their lawyer without delay, interception or censorship, in full confidentiality. When the lawyer and his or her client meet they may be in sight of a law enforcement official, but cannot be within hearing range.[25]

4. *The right to a prompt appearance before a judge to challenge the lawfulness of arrest and detention*

Article 9(3)[26] refers specifically to the rights of a person arrested or detained on a criminal charge, who "shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." Promptness has been interpreted by the Human Rights Committee (HRC) to mean

[20] General Comment 13, *supra* note 16, para 9.

[21] *See infra* notes 77-80, 83-89 and accompanying text.

[22] Compare Principle 15 of the Body of Principles, which states that a detainee must be able to communicate with counsel within "a matter of days," with the Human Rights Committee's statement that "all persons who are arrested must immediately have access to counsel." Concluding Observations of the HRC, *supra* note 19.

[23] Principles on the Role of Lawyers, *supra* note 6, Principle 6; Body of Principles, *supra* note 6, Principle 17(2); ICC Statute, *supra* note 10, Article 55(2)(c).

[24] For further the discussion on the right to counsel during the hearing see *infra* notes 83-89 and accompanying text.

[25] *See* Principles on the Role of Lawyers, *supra* note 6, Principle 22 ("Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationships are confidential;" and Body of Principles, *supra* note 6, Principles 15 and 18.

[26] *See also* European Convention, *supra* note 8, Article 5(3); American Convention, *supra* note 8, Article 7(5); African Commission Resolution, *supra* note 13, Paragraph 2(C); and ICC Statute, *supra* note 10, Article 59(2)-(3). See further Body of Principles, *supra* note 6, Principles 11, 38 and 39; and Declaration on the Protection of all Persons from Enforced Disappearance, UN General Assembly resolution 47/133, December 18, 1992, Article 10(1).

that the period of custody, before an individual is brought before a judge or other officer, may not exceed "a few days."[27]

Article 9(3) makes it clear that pre-trial detention "shall not be the general rule" and implicitly provides a detainee with a legitimate claim to release in exchange for bail or some other guarantee of appearance at the trial.[28] Furthermore, Article 9(3) states that if a trial does not occur within a reasonable period of time then the accused must be released from pre-trial detention pending trial.[29] The period of time that is considered to be "reasonable" depends on the circumstances of the case. The relevant factors include the risk of flight, the complexity of the case, the nature of the offence and the diligence of the investigating and prosecutorial authorities in pursuing the case.[30]

Without expressly mentioning it, Article 9(4)[31] provides for the right to habeas corpus, or *amparo*, that is, the right of anyone deprived of liberty by arrest or detention to "take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." In this context it should be noted:

i) that the term "court" signifies not only a regular court, but a special court, including an administrative, constitutional or military court as well;[32]

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[27] Human Rights Committee, General Comment No. 8, July 27, 1982, [hereinafter General Comment 8], para 2. The European Court has held that to hold a person for four days and six hours violates article 5(3) of the European Convention (*Brogan et al v United Kingdom*, 10/1987/133/184-187, November 29, 1988, para 62). The Inter-American Commission has held that a week is too long (Inter-American Commission Seventh Report on the Situation on Human Rights in Cuba, 1983 OEA Ser L/V/11 61.doc 29 rev 1, at 41).

[28] In General Comment 8, *supra* note 27, para 3, the UN Human Rights Committee stated that "[p]re trial detention should be an exception and as short as possible." Furthermore, in the case of *Van Alphen v The Netherlands*, the Human Rights Committee stated that "remand in custody must not only be lawful but necessary in all the circumstances…for example, to prevent light, interference with evidence or the recurrence of crime." Detention for the sole purpose of further interrogation is not justifiable. (Communication 305/1988, 23 July 1990, 1990 Report of the Human Rights Committee Vol. II, UN Doc. A/45/40, at 115).

[29] *See also* European Convention, *supra* note 8, Article 5(3); American Convention, *supra* note 8, Article 7(5); African Commission Resolution, *supra* note 13, Paragraph 2(C); ICC Statute, *supra* note 10, Article 60(4); and Body of Principles, *supra* note 6, Principle 38.

[30] The European Court has held that the authorities must exercise "special diligence" in the conduct of proceedings when the accused is in pre-trial detention (see *Tomasi v France*, 27/1991/279/350, 25 June 1992, para 84; *Abdoella v the Netherlands*, 1/1992/346/419, 28 October 1992, para 24).

[31] *See also* European Convention, *supra* note 8, Article 5(4); African Charter, *supra* note 8, Article 7(1)(a); American Convention, *supra* note 8, Article 7(6); and Body of Principles, *supra* note 6, Principle 32.

[32] Note that review by a superior military officer, government official or advisory panel would be insufficient. Regarding superior military officers, see *Vuolanne v Finland* (Communication 265/1987, 7 April 1989, 1989 Report of the Human Rights Committee, UN Doc.A/44/40, at 265-257) stating that review of detention of a soldier by a superior military officer does not satisfy Article 9(4). As to government officials, see the Human Rights Committee in *Torres v Finland* (Communication 291/1988, 2 April 1990, 1990 Report of the Human Rights Committee, Vol II, UN Doc.A/45/40, at 99-100), which states that the opportunity of an asylum-seeker to appeal to the Ministry of the Interior does not satisfy Article 9(4) of the ICCPR. Regarding advisory panels, see the European Court in *Chahal v United Kingdom* (70/1995/576/662, 15 November 1996, paras 130-133) which decided that an advisory panel which did not disclose its reasons for decision, had no binding decision-making power and which did not permit legal representation did not satisfy Article 5(4) of the European Convention.

ii) that the court's decision pertains only to the lawfulness of detention, and
iii) that what constitutes "delay" must be assessed with regard to the circumstances of the case.

The habeas corpus procedures must be simple, speedy and free of charge if the detainee cannot afford to pay.[33] The detainee also has the right to continuing review of the lawfulness of detention at reasonable intervals.[34]

Lastly, Article 9(5)[35] provides that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." Such a claim arises when the arrest or detention has contravened the provisions of Article 9(1) to (4) and/or a provision of domestic law. The way in which a claim for compensation is to be implemented is not, however, explicitly spelled out, but is generally considered to refer to an individual's right to bring a civil law suit either against the state or the particular body or person responsible for the wrongful conduct.

5. The prohibition of torture and the right to humane conditions during pre-trial detention

Article 7 of the ICCPR prohibits torture—or cruel, inhuman or degrading treatment or punishment—and is a norm of customary international law that also belongs to the category of *jus cogens*. The definition of and protection against torture was elaborated in the 1984 Convention against Torture:

> Art 1(1): … the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The definition of torture, which is prohibited by the ICC Statute as a crime against humanity when committed on a widespread or systematic basis, is slightly broader in that Statute than in the Torture Convention. Unlike the Torture Convention, the ICC Statute definition includes acts committed independently of any public official (i.e. by private individuals with private motives).[36]

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[33] Body of Principles, *supra* note 6, Principle 32(2).

[34] *Id*., Principles 11(3), 32 and 39.

[35] *See also* European Convention, *supra* note 8, Article 5(5); American Convention, *supra* note 8, Article 25; and African Charter, *supra* note 8, Article 7(1)(a).

[36] Article 7(2)(e) of the ICC Statute defines torture as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture

Under Article 2(2) of the Torture Convention no exceptional circumstances whatsoever, "whether a state of war or a threat of war, internal political instability or any other public emergency" may be invoked as a justification of torture.[37] States parties are obliged to take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under their jurisdiction [Article 2(1)]. Furthermore, according to Article 2(3), superior orders may not be invoked as a justification of torture.

Article 10 of the ICCPR provides in paragraph 1 that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[38] It should be stressed that, unlike the prohibition against torture in Article 7 of the ICCPR, which demands non-interference on the part of state authorities, the right to humane treatment imposes a positive obligation on states. This obligation is intended to ensure the observance of minimum standards with regard to conditions of detention and the exercise of a detainee's rights while deprived of liberty. The line between Articles 7 and 10 is, admittedly, sometimes hard to draw, as evidenced by the case law of the HRC.

In general, it may be said that inhuman treatment as referred to in Article 10 pertains to a "lower intensity of disregard for human dignity than that within the meaning of Article 7."[39] While the prohibition of torture and other cruel, inhuman or degrading treatment or punishment covers specific attacks on personal integrity[40] and applies to all persons, whether in any form of detention or not, Article 10 relates more to the general state of a detention facility and/or the conditions of detention and is meant to encompass only the treatment of persons actually deprived of liberty. According to the HRC, States cannot invoke a lack of adequate material resources or financial difficulties as justification for inhuman treatment and are obliged to provide detainees and prisoners with services that will satisfy their essential needs.[41] For instance, detainees have a right to food,[42] to clothing,[43] to adequate medical attention[44] and to communicate with their families.[45]

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shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."

[37] *See also* Body of Principles, *supra* note 6, Principle 6: "No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment." See further Code of Conduct for Law Enforcement Officials, *supra* note 6, Article 5: "No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment."

[38] *See also* American Convention, *supra* note 8, Article 5; African Charter, *supra* note 8, Articles 4-5; Basic Principles for the Treatment of Prisoners, *supra* note 6, Principle 1; and Body of Principles, *supra* note 6, Principle 1.

[39] Nowak Commentary, *supra* note 9, at 186.

[40] This would include, for example, acts that cause mental suffering. It would also include prolonged solitary confinement. *See* Human Rights Committee General Comment 20, (Forty-fourth session, 1992), [hereinafter General Comment 20], paras 5 and 6 respectively.

[41] *See* Human Rights Committee, General Comment No. 9/16, July 27, 1982.

[42] Standard Minimum Rules for the Treatment of Prisoners, *supra* note 6, Rules 20 and 87.

Generally, the Standard Minimum Rules,[46] Basic Principles on Prisoners and Body of Principles are important reference tools regarding the rights of prisoners.[47]

6. The prohibition on incommunicado detention

The HRC has found that incommunicado detention may violate Article 7 of the ICCPR which prohibits torture, inhuman, cruel and degrading treatment.[48] Principle 19 of the Body of Principles states that a "detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations." At a minimum, the right to communicate with the "the outside world" includes the right to communicate with a detainee's family, a lawyer and a doctor.

Principle 16 of the Body of Principles requires that the family of any arrested or detained person must be notified promptly of the arrest and the location of their family member. If the detainee is moved to another facility the family must be notified of that change.[49] A detainee cannot be denied the right to communicate with his family and counsel "for more than a matter of days."[50] Furthermore, where the detainee is in pre-trial detention he or she is entitled to visits by family and friends, subject only to restrictions "*necessary* in the interests of the administration of justice and of the security and good order of the institution."[51]

Regarding access to lawyers, see section II.A.3. of this report, which discusses access to legal counsel. With respect to doctors, HRC General Comment 20, the Body of Principles

[43] *Id*., Rules 17, 18, and 88; Body of Principles, *supra* note 6, Principles 15-16.

[44] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra* note 6, Principle 24; Standard Minimum Rules for the Treatment of Prisoners, *supra* note 6, Rules 22-25, 91; and Code of Conduct for Law Enforcement Officials, *supra* note 6, Article 6 (imposing a duty on officials to ensure the health of prisoners).

[45] See further *infra* notes 73-76 and accompanying text.

[46] See especially Rules 84-93 and 95 regarding persons under arrest, awaiting trial and detained without charge. Standard Minimum Rules, *supra* note 6.

[47] All of these documents can be found on the web site of the UN High Commissioner for Human Rights at http://www.unhchr.ch/html/intlinst.htm. See further the Appendix to this report, "Note on Sources."

[48] *See e.g*., Human Rights Commission Resolution 1997/38 para 20 holding that "prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment." See further, the Report of the Special Rapporteur on Torture, UN Doc E/CN.4/1995/34, para 926(d) and findings of the Inter-American Commission (Report on the Situation of Human Rights in Bolivia, OEA/Ser.L/V/II.53, doc rev.2, 1 July 1981 at 41-42) and Inter American Court (*Suavez Rosero Case*, Ecuador, 12 November 1997).

[49] *See also* Standard Minimum Rules, *supra* note 6, Rule 92.

[50] Body of Principles, *supra* note 6, Principle 15.

[51] Standard Minimum Rules, *supra* note 6, Rule 92 (emphasis added).

and the Standard Minimum Rules all state that detainees must be provided prompt and regular access to medical care.[52]

Finally, if the detainee is a foreign national, he or she must be permitted to communicate with, and receive visits from, representatives of their government.[53]

B. THE HEARING

Article 14 of the ICCPR is undoubtedly the most pertinent to this review. It specifically provides for equality before the courts and for the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, regardless of whether a criminal trial or a suit at law is involved (paragraph 1). The remainder of its provisions—paragraphs 2 to 7—contain a catalogue of "minimum [procedural] guarantees" belonging to an individual in the determination of any criminal charge against him/her. The following section elaborates the meaning of the rights set out in Article 14 in the order in which they arise.

1. Equal access to, and equality before, the courts

The first sentence of Article 14(1) provides that "All persons shall be equal before the courts and tribunals" and has been interpreted to signify that all persons must be granted, without discrimination, the right of equal access to a court. This, on the one hand, means that establishing separate courts for different groups of people based on their race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status would be a contravention of Article 14(1). On the other hand, the establishment of certain types of special courts with jurisdiction over all persons belonging to the same category, such as military personnel, remains a thorny issue. According to the HRC, this practice is not prohibited under Article 14(1) as long as the procedural guarantees set forth in it are observed; in addition, the HRC has not ruled across the board that military courts may never try civilians. At the same time however, there is an increasingly widespread view that the trials of civilians by military courts lack legitimacy. This interpretation, endorsed by many human rights NGOs, is also supported by the provisions of the Basic Principles on the Independence of the Judiciary. Paragraph 5 of the Basic Principles provides that "Everyone shall have the right to be tried by *ordinary courts or tribunals* using established legal procedures."[emphasis added][54]

The second sentence of Article 14(1) relates to the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. It includes the basic

[52] *See* General Comment 20, *supra* note 1, para 11; Body of Principles, *supra* note 6, Principle 24; Standard Minimum Rules, *supra* note 6, Rule 24.

[53] Vienna Convention on Consular Relations, April 24, 1963, Article 36; Body of Principles, *supra* note 6, Rule 16(2); Standard Minimum Rules, *supra* note 6, Rule 38.

[54] This provision raises the question of the validity of a hearing by a military tribunal. The Human Rights Committee has raised serious questions about the validity of such tribunals. *See* General Comment 13, *supra* note 16, para 4. A detailed analysis of this issue is outside the scope of this paper.

components of due process of law which is, in criminal cases, further supplemented by the other provisions of Articles 14 and 15.[55]

2. The right to a fair hearing

The right to a fair hearing as provided for in Article 14(1) of the ICCPR encompasses the procedural and other guarantees laid down in paragraphs 2 to 7 of Article 14 and Article 15.[56] However, it is wider in scope, as can be deduced from the wording of Article 14(3) which refers to the concrete rights enumerated as "minimum guarantees." Therefore, it is important to note that despite having fulfilled all the main procedural guarantees laid out in paragraphs 2-7 of Article 14 and the provisions of Article 15, a trial may still not meet the fairness standard envisaged in Article 14(1).

The single most important criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms between the defense and the prosecution. (The specific procedural rights constituting "minimum guarantees" of a fair trial will be mentioned later.) Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner ensuring their procedurally equal position during the course of a trial. It would be difficult to identify in advance all of the situations that could constitute violations of this principle. They might range from denying the accused and/or counsel time to prepare a defense to excluding the accused and/or counsel from an appellate hearing when the prosecutor is present.

3. The right to a public hearing

Article 14(1) of the ICCPR[57] also guarantees the right to a public hearing, as one of the essential elements of the concept of a fair trial. However, it also permits several exceptions to this general rule under specified circumstances. The publicity of a trial includes both the public nature of the hearings—not, it should be stressed, of other stages in the proceedings—and the publicity of the judgement eventually rendered in a case. It is a right belonging to the parties, but also to the general public in a democratic society.

The right to a public hearing means that the hearing should as a rule be conducted orally and publicly, without a specific request by the parties to that effect. The court or tribunal is, *inter alia*, obliged to make information about the time and venue of the public hearing available and to provide adequate facilities for attendance by interested members of the public, within reasonable limits. The public, including the press, may be excluded from all or

[55] For an explanation of Article 15, see *infra* notes 102-104 and accompanying text.

[56] *See also* European Convention, *supra* note 8, Article 6(1); American Convention, *supra* note 8, Article 8; and ICC Statute, *supra* note 10, Article 67(1).

[57] *See also* European Convention, *supra* note 8, Article 6(1); and American Convention, *supra* note 8, Article 8(5).

part of a trial for the reasons specified in Article 14(1), but such an exclusion must be based on a decision of the court rendered in keeping with the respective rules of procedure.

The public may be excluded for reasons of "morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires." The public may also be excluded "to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." Moral grounds for the exclusion of the public are usually asserted in cases involving sexual offences. The term "public order" in this specific context has been interpreted to relate primarily to order within the courtroom, while reasons of national security may be advanced so as to preserve military secrets. In both the latter cases, however, the restriction applied must correspond to the principles observed *in a democratic society*, [emphasis added], a qualification that seeks to prevent arbitrariness in decisions to close trials. The private lives of the parties has been interpreted to denote family, parental and other relations, such as guardianship, which could be prejudiced in public proceedings. Lastly, the public may be barred from a trial in the interests of justice, but only in special circumstances and to the extent strictly necessary in the opinion of the court. Emotional outburst(s) by the spectators of a trial has been cited as an example of when this provision could come into play.

While the number of instances that could merit the closing of a trial are fairly broad, this is not the case when the pronouncement of a judgement is involved.[58] Under Article 14(1) judgements "shall be made public" except where the interest of juvenile persons otherwise requires or where the proceedings concern matrimonial disputes of the guardianship of children. The possible exceptions from publicity are thus defined more narrowly and precisely. A judgement is considered to have been made public either when it was orally pronounced in court or when it was published, or when it was made public by a combination of those methods. In any event, its accessibility to all is the determining factor. The judgment must provide reasons sufficient to permit the accused to lodge an appeal,[59] and must be delivered within a reasonable time of the hearing.[60]

4. The right to a competent, independent and impartial tribunal established by law

The basic institutional framework enabling the enjoyment of the right to a fair trial is that proceedings in any criminal case (or in a suit at law) are to be conducted by a competent, independent and impartial tribunal established by law [Article 14(1)].[61] The rationale of this provision is to avoid the arbitrariness and/or bias that would potentially arise if criminal

[58] This includes the delivery of judgments of military courts and courts of appeal. *See* General Comment 13, *supra* note 16, para 4.

[59] The Human Rights Committee held that a Jamaican court violated Article 14(1) by failing to issue a reasoned written judgment (*Hamilton v Jamaica* (377/1989), 29 March 1996, Report of the HRC, vol. II (A/49/40), 1994 at 73.

[60] See *Curne v Jamaica* (377/1989), 29 March 1994, Report of the HRC, vol. II (A/49/40), 1994 at 73.

[61] *See also* European Convention, *supra* note 8, Article 6(1); American Convention, *supra* note 8, Articles 8(1) and 27(2); and African Charter, *supra* note 8, Articles 7(1) and 26.

charges were to be decided on by a political body or an administrative agency. A tribunal should be competent and established by law. Both of these attributes are in fact aspects of the same requirement: while competence refers to the appropriate personal, subject-matter, territorial or temporal jurisdiction of a court in a given case, the court as such, including the delineation of its competence, must have been established by law. The term "law" denotes legislation passed by the habitual law-making body empowered to enact statutes or an unwritten norm of common law, depending on the legal system. In either case the important feature is that the law must be accessible to all who are subject to it. The general aim of this provision is to assure that criminal charges are heard by a court set up in advance and independently of a particular case—and not prior to and specifically for the offense involved. In order to be independent, a tribunal must have been established by law to perform adjudicative functions, i.e. to determine matters within its competence on the basis of rules of law (substantive) and in accordance with proceedings conducted in a prescribed manner (procedural).[62]

Independence presupposes a separation of powers in which the judiciary is institutionally protected from undue influence by, or interference from, the executive branch and, to a lesser degree, from the legislative branch. The Basic Principles on the Judiciary set out in some detail the need for and mechanisms necessary to achieve that independence. Some of the practical safeguards of independence include the specification of qualifications necessary for judicial appointment, the terms of appointment, [63] the need for guaranteed tenure,[64] the requirement of efficient, fair and independent disciplinary proceedings regarding judges,[65] and the duty of every State to provide adequate resources to enable the judiciary to properly perform its functions[66] (for example adequate salaries[67] and training[68]). Depending on the circumstances of a case, a court's independence may also be assessed on the basis of its relationship with prominent social groups such as political parties, the media and various lobbies.

While independence primarily rests on mechanisms aimed at ensuring a court's position externally, impartiality refers to its conduct of, and bearing on, the final outcome of a specific case. Bias (or a lack thereof) is the overriding criterion for ascertaining a court's impartiality. It can, thus, be *prima facie* called into question when a judge has taken part in the proceedings in some prior capacity, or when s/he is related to the parties, or when s/he has a personal stake in the proceedings. It is also open to suspicion when the judge has an evidently preformed opinion that could weigh in on the decision-making or when there are other reasons giving rise to concern about his/her impartiality.

[62] The Final Report, *supra* note 2, at 67.

[63] Basic Principles on the Independence of the Judiciary, *supra* note 6, Principle 10.

[64] *Id*., Principle 12.

[65] *Id*., Principles 17-20.

[66] *Id*., Principle 7.

[67] *Id*., Principle 11.

[68] *Id*., Principle 10.

5. The right to a presumption of innocence

According to Article 14(2) of the ICCPR "Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law."[69] As a basic component of the right to a fair trial, the presumption of innocence, *inter alia*, means that the burden of proof in a criminal trial lies on the prosecution and that the accused has the benefit of the doubt.[70] Despite the fact that Article 14(2) does not specify the standard of proof required, it is generally accepted that guilt must be proved "to the intimate conviction of the trier of fact or beyond a reasonable doubt, whichever standard of proof provides the greatest protection for the presumption of innocence under national law."[71] The presumption of innocence must, in addition, be maintained not only during a criminal trial *vis á vis* the defendant, but also in relation to a suspect or accused throughout the pre-trial phase. It is the duty of both the officials involved in a case as well as all public authorities to maintain the presumption of innocence by "refrain[ing] from prejudging the outcome of a trial."[72] It may also be necessary to pay attention to the appearance of an accused during a trial in order to maintain the presumption of innocence, for instance, it may be prejudicial to require the accused to wear handcuffs, shackles or a prison uniform in the courtroom.

6. The right to prompt notice of the nature and cause of criminal charges

In the determination of any criminal charge against him/her everyone shall be entitled, in full equality "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him."[73] This duty to inform relates to an exact legal description of the offense ("nature") and of the facts underlying it ("cause") and is thus broader than the corresponding rights granted under Article 9(2) of the ICCPR applicable to arrest.[74] The rationale is that the information provided must be sufficient to allow the preparation of a defense.

When information may be deemed to have been "promptly" supplied, has not been uniformly interpreted, but has generally been taken to coincide with the "lodging of the charge or directly thereafter, with the opening of the preliminary judicial investigation or with the setting of some other hearing that gives rise to clear official suspicion against a specific person."[75] The information must also be provided to the accused in a language which s/he understands, meaning that translation is mandated and that its form, oral or written, will depend on the manner in which the "charge" is initially conveyed. An indictment must, obviously, be translated in writing.[76]

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[69] *See also* European Convention, *supra* note 8, Article 6(2); American Convention, *supra* note 8, Article 8(2); African Charter, *supra* note 8, Article 7(1)(b); and ICC Statute, *supra* note 10, Article 66(1).

[70] *See e.g.*, ICC Statute, *supra* note 10, Article 66.

[71] The Final Report, *supra* note 2, at 76. *See also* General Comment 13, *supra* note 16, para 7; ICC Statute, *supra* note 10, Article 66.

[72] General Comment 13, *supra* note 16, para 7.

[73] ICCPR, *supra* note 1, Article 14(3)(a).

[74] See *supra* notes 13-15 and accompanying text.

[75] Nowak Commentary, *supra* note 9, at 255.

[76] *See supra* notes 16-18 and accompanying text on the right to an interpreter.

7. The right to adequate time and facilities for the preparation of a defense

Article 14(3)(b) of the ICCPR provides that in the determination of any criminal charge against him or her everyone is entitled "To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing."[77] The right to adequate time and facilities for the preparation of a defense applies not only to the defendant but to his or her defense counsel as well[78] and is to be observed in all stages of the proceedings.

What constitutes "adequate" time will depend on the nature of the proceedings and the factual circumstances of a case. Factors to be taken into account include the complexity of a case, the defendant's access to evidence, the time limits provided for in domestic law for certain actions in the proceedings, etc.

The term "facilities" has, among other things, been interpreted to mean that the accused and defense counsel must be granted access to appropriate information, files and documents necessary for the preparation of a defense and that the defendant must be provided with facilities enabling communication, in confidentiality, with defense counsel.[79] An individual's right to communicate with counsel of his or her own choosing, is the most important element of the right to adequate facilities for the preparation of a defense.[80]

8. The right to a trial without undue delay

In the determination of any criminal charge against him/her, everyone shall be entitled "To be tried without undue delay" [Article 14(3)(c)]. This provision has been interpreted to signify the right to a trial that produces a final judgement and, if appropriate, a sentence without undue delay. The time limit "begins to run when the suspect (accused, defendant) is informed that the authorities are taking specific steps to prosecute him."[81] The assessment of what may be considered undue delay will depend on the circumstances of a case, i.e. its complexity, the conduct of the parties, whether the accused is in detention, etc. The right is, however, not contingent on a request by the accused to be tried without undue delay.

Note that a person who is in pre-trial detention may be entitled to release prior to the commencement of the trial even if there has not been undue delay.[82]

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[77] *See also* European Convention, *supra* note 8, Article 6(3)(b); American Convention, *supra* note 8, Article 8(2)(c); African Commission Resolution, *supra* note 13, Article 2(E)(1); and ICC Statute, *supra* note 10, Articles 67(1)(b) and 67(2).

[78] *See* Basic Principles on the Role of Lawyers, *supra* note 6, Principle 21.

[79] General Comment 13, *supra* note 16, para 9. Basic Principles on Lawyers, *supra* note 6, Principle 21. The European Commission has stated that this right permits the defense to have reasonable access to the prosecutions files (*X v Austria* (7138/75), 5 July 1977, 9 DR 50) but this may be subject to reasonable security restrictions (*Haase v Federal Republic of Germany* (7412/76, 12 July 1977, 11 DR 78).

[80] *See supra* notes 16-18 and *infra* notes 83-89 and accompanying text.

[81] Nowak Commentary, *supra* note 9, at 257.

[82] *See supra* notes 10-12, 26-35 and accompanying text.

9. The right to defend oneself in person or through legal counsel

The right to counsel in the pre-trial stages of a criminal trial, as discussed earlier in this paper,[83] is clearly linked to the right to a defense during trial as set out in Article 14(3)(d) of the ICCPR. The provision states that everyone shall be entitled, in the determination of any criminal charge against him/her "To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it." This provision includes the following specific rights:

(i) the right to be tried in one's presence. This is one of the more controversial rights in terms of its interpretation. A literal reading would not permit trials in absentia, which is a view consistently held by most international human rights NGOs and, more recently, supported by the Statute of the International Criminal Court.[84] However, according to the HRC, trials in absentia are permissible in certain circumstances if the state makes "sufficient efforts with a view to informing the [accused] about the impending court proceedings, thus enabling him to prepare his defense."[85]
(ii) to defend oneself in person;
(iii) to choose one's own counsel;
(iv) to be informed of the right to counsel; and
(v) to receive free legal assistance.

Their operation may be summed up as follows: "Everyone charged with a criminal offense has a primary, unrestricted right . . . to defend himself. However, he can forego this right and instead make use of defense counsel, with the court being required to inform him of the right to counsel. In principle, he may select an attorney of his own choosing so long as he can afford to do so. Should he lack the financial means, he has a right to appointment of defense counsel by the court at no cost, insofar as this is necessary in the administration of justice. Whether the interests of justice require the state to provide for effective representation by counsel depends primarily on the seriousness of the offense and the potential maximum punishment."[86]

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[83] *See supra* notes 19-25 and accompanying text.

[84] ICC Statute, *supra* note 10, Article 67(1)(d).

[85] *See Daniel Monguya Mbenge et al. v. Zaire* (16/1977) (March 25, 1983), Selected Decisions of the Human Rights Committee under the Optional Protocol, International Covenant on Civil and Political Rights, Volume 2, Seventeenth to Thirty-second Sessions (October 1982-April 1988), United Nations publication, Sales No. E.89.XIV.1, at 78.

[86] Nowak Commentary, *supra* note 9, at 259-260. For instance, the Human Rights Committee has held that any person charged with a crime punishable by death must have counsel assigned (*Henry and Douglas v Jamaica* (571/1994), 26 July 1996, UN Doc CCPR/C/57/D/571/1994, para 9.2.). However, a person accused of speeding would not necessarily be entitled to have counsel appointed at the expense of the state (*OF v Norway* (158/1983), 26 October 1984, 2 Sel. Dec.44). In the Inter-American system, counsel must be provided if it is necessary to ensure a fair hearing (Inter-American Court, Advisory Opinion of August 1990, OC 11/90, Exceptions to the

According to the prevailing reading of the ICCPR, the right to counsel applies to all stages of criminal proceedings, including the preliminary investigation and pre-trial detention.[87] Assignment of counsel by the court contravenes the principle of fair trial if a qualified lawyer of the accused's own choice is available and willing to represent him or her.[88] Court–appointed counsel must be able effectively to defend the accused, that is, to freely exercise his/her professional judgement and to actually advocate in favor of the accused.[89]

10. The right to examine witnesses

In the determination of any criminal charge against him/her, everyone is entitled "To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" [Article 14(3)(e)].[90] This right is an essential element of the principle of equality of arms. The terms "to examine, or have examined" should be read as a recognition of the two main systems of criminal justice, the inquisitorial and accusatorial one. It should be noted that, according to the text itself, the defense does not have an unlimited right to obtain the compulsory attendance of witnesses on the defendant's behalf, but only "under the same conditions" as witnesses against him/her. No such restriction applies to the prosecution. While a court is thereby given a fairly free hand in summoning witnesses, it must do so in keeping with the principle of fairness and equality of arms. This, in turn, mandates that the parties be equally treated with respect to the introduction of evidence by means of interrogation of witnesses.[91]

In addition, Article 14(3)(e) has been concretely interpreted to mean that the prosecution must inform the defense of the witnesses it intends to call at trial within a reasonable time prior to the trial so that the defendant may have sufficient time to prepare his/her defense. The defendant also has the right to be present during the testimony of a witness and may be restricted in doing so only in exceptional circumstances, such as when the witness reasonably fears reprisal by the defendant.

In order to avoid violations of a defendant's right to examine and have examined witnesses against him or her, courts should particularly scrutinize claims of possible reprisals and allow the removal of defendants from the courtroom only in truly valid instances.

Exhaustion of Domestic Remedies, OAS/Ser.L/V/III23 Doc 12 rev 1991, paras 25-28).

[87] *See* Nowak Commentary, *supra* note 9, at 256 and The Final Report, *supra* note 2, at 71. *See also Henry and Douglas v Jamaica* (571/1994), 26 July 1996, UN Doc CCPR/C/57/D/571/1994, para 9.2. *See* further *supra* notes 19-25 and accompanying text.

[88] *See e.g*., the case of *Estrella v Uruguay* (74/180) 29 March 1983, at 95 where the Human Rights Committee held that a military court had violated the defendant's right to choose counsel by limiting him to a choice between two appointed attorneys. *See also* Basic Principles on the Role of Lawyers, *supra* note 6, Principle 5.

[89] General Comment 13, *supra* note 16, para 9. *See also* Principle 6 of the Basic Principles on the Role of Lawyers, *supra* note 6, which refers to the right to "effective legal assistance."

[90] *See also* European Convention, *supra* note 8, Article 6(3)(d); American Convention, *supra* note 8, Article 8(2)(f); African Commission Resolution, *supra* note 13, Paragraph 2(e)(3); and ICC Statute, *supra* note 10, Article 67(1)(e).

[91] Nowak Commentary, *supra* note 9, at 262.

However, in no case may a witness be examined in the absence of both the defendant and counsel. Similarly, the use of the testimony of anonymous witnesses at trial is considered impermissible, as it would represent a violation of the defendant's right to examine or have examined witnesses against him/her.[92]

11. The right to an interpreter

In the determination of any criminal charge against him/her everyone is entitled "To have the free assistance of an interpreter if he cannot understand or speak the language used in court" [Article 14(3)(f)].[93] The main issue raised by this provision is what interpretation should be given to the words "used in court." While the phrase could obviously be said to refer to oral proceedings, the right to translation of written documents is not expressly provided for. Both in scholarly writings and in the practice of human rights bodies, however, the view has consistently been held that the right to an interpreter includes the translation of all the relevant documents.[94] As already mentioned, the right to an interpreter may also be claimed by a suspect or an accused being interrogated by the police or by an investigating judge in the pre-trial phase.[95]

The right to an interpreter applies equally to nationals and aliens,[96] but cannot be demanded by a person who is sufficiently proficient in the language of the court.[97] When granted, the right to the assistance of an interpreter is free and can in no way be restricted by seeking payment from the defendant upon conviction.

12. The prohibition on self-incrimination

In the determination of any criminal charge against him/her, everyone is entitled "Not to be compelled to testify against himself or to confess guilt" [Article 14(3)(g)].[98] This

[92] The Final Report, *supra* note 2, para 60(j), at 77. *See e.g*., Human Rights Committee's Concluding Observations on Colombia, UN Doc. CCPR/c/79/Add. 76 1 April 1997, paras. 21, 40 (criticism of the Colombian practice of suppressing the names of judges, prosecutors and witnesses in regional courts dealing with certain drug, terrorism, rebellion and weapons crimes). Note however that the European Court permits anonymous witnesses in some limited cases such as during the investigative stage of a case. See *Doorson v. The Netherlands*, 26 March 1996, 2 Ser A 470, para 69. Compare the decision of the ICTY in *Prosecutor v. Tadic, Prosecutor's motion Requesting Protective Measures for Victims and Witnesses* 10 Aug. 1995.

[93] *See also* European Convention, *supra* note 8, Article 6(3)(e); American Convention, *supra* note 8, Article 8(2)(a); African Commission Resolution, *supra* note 13, Paragraph 2(E)(4); and ICC Statute, *supra* note 10, Article 67(1)(f).

[94] For example, the Inter-American Commission considers the right to translation of documents as fundamental to due process (Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA Ser.L/V/11.62, doc.10, rev. 3, 1983.

[95] *See supra* notes 16-18 and accompanying text.

[96] General Comment 13, *supra* note 16, para 13.

[97] *See, e.g*., *Cadoret and Bihan v France* (221/1987 and 323/1988), April 11, 1991, Report to the HRC (A/46/40), 1991 at 219.

[98] *See also* American Convention, *supra* note 8, Articles 8(2)(g) and 8(3); ICC Statute, *supra* note 10, Articles 55(1)(a) (pre-trial) and 67(1)(g).

provision aims to prohibit any form of coercion, whether direct or indirect, physical or mental, and whether before or during the trial, that could be used to force the accused to testify against him/herself or to confess guilt. Although the exclusion of evidence obtained by such means is not expressly covered by this provision, it is a well-established interpretation that such evidence is not admissible at trial.[99] The judge must have the authority to consider an allegation of coercion or torture at any stage of the proceedings.[100] In addition, silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from an accused's exercise of the right to remain silent.[101]

13. The prohibition on retroactive application of criminal laws

Although set forth as last in the sequence of the ICCPR's provisions relating to criminal justice, Article 15(1) of the ICCPR which embodies the principle *nullum crimen sine lege* (a crime must be provided for by law) [102], can in fact be taken as a point of departure in any consideration of the fairness of a trial. In the broad sense, it expresses the principle of legality, according to which "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed" [Article 15(1)]. In the narrow sense, it is aimed at prohibiting the retroactive application of substantive criminal law and thus chronologically precedes a determination of the procedural fairness of a trial pursuant to Article 14. It is one of the few non-derogable rights provided for in Article 4(2) of the ICCPR.

The principle of legality obliges states to define criminal offences by law, that is, in the form of abstract norms laid down in statutes or belonging to the body of unwritten common law accessible to all. It is important to note that the prohibition of retroactivity applies to all criminal offenses, which may be provided for either in domestic legislation or international law, both treaty-based and customary.[103] The reference to international law was included to prevent individuals from escaping international justice by claiming that an act or omission did not constitute an offense under national law. On the other hand, it is also meant to protect individuals against the retroactive application of international law. Just as no one can be found

[99] See the prohibition on the use of evidence in Article 15 of the Convention against Torture and Article 10 of the Inter-American Convention on Torture. *See also* General Comment 13, *supra* note 16, para 14. See also the European Court in *Murray v United Kingdom* 41/1994/488/570, 8 February 1996, para 45.

[100] General Comment 13, *supra* note 16, para 15.

[101] The Final Report, *supra* note 2, Article 58(b), at 76. Article 14(4) of the ICCPR pertaining to the rights of juvenile persons has been omitted from this review.

[102] *See also* European Convention, *supra* note 8, Article 7; American Convention, *supra* note 8, Article 9; African Charter, *supra* note 8, Article 7(2); and ICC Statute, *supra* note 10, Article 22.

[103] The one exception to the prohibition of retroactive domestic criminal legislation is contained in Article 15(2) of the ICCPR: "Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." This provision has been interpreted to mean that certain violations of customary international law, such as war crimes, torture, slavery, etc. may be punished by states applying retroactive domestic criminal laws. However, in effect, this provision simply restates the position that persons may held accountable for violations of international customary law: it merely facilitates the ability of States to legislate to this effect. ICCPR, *supra* note 1, Article 15(2).

guilty of a criminal offense which was not laid down as such at the time an act or omission took place, so also, under Article 15(1) a penalty cannot be imposed if it was not provided for under national or international law at the time the offense was committed (*nulla poena sine lege*). Moreover, under Article 15(1), a penalty heavier than the one that was prescribed at the time of commission for a specific offense may not be imposed. In keeping with a contemporary understanding of the role of criminal sanctions, Article 15(1) also provides that states are obliged to retroactively apply a lighter penalty if it is subsequently provided for by law.[104]

14. The prohibition on double jeopardy

"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country" [Article 14(7)].[105] The prohibition of *ne bis in idem* or of double jeopardy is aimed at preventing a person from being tried—and punished—for the same crime twice. The issue here is what is the relevant jurisdiction. According to some interpretations, including that of the HRC, double jeopardy applies only to prohibit a subsequent trial for the same offense within the jurisdiction of one state, but is not valid with regard to the national jurisdiction of two or more states.[106] On the other hand, some hold the view that this is "too general and too absolute."[107] An interesting question raised by the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and by the Statute of the future International Criminal Court is whether retrials of persons by those tribunals after the completion of proceedings in a national jurisdiction, permitted under certain circumstances, violate the principle of double jeopardy.[108] The prevailing view is that they do not.

C. POST-TRIAL RIGHTS

1. The right to appeal

"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law" [Article 14(5)].[109] The right to appeal is aimed at ensuring at least two levels of judicial scrutiny of a case, the second of which must take place before a higher tribunal. The review undertaken by such a tribunal must be genuine.

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[104] The right to retroactive application of a lighter penalty generally applies only in cases where a penalty is irreversible, however some exceptions include cases where the sentence is for life, the death penalty or corporal punishment. *See* Nowak Commentary, *supra* note 9, at 279-280.

[105] *See also* Article 4 of Protocol 7 to the European Convention and Article 20 of the ICC Statute. Note that Article 8(4) of the American Convention is different in that the prohibition applies only if the accused has been previously *acquitted*, but then the prohibition is not limited to retrial on the same charge—no charge arising out of the same facts ("the same cause") may be pursued.

[106] *See* Nowak Commentary, *supra* note 9, at 273.

[107] *Id*.

[108] *See* ICC Statute, *supra* note 10, Article 20; Statute of the International Criminal Tribunal for Yugoslavia, Article 10; and Statute of the International Criminal Tribunal for Rwanda, Article 9.

[109] *See also* European Convention, *supra* note 8, Article 2 of Protocol 7; American Convention, *supra* note 8, Article 8(2)(h); and African Commission Resolution, *supra* note 13, para 3.

This, among other things, means that appeal proceedings confined only to a scrutiny of issues of law raised by a first instance judgement might not always meet that criterion.[110] Appeal proceedings must also be timely. The immediate effect of the exercise of the right to appeal is that a court has to stay the execution of any sentence passed in the first instance until appellate review has been concluded. This principle applies unless the convicted person voluntarily accepts that the sentence be implemented earlier. The right to appeal belongs to all persons convicted of a crime regardless of the severity of the offense and of the sentence pronounced in the first instance.[111] The guarantees of a fair trial must be observed in all appellate proceedings.

2. The right to compensation for miscarriage of justice

"When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him" [Article 14(6)].[112] It should be noted that compensation for miscarriage of justice may be granted only after a conviction has become final and that the claim may be brought regardless of the severity of the offense involved. There are three additional conditions that must be cumulatively met: i) a miscarriage of justice must have been subsequently officially acknowledged by a reversal of the conviction or by pardon; ii) the delayed disclosure of the pertinent fact(s) must not be attributable to the convicted person, and iii) the convicted person must have suffered punishment as a result of the miscarriage of justice. The phrase "according to law" does not mean that states can ignore the right to compensation by simply not providing for it, but rather that they are obliged to grant compensation pursuant to a mechanism provided for by law.[113]

III. TRIAL OBSERVATION

Regardless of the considerable experience in trial observation accumulated by international and local NGOs over the past few decades, there are no ironclad rules as to how monitoring should be carried out. It is unlikely that such norms can ever be developed because monitoring is an activity that needs to be tailored to each particular case. Monitors need a certain flexibility and must use their own judgement in responding to the different situations they may encounter. This is not to say that a set of basic directions for trial observation

[110] See for example the concerns of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions in his 1993 Report (7 December 1993, UN Doc E/CN.4/1994/7 at paras 113 and 404).

[111] General Comment 13, *supra* note 16, para 17.

[112] *See also* European Convention, *supra* note 8, Article 3 of Protocol 7; and American Convention, *supra* note 8, Article 10.

[113] See General Comment 13, *supra* note 16, para 18.

completely lacking: the ensuing section is based on guidelines pertaining to the practice of trial monitoring developed and applied by organizations with extensive expertise in this area.[114]

1. Choice of Trials

The choice of a trial to be observed will primarily depend on the sending organization's general field of activity and the interest it might have in a particular case. Factors which may influence a decision to send trial observers are: the stature of the person on trial, the political or human rights significance of the proceedings, the historical relevance of the trial, the media attention generated by the case, anticipated irregularities in the proceedings, etc., or any combination of these and other concerns. There simply can be no exhaustive enumeration.

2. Selection of Trial Observer

Regardless of the underlying reasons for observing a trial, crucial to the success of every mission will be the monitor's independence, impartiality and qualifications. The different factors most often taken into account when selecting an observer are: the individual's prestige, reputation for impartiality, knowledge of domestic law and international human rights standards, familiarity with a case, language skills, trustworthiness, availability at short notice, etc. If an observer is being sent to monitor a trial abroad, his or her nationality, ethnicity or gender may be relevant criteria. His or her ability to enter a particular country with or without a visa will also be significant. In the selection of observers, NGOs are faced with the option of either sending a staff member or engaging an independent expert outside the organization. The advantage of the former is that a staff member will most likely be familiar with the case and can be trusted to present a reliable and timely report. However, the presence of a prestigious independent expert outside the organization will often have more impact on the proceedings. Similarly, an issue that needs to be considered is the utility of engaging local lawyers—whether staff members or outside experts—to observe domestic trials. While such lawyers may know the legal system and background of a case very well, this may in fact be perceived as potentially tainting their assessment of the fairness of the proceedings and give rise to claims of bias. Because of their prestige and lack of national affiliation, foreign lawyers are initially less open to such charges. It should be noted that several international human rights NGOs, among them Amnesty International, have explicit rules against the practice of engaging local lawyers as trial observers.

3. Informing the Government

The sponsoring organization should supply an observer with several copies of an Order of Mission (Letter of Credentials) stating the purpose of the mission, the identity and qualifications of the observer and requesting the cooperation of the authorities. It is standard practice to also inform the appropriate bodies, such as the Ministry of Justice, by letter or other

[114] Among others, The International Commission of Jurists (ICJ), Amnesty International (AI), The International Federation of Human Rights (FIDH), and The American Bar Association (ABA). This sections also draws heavily on Professor David Weissbrodts's seminal article "International Trial Observers," *Stanford Journal of International Law*, Volume 18, Issue 1, Spring 1982.

means, of the nomination of an observer and to request that s/he be extended the usual facilities.

4. Briefing

Before undertaking an observer mission, a monitor should be briefed by the sending organization on i) the approach, policies and methods of the sending organization; ii) the background of the case, including the relevant domestic and international legal framework applicable in the proceedings; iii) the names, addresses and background of lawyers, translators and other contacts during the proceedings, as the situation may necessitate; and iv) the means of a monitor's communication with the organization while on the mission.

5. Translators

An observer should, among other things, be chosen for his/her command of the language in which the proceedings will be conducted. When such a person cannot be found the observer should, ideally, be provided with an interpreter who will sit next to him/her in the courtroom and give a simultaneous translation sotto voce. The selection of an interpreter is important because an observer's impartiality could be discredited if the interpreter is perceived as being affiliated with the parties or participants in the proceedings. An interpreter should, ideally, have the requisite legal knowledge, be trustworthy and independent.

6. Travel and Housing Arrangements; Visa and Entry Formalities

If the trial to be observed is taking place outside the seat of the sending organization or abroad, arrangements should be made for the monitor to be assisted upon arrival by a person not involved in the proceedings who could provide him/her with an initial briefing. The observer should preferably stay in a hotel, or other mode of accommodation, close to the court. S/he should not take up offers to be hosted by persons involved in the proceedings or their supporters, as that could discredit his/her impartiality.

If a trial is being observed abroad, it would be logical to select as an observer a person who does not need a visa to enter the country of destination or who already has one. If a visa is required, an Order of Mission (Letter of Credentials) should be furnished along with the visa application, stating that the purpose of the visit is to attend the trial in question on behalf of the sponsoring organization.

7. Public Statements Before, During and After a Mission

There is little uniformity of practice among NGOs as regards statements made by an observer prior to, during and after a mission. While some organizations will announce a mission precisely in order to attract attention to a case, others will decline to do so for fear of making it harder for the observer to attend the trial. In each instance of advance announcement the expected benefits must be weighed against the possible drawbacks. There is also no common stand among NGOs with respect to an observer's statements during a mission. On the one hand, statements might jeopardize the mission, the appearance of neutrality or even the

safety of the observer but, on the other hand, the impact of public comments is usually the greatest while the trial is still taking place or immediately upon its conclusion. On a cautionary note, it can be said that an observer should generally refrain from commenting on a trial that is still unfolding unless there are exceptional events—such as a breakdown of the judicial process—which merit immediate response. Similarly, if an observer is not specifically authorized to issue a statement after the end of his/her mission he or she should generally refrain from doing so unless there is an issue requiring momentary reaction. Practice has shown that it is often better both for the observer and for the appearance of his/her impartiality if a statement is issued after the observer has returned home and has had time for reflection, rather than if s/he comments on the trial while at the trial site. A case by case approach is necessary in this phase as well. Throughout the proceedings, however, a monitor should be free to inform the press about his/her presence, the purpose of the mission and about the report to be drawn up following the end of trial observation. S/he should also be prepared to explain his/her authority to make statements during and after the trial or to decline from comments.

8. Contacts and Interviews during the Mission

An observer should, if possible, try to make contact with the parties to the trial and with the presiding judge before the proceedings begin. If helpful, s/he should also arrange to be introduced in open court by a neutral party so as to enable the participants and the public to take note of his/her presence. Depending on the scope of the observer's mission, the circumstances of the case and the observer's stature, he or she may also try to establish contact with other government officials in order to collect more background information and to enhance his or her impact on the proceedings. An observer should also leave him/herself time for collecting documents related to the trial and other information of relevance to an assessment of fairness. Last, but not least, if possible, a monitor should try to interview the defendant, in full confidentiality, in order to observe his/her physical and mental condition and the circumstances of detention.

9. Seating in the Courtroom; Notes

With the primary aim of preserving an appearance of neutrality, an observer should ideally follow the proceedings from a prominent but neutral position in the courtroom. The seating arrangement should not lead to an observer's being identified with persons participating in the proceedings or attending it in some other capacity, such as defense attorneys or the press. Nor should it detract from his/her prestige, which would be the case if s/he were to sit in the section of the courtroom reserved for the general public. While following the trial the observer should be seen taking extensive notes. This action not only signifies the close attention being paid to the trial but, also, the creation of a record that will be used in compiling the final report.

10. Observer's Report

Preparing a report upon the completion of a trial observation mission is the second half of an observer's task. If the mission is to be successful, the report should be drawn up as quickly as possible so that the sponsoring organization may issue it while the government and the general public are still responsive to the findings. Promptness is vital.

NGOs with extensive practice in trial observation recommend that a trial observation report be composed to include the following headings (the list is not exhaustive and will obviously depend on the circumstances of the case):[115]

(i) the observer's instructions;
(ii) the background of the case;
(iii) the facts of the case as revealed at trial and by independent fact-finding, with particular emphasis on the prosecution and defense evidence;
(iv) the charges, applicable laws, pre-trial procedures, trial process, judgment (if any) and subsequent proceedings;
(v) the mental and physical condition of the defendant and the conditions of confinement;
(vi) an evaluation of the fairness of the proceedings, applicable laws and treatment of the defendant under national and international standards; and
(vii) a conclusion.

In addition a report should, if possible, include the following information:

(i) a copy of the Order of Mission;
(ii) copies of relevant procedural rules, court decisions and laws;
(iii) copies of charges, transcripts and the court's judgment;
(iv) a description of the observer's methodology, including material studied and persons interviewed;
(v) sensitive material which should be omitted from the published report;
(vi) copies of newspaper articles referring to the trial or the observer's presence, with the names of the newspapers and the dates of publication;
(vii) additional information not strictly within the observer's mission (such as information about other prisoners, other trials and recent laws); and
(viii) practical observations for the guidance of future observers.

When there is a protracted trial the observer will usually attend only part of the proceedings. In such a case s/he should send an immediate report to the sponsoring organization and add to it later, in the form of a supplement commenting on the decision rendered at the end of the trial. S/he should therefore make arrangements for the official text of the judgment and the sentence of the court to be sent to the sponsoring organization either directly or through the observer him/herself.

Observers may include recommendations to the government concerned or to the sending organization on how to overcome the irregularities noted in the trial procedure and/or on the action the sponsoring organization should take in pursuing this goal, depending, of course on the sender's mandate.

[115] This list is reproduced from Weissbrodt, *supra* note 114, at 93-94.

Finally, an issue that also needs to be resolved by the sponsoring organization is whether the report will be conveyed to the government in question for comment and response before it is made public. This is a matter of policy that will hinge on the circumstances of a case, the purpose and focus of the report and the government's anticipated reaction to it. If the report is first sent to the government it should contain precise time limits for a response before publication.

IV. CONCLUSION

An examination of the customary international law status of trial observation is outside the scope of this review. However, the practice of sending and receiving trial observers is today so widespread and accepted that it may already constitute a norm of customary international law. The rapid development of the institution of trial observation over the past several decades can be attributed largely to the knowledge and integrity of the individuals who have served as observers. In order for this method of human rights monitoring to expand further, the high standards achieved so far must be maintained and continuously refined. This, among other things, means that the monitors themselves should increasingly be individuals familiar with the intricacies of domestic and international fair trial standards. In practice, they should bring to the performance of their task the very qualities they monitor: fairness and humanity.

Asha Ranjan and another v State of Bihar and others AIR 2017 SC 1079, 2017(2) SCALE 709

Bench: Dipak Misra, Amitava Roy, JJ.

The Judgment was delivered by: Dipak Misra, J.

1. Regard being had to the similitude of prayers and considering the commonality of issues exposited in these Writ Petitions, they were finally heard together. The principal issue raised is disposed of by this singular order. It is necessary to note that in Writ Petition (Criminal) No. 132 of 2016 preferred by Asha Ranjan, it has been prayed for issue of appropriate directions to the Central Bureau of Investigation (CBI) to take over the investigation in connection with FIR No. 362/16 dated 13.05.2016 under Police Station Nagar Thana, Siwan, District Siwan under Sections 302/120B read with Section 34 of the Indian Penal Code (IPC); to transfer the entire proceedings and trial in FIR No. 362/16 dated 13.05.2016 registered under the same Police Station for the same offences from Siwan, Bihar to Delhi; to call for the status report in the investigation relating to FIR No. 362/16 dated 13.05.2016; to grant appropriate compensation to the petitioner and her family members and to ensure their security. That apart, there is also a prayer to register FIR against respondent Nos. 3 and 4 for conspiracy and harboring and sheltering the proclaimed offenders in FIR No. 362/16 dated 13.05.2016. In this Writ Petition, at a subsequent stage, Criminal Miscellaneous Petition No. 17101 of 2016 has been filed for transfer of respondent No. 3, M. Shahabuddin, from Siwan Jail, Bihar to a jail in Delhi. During the pendency of this case, Writ Petition (Criminal) No. 147 of 2016 came to be filed. In the said Writ Petition, the prayer is to issue a direction to transfer respondent No. 3, M. Shahabuddin, to a jail outside the State of Bihar and to issue further directions for conducting of the trial in pending cases against him through video conferencing. Thus, the prayers in Writ Petition (Criminal) No. 147 of 2016 are two fold and in Writ Petition (Criminal) No. 132 of 2016 are manifold.

2. It is apposite to state here that both the cases, as stated earlier, were heard together and learned counsel for the parties addressed the Court with regard to sustainability of prayer for transfer of the cases pending against respondent No. 3, Shahabuddin, from Siwan Jail to a jail in Delhi and conducting of the trial through video conferencing.

3. Thus, we are presently required to deal with the transfer of the third respondent, M. Shahabuddin from the Siwan Jail, Bihar to a Jail in Delhi keeping in view the averments made in Writ Petition (Criminal) No. 147 of 2016 and the assertions made in the application filed in Writ Petition (Criminal) No. 132 of 2016

4. The factual matrix in Writ Petition (Criminal) No. 132 of 2016, as unfolded, is that on 13.5.2016 petitioner's husband, namely, Sh. Rajdev Ranjan, Senior Reporter (Journalist Incharge, Dainik Hindustan, Siwan Bureau, Bihar) was shot dead as he received five bullet injuries in his head and other parts of his body and FIR No. 362/16 dated 13.5.16 was registered under PS Nagar Thana, Dist. Siwan for the offences punishable under Sections 302/120(B) and 34 of IPC.

5. On 13.5.2016, the petitioner informed the police that one notorious criminal, Shahabuddin, and his henchmen were involved in the murder of her husband but the police deliberately did not include the name of Shahabuddin in the list of accused persons. Thereafter, as the matter stands today, the investigation of the said case has been transferred to the CBI. It is asseverated that in the meantime certain persons have been arrested and some have surrendered to custody.

6. The factual expose of the murder of the husband of the petitioner has a narrative that goes back to the year 2005. The husband of the petitioner, a journalist, it is averred, had written various news reports pertaining to serious and substantive criminal activities of said Shahabuddin who had threatened to eliminate him and his family members. Undeterred he kept on writing various investigative news articles and reports in respect of murder of the three sons of one Siwan resident, namely, Chanda Babu, which eventually led to the arrest of Shahabuddin and after conclusion of the trial he stood convicted for the offence under Section 302 IPC and sentenced to undergo life imprisonment. It is apt to note that during the trial of the said case, Shahabuddin and his shooters had constantly threatened the petitioner's husband with death threats to him and the family members. As the narration has been undraped, petitioner's husband highlighted about the murder of one Shrikant Bharti by publishing news articles and at that stage on 13.5.2016 petitioner's husband got a phone call from an unknown person on his mobile about 7.15 p.m. and soon thereafter he left the office and started moving towards the Station Road. About 7.30 p.m. he was shot dead.

7. Thereafter, during the course of investigation, two accused persons, namely, Mohammed Kaif and Mohammad Javed were declared as proclaimed offenders. On 10.9.2016, Shahabuddin was released on bail and the aforesaid proclaimed offenders were seen in his company but apathy reigned and the fear ruled so that no police official dared to arrest them. On 14.9.2016 petitioner saw the pictures of the proclaimed offenders

Mohammed Kaif and Mohammad Javed with Shri Tej Pratap Yadav, Health Minister of Bihar on all media channels.

8. Feeling in secured, terrorized and helpless as regards her safety and security and of her two minor children, the petitioner has moved this Court. As set forth, the death of the husband, makes her apprehensive that Shahabuddin may eliminate her entire family. Her petrification has been agonizingly articulated in the petition and by the learned counsel, sometimes with vehemence and on occasions with desperation.

9. At this juncture, we may advert to the facts in Writ Petition (Crl.) No. 147 of 2016. It is averred that respondent No. 3 is a dreaded criminal-cum-politician who has already been declared history-sheeter Type A (who is beyond reform) and till date he has been booked in 75 cases.

10. It is set forth that in August 2004, three sons of the petitioner were picked up by the henchmen of respondent No. 3 and taken to his native village Pratappur where two of his sons, namely, Girish and Satish were drenched in acid and his third son, who witnessed the murder managed to escape and a criminal case was registered against him under Sections 341, 323, 380, 364, 435/34 IPC for abduction, etc. of the petitioner's two sons in which charges were framed on 04.06.2010 against respondent No. 3 and others. The prosecution moved an application for addition of charges under Sections 302 and 201 read with Section 120B IPC, which prayer was initially rejected on the ground of delay but after the direction of the High Court of Patna, the charges under the aforesaid Sections were added vide order dated 18.04.2014. During the litigation, the petitioner's third son, Rajeev Roshan, a material eye witness in the said case was murdered and an FIR No. 220/14 was lodged against respondent No. 3, his son Osama and other unknown persons. Thus, the three sons of the petitioner were murdered.

11. On 18.05.2016, a raid was conducted by the district administration at Siwan jail and District Magistrate, Siwan in his report stated about the conduct of respondent No. 3 inside the jail and the facilities he was enjoying in jail in violation of the jail rules/manual and recommended his transfer from Siwan to Bhagalpur jail whereafter he was transferred to Bhagalpur jail for six months.

12. As the narration would further unfurl, in the said case, the High Court granted bail to the respondent No. 3 on 02.03.2016 in FIR No. 131/04 and further granted bail in the murder's case of third son of petitioner on 07.09.2016 in the FIR No. 220/14. The petitioner as well as the State of Bihar challenged the orders granting bail. The bail orders have been set aside by this Court in Chandrakeshwar Prasad v. State of Bihar and Anr. (2016) 9 SCC 443. While setting aside the order granting him bail, this Court has held:-

"12. In the instant case, having regard to the recorded allegations against the respondent-accused and the overall factual scenario, we are of the view, having regard in particular to the present stage of the case in which the impugned order has been passed, that the High Court was not justified in granting bail on the considerations recorded. Qua the assertion that the respondent-accused was in judicial custody on the date on which the incident of murder in the earlier case had occurred, the judgment and order of the trial court convicting him has recorded the version of the brother of the deceased therein, that he had seen the respondent-accused participating in the offence. We refrain from elaborating further on this aspect as the said judgment and order of the trial court is presently sub judice in an appeal before the High Court.

13. *On a careful perusal of the records of the case and considering all the aspects of the matter in question and having regard to the proved charges in the cases concerned, and the charges pending adjudication against the respondent-accused and further balancing the considerations of individual liberty and societal interest as well as the prescriptions and the perception of law regarding bail, it appears to us that the High Court has erred in granting bail to the respondent-accused without taking into consideration the overall facts otherwise having a bearing on the exercise of its discretion on the issue."*

On the aforementioned factual plinth, the petitioner has sought transfer of the third respondent from the Siwan jail to a jail outside the State of Bihar and conducting of the trials in pending cases by video conferencing.

14. As per our order dated 17.01.2017, the grievance against the 4th respondent in Writ Petition (Criminal) No. 132 of 2016 shall be heard and dealt with after pronouncement of this judgment and hence, we shall not delve into the contentions put forth in the said writ petition and the stand taken in the counter affidavit in that regard for the present.

15. The seminal issue that we are required to address is **whether this Court, in exercise of power under Article 32 and Article 142 of the Constitution can direct transfer of an accused from one State to another and direct conducting of pending trials by way of video conferencing.** Needless to emphasise the said advertence in law will also depend upon the factual scenario and satisfaction of the judicial conscience of this Court to take recourse to such a mode. The petitioners have asserted with regard to the criminal activities of the third respondent, the cases in which he has been roped in, the convictions he has faced, the sentences imposed

upon him, the snails speed at which the trials are in progress because of the terror that reigns in Siwan, the declaration of the third respondent as a history-sheeter Type-A (who is beyond reform), the non-chalant attitude unabashedly and brazenly demonstrated by him that has unnerved and shaken the victims and the society at large, the impunity with which the collusion with the jail administration has taken place, the blatant intimidation of witnesses that weakens their sense of truth and justice; and mortal terror unleashed when they come to court, the audacious violation of the rules and regulations that are supposed to govern the convicts or under-trial prisoners inside the jail as if they have been made elegantly unperceivable and the confinement inside jail remains a word on paper, for the third respondent, still is able to issue his command and writs from the jail, run a parallel administration and get involved with the crimes, at his own whim and fancy.

20. First, we shall have a survey of the statutory law in the field. The Prisoners Act, 1900 was brought into existence to consolidate the law relating to prisoners confined by the order of a court. As Section 29 of the Prisoners Act, 1900 covered a different field, the Parliament thought it appropriate to bring in the Transfer of Prisoners Act, 1950 (for short, "the 1950 Act").

22. We are required to examine, when the said provision permits transfer outside the State only in certain circumstances and the case of respondent No. 3 does not come within any of the circumstances, could the accused respondent be transferred from the prison in Bihar to any other prison situate in another State. It is also necessary to be addressed, whether the transfer would vitiate the basic tenet of Article 21 of the Constitution and should such a right be allowed to founder. In this regard, we have been commended to Sunil Batra (II) v. Delhi Administration, 1980) 3 SCC 488 1979 Indlaw SC 329, and State of Maharashtra & ors v. Saeed Sohail Sheikh and Ors. (2012) 13 SCC 192 2012 Indlaw SC 392.

23. In Sunil Batra (II) 1979 Indlaw SC 329 (supra), a writ petition was registered on receipt of a letter from the prisoner complaining of a brutal assault by Head Warder on another prisoner. The letter was metamorphosed into a proceeding under Article 32 of the Constitution. The Court referred to the decision in Sunil Batra v. Delhi Administration & Ors., (1978) 4 SCC 494 1978 Indlaw SC 289, to opine that the said decision imparts to the habeas corpus writ a versatile vitality and operational utility that makes a healing presence of the law to live up to its reputation as bastion of liberty even within the secrecy of the hidden cell.

27. Considerable emphasis was laid on the aspect that transfer to a distant prison where visits or society of friends or relations is snapped, is an affliction or abridgment and the same is an infraction of liberty or life in its wider sense and cannot be sustained unless Article 21 is satisfied.

31. The question that is required to be posed is if the accused is transferred to another jail in another State, would the same become an apology for trial or promote and safeguard free and fair trial. The argument that all relevant witnesses are in Siwan and the witnesses the defence intends to cite are in Siwan and in such a situation the trial after shifting cannot be characterized as fair trial refers to only one aspect. The concept of fair trial recognized under the Code of Criminal Procedure is conferred an elevated status under the Constitution, is a much broader and wider concept. If the transfer will create a dent in the said concept, there is no justification to accept such a prayer at the behest of the petitioners. In oppugnation, the conception of fair trial in criminal jurisprudence is not one way traffic, but includes the accused and the victim and it is the duty of the court to weigh the balance. When there is threat to life, liberty and fear pervades, it sends shivers in the spine and corrodes the basic marrows of holding of the trial at Siwan. This is quite farther from the idea of fair trial. The grievance of the victims, who have enormously and apparently suffered deserves to be dealt with as per the law of the land and should not remain a mirage and a distant dream. As we find, both sides have propounded the propositions in extreme terms. And we have a duty to balance.

32. To appreciate the contention on this score, we may, at present, refer to certain authorities that have dealt with fair trial in the Constitutional and statutory backdrop.

33. In J. Jayalalithaa & Ors v. State of Karnataka & Ors. (2014) 2 SCC 401, the Court held that fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. Fair trial must be accorded to every accused in the spirit of the right to life and personal liberty and the accused must get a free and fair, just and reasonable trial on the charge imputed in a criminal case. It has been further observed that any breach or violation of public rights and duties adversely affects the community as a whole and it becomes harmful to the society in general and, therefore, in all circumstances, the courts have a duty to maintain public confidence in the administration of justice and such duty is to vindicate and uphold the "majesty of the law" and the courts cannot turn a blind eye to vexatious or oppressive conduct that occurs in relation to criminal proceedings. The Court further laid down that denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a trial before an impartial Judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent,

the trial should be a search for the truth and not about over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seen to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution. Right to get a fair trial is not only a basic fundamental right, but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution.

34. In this regard, we may sit in the time machine and refer to a three-Judge Bench judgment in Maneka Sanjay Gandhi & another v. Rani Jethmalani, (1979) 4 SCC 167 1978 Indlaw SC 109, wherein it has been observed that assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperiling, from the point of view of public justice and its attendant environment is necessitous, if the court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. The Court observed that accused cannot dictate where the case against him should be tried and, in a case, it the duty of the Court to weigh the circumstances.

36. Be it noted, the Court in the said case had noted that there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple-pie order in carrying out the adjective law, would only be sound and fury signifying nothing."

40. In Mohd. Hussain @ Julfikar Ali 2012 Indlaw SC 332 the three-Judge Bench has drawn a distinction between the speedy trial and fair trial by opining that there is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-a-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of the accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end.

41. We have referred to the said authority as the three-Judge Bench has categorically stated that interests of the society at large cannot be disregarded or totally ostracized while applying the test of fair trial.

42. In Bablu Kumar and Ors. v.State of Bihar and Anr. (2015) 8 SCC 787 2015 Indlaw SC 488, the Court observed that it is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a mock trial. The Court further ruled that a criminal trial is a serious concern of society and every member of the collective has an inherent interest in such a trial and, therefore, the court is duty-bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. The said observations were made keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the court.

44. On a studied analysis of the concept of fair trial as a facet of Article 21, it is noticeable that in its ambit and sweep it covers interest of the accused, prosecution and the victim. The victim, may be a singular person, who has suffered, but the injury suffered by singular is likely to affect the community interest. Therefore, the collective under certain circumstances and in certain cases, assume the position of the victim. They may not be entitled to compensation as conceived under section 357A of the Cr.PC. but their anxiety and concern of the crime and desire to prevent such occurrences and that the perpetrator, if guilty, should be punished, is a facet of Rule of Law. And that has to be accepted and ultimately protected.

45. It is settled in law that the right under Article 21 is not absolute. It can be curtailed in accordance with law. The curtailment of the right is permissible by following due procedure which can withstand the test of reasonableness. Submission that if the accused is transferred from jail in Siwan to any other jail outside the State of Bihar, his right to fair trial would be smothered and there will be an inscription of an obituary of fair trial and refutation of the said proponent, that the accused neither has monopoly over the process nor does he has any

exclusively absolute right, requires a balanced resolution. The opposite arguments are both predicated on the precept of fair trial and the said scale would decide this controversy. The interest of the victim is relevant and has to be taken into consideration. The contention that if the accused is not shifted out of Siwan Jail, the pending trials would result in complete farce, for no witness would be in a position to depose against him and they, in total haplessness, shall be bound to succumb to the feeling of accentuated fear that is created by his unseen tentacles, is not an artifice and cannot be ignored. In such a situation, this Court should balance the rights between the accused and the victims and thereafter weigh on the scale of fair trial whether shifting is necessary or not. It would be travesty if we ignore the assertion that if the respondent No. 3 is not shifted from Siwan Jail and the trial is held at Siwan, justice, which is necessitous to be done in accordance with law, will suffer an unprecedented set back and the petitioners would remain in a constant state of fear that shall melt their bones. This would imply balancing of rights.

48. In this context, it is also appropriate to refer to certain other decisions where the Court has dealt with the concept of competing rights. We are disposed to think that dictum laid therein has to be appositely appreciated. In Mr. 'X' v. Hospital 'Z', (1998) 8 SCC 296 1998 Indlaw SC 1218, the issue arose with regard to right to privacy as implicit in the right to life and liberty as guaranteed to the citizens under Article 21 of the Constitution and the right of another to lead a healthy life. Dealing with the said controversy, the Court held as a human being, Ms Y must also enjoy, as she obviously is entitled to, all the human rights available to any other human being. This is apart from, and in addition to, the fundamental right available to her under Article 21, which guarantees "right to life" to every citizen of this country. The Court further held that where there is a clash of two fundamental rights, namely, the appellant's right to privacy as part of right to life and Ms 'Y's right to lead a healthy life which is her fundamental right under Article 21, the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive.

49. The aforesaid decision is an authority for the proposition that there can be a conflict between two individuals qua their right under Article 21 of the Constitution and in such a situation, to weigh the balance the test that is required to be applied is the test of larger public interest and further that would, in certain circumstances, advance public morality of the day. To put it differently, the "greater community interest" or "interest of the collective or social order" would be the principle to recognize and accept the right of one which has to be protected.

50. In this context, reference to the pronouncement in Rev. Stainislaus v. State of M.P. and Ors. (1977) 1 SCC 677 1977 Indlaw SC 284, would be instructive. In the said case, the Constitution Bench was dealing with two sets of appeals, one arising from Madhya Pradesh that related to Madhya Pradesh Dharma Swatantraya Adhiniyam, 1968 and the other pertained to Orissa Freedom of Religion Act, 1967. The two Acts insofar as they were concerned with prohibition of forcible conversion and punishment therefor, were similar. The larger Bench stated the facts from Madhya Pradesh case which eventually travelled to the High Court. The High Court ruled that that there was no justification for the argument that Sections 3, 4 and 5 were violative of Article 25(1) of the Constitution. The High Court went on to hold that those Sections "establish the equality of religious freedom for all citizens by prohibiting conversion by objectionable activities such as conversion by force, fraud and by allurement". The Orissa Act was declared to be ultra vires the Constitution by the High Court. To understand the controversy, the Court posed the following questions:-

"(1) whether the two Acts were violative of the fundamental right guaranteed under Article 25(1) of the Constitution*, and*

(2) whether the State Legislatures were competent to enact them?"

51. It was contended before this Court that the right to propagate one's religion means the right to convert a person to one's own religion and such a right is guaranteed by Article 25(1) of the Constitution. The larger Bench dealing with the said contention held:-

"We have no doubt that it is in this sense that the word 'propagate' has been used in Article 25(1), for what the article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25(1) guarantees "freedom of conscience" to every citizen, and not merely to the followers of one particular religion, and that, in turn postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the "freedom of conscience" guaranteed to all the citizens of the country alike." And again:-

"It has to be appreciated that the freedom of religion enshrined in the article is not guaranteed in respect of one religion only, but covers all religions alike, and it can be properly enjoyed by a person if he exercises his right in a manner commensurate with the like freedom of persons following the other religions. What is freedom for one, is freedom for the other, in equal measure, and there can therefore be no such thing as a fundamental right to convert any person to one's own religion."

52. The aforesaid judgment clearly lays down, though in a different context, that what is freedom for one is also the freedom for the other in equal measure. The perception is explicated when the Court has said that it has to be remembered that Article 25(1) guarantees freedom of conscience to other citizens and not merely to followers of particular religion and there is no fundamental right to convert another person. The right is guaranteed to all citizens. The right to propagate or spread one's religion by an exposition of its tenets does not mean one's religion to convert another person as it affects the fundamental right of the other. We have referred to this authority as it has, in a way, dwelt upon the "intra-conflict of a fundamental right".

53. Be it stated, circumstances may emerge that may necessitate for balancing between intra-fundamental rights. It has been distinctly understood that the test that has to be applied while balancing the two fundamental rights or inter fundamental rights, the principles applied may be different than the principle to be applied in intra-conflict between the same fundamental right. To elaborate, as in this case, the accused has a fundamental right to have a fair trial under Article 21 of the Constitution. Similarly, the victims who are directly affected and also form a part of the constituent of the collective, have a fundamental right for a fair trial. Thus, there can be two individuals both having legitimacy to claim or assert the right. The factum of legitimacy is a primary consideration. It has to be remembered that no fundamental right is absolute and it can have limitations in certain circumstances. Thus, permissible limitations are imposed by the State. The said limitations are to be within the bounds of law. However, when there is intra-conflict of the right conferred under the same Article, like fair trial in this case, the test that is required to be applied, we are disposed to think, it would be "paramount collective interest" or "sustenance of public confidence in the justice dispensation system". An example can be cited. A group of persons in the name of "class honour", as has been stated in Vikas Yadav v. State of U.P. & Ors. (2016) 9 SCC 541 2016 Indlaw SC 702, cannot curtail or throttle the choice of a woman. It is because choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognized in the Constitution under Article 19, and such a right is not expected to succumb to the concept of "class honour" or "group thinking". It is because the sense of class honour has no legitimacy even if it is practised by the collective under some kind of a notion. Therefore, if the collective interest or the public interest that serves the public cause and further has the legitimacy to claim or assert a fundamental right, then only it can put forth that their right should be protected. There can be no denial of the fact that the rights of the victims for a fair trial is an inseparable aspect of Article 21 of the Constitution and when they assert that right by themselves as well as the part of the collective, the conception of public interest gets galvanised. The accentuated public interest in such circumstances has to be given primacy, for it furthers and promotes "Rule of Law". It may be clarified at once that the test of primacy which is based on legitimacy and the public interest has to be adjudged on the facts of each case and cannot be stated in abstract terms. It will require studied scanning of facts, the competing interests and the ultimate perception of the balancing that would subserve the larger public interest and serve the majesty of rule of law. In this regard, we are reminded of an ancient saying:- "yadapi siddham, loka viruddham Na adaraniyam, na acharaniyam"

The aforesaid saying lays stress on public interest and its significance and primacy over certain individual interest. It may not thus have general application, but the purpose of referring to the same is that on certain occasions it can be treated to be appropriate.

54. There may be a perception that if principle of primacy is to be followed, then the right of one gets totally extinguished. It has to be borne in mind that total extinction is not balancing. When balancing act is done, the right to fair trial is not totally crippled, but it is curtailed to some extent by which the accused gets the right of fair trial and simultaneously, the victims feel that the fair trial is conducted and the court feels assured that there is a fair trial in respect of such cases. That apart, the faith of the collective is reposed in the criminal justice dispensation system and remains anchored.

55. While appreciating the concept of public interest in such a situation, the Court is required to engage itself in construing the process of fair trial which ultimately subserves the cause of justice and remains closer to constitutional sensibility. An accused, in the name of fair trial, cannot go on seeking adjournments defeating the basic purpose behind the conducting of a trial as enshrined under Section 309 CrPC. He cannot go on filing applications under various provisions of CrPC, whether tenable or not, and put forth a plea on each and every occasion on the bedrock that principle of fair trial sanctions it. In such a situation, as has been held by this Court, the prosecution which represents the cause of collective and the victim, who fights for remedy of his individual grievance, is allowed to have a say and the court is not expected to be a silent spectator. Thus, the discord that

arises when there is intra-conflict in the same fundamental right especially, in the context of fair trial, it has to be resolved regard being had to the obtaining fact situation. An accused who has been able to, by his sheer presence, erode the idea of safety of a witness in court or for that matter impairs and rusts the faith of a victim in the ultimate justice and such erosion is due to fear psychosis prevalent in the atmosphere of trial, is not to be countenanced as it is an unconscionable situation. Such a hazard is not to be silently suffered because the "Majesty of Justice" does not allow such kinds of complaints to survive. Thus analysed, the submission of Mr. Naphade that shifting of the accused outside the Siwan Jail would affect his right under Article 21 of the Constitution does not commend acceptation.

56. **The next limb of controversy relates to exercise of power and jurisdiction.**

67. In the context of the aforesaid authorities, the submission of Mr. Naphade is to be appreciated. It is canvassed by him that Section 3 of the 1950 Act permits transfer of a prisoner outside the State under certain circumstances and, therefore, no other circumstance can be visualized while exercising power under Article 142 of the Constitution as that will be running counter to the substantive provisions of the statute. He further submits that this Court cannot legislate under Article 142 and equity must yield to the provisions of law.

68. There can be no doubt that equity cannot override law. As far as the first aspect is concerned, we need not advert to the broad platform on which Mr. Naphade has based his contention. Suffice it to note that Section 3 of the 1950 Act bestows power on the State Government to transfer an accused to another State after consulting the other State. Such an action by the State has to be totally controlled by the circumstances which find mention under Section 3. When the State passes an order with the concurrence of another State, it is obliged to be bound by the circumstances which are postulated under Section 3(1) of the 1950 Act, but when the issue of fair trial emerges before the Constitutional court, Section 3 of the 1950 Act cannot be regarded so as to restrain the court from what is mandated and required for a free and fair trial. The statutory power is not such which is negative and curtails power of the court to act in the interest of justice, and ensure free and fair trial, which is of paramount importance for the Rule of Law. It only controls the power of the executive. Therefore, we are unable to accept the submission of Mr. Naphade in this regard.

69. Presently, we shall advert to the facts which we have stated in the beginning. The third respondent has already been declared as a history-sheeter type 'A', that is, who is beyond reform. Till today, he has been booked in 75 cases, out of which he had been convicted in 10 cases and presently facing trial in 45 cases. There is no dispute that he has been acquitted in 20 cases. Out of 45 cases, 21 cases are those where maximum sentence is 7 years or more. He has been booked in 15 cases where he has been in custody and one such case relates to the murder of the third son of the petitioner and other two cases are of attempt to murder. He is an influential person of the locality, for he has been a representative to the Legislative Assembly on two occasions and elected as a Member of Parliament four times. This is not a normal and usual case.

It has to be dealt with in the aforesaid factual matrix. A history-sheeter has criminal antecedents and sometimes becomes a terror in society.

We have referred to the aforesaid authority to highlight how the Court has taken into consideration the paramountcy of peaceful social order while cancelling the order of bail, for the order granting bail was passed without proper consideration of criminal antecedents of the accused whose acts created a concavity in the social stream.

70. Mr. Bhushan, learned senior counsel heavily relied on the authority in Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Ya.dav and another, (2005) 3 SCC 284 2005 Indlaw SC 93. It is urged by him that factual matrix in the said case and the present case is identical. In the said case, the Court noticed that the respondent therein, Rajesh Ranjan alias Pappu Yadav while he was in judicial custody, was found addressing an election meeting. The Court called for a report from the authorities concerned requiring them to explain on what authority the said respondent was allowed to address a public meeting. The report filed by the CBI revealed that the respondent, in collusion with the police authorities accompanying him to Madhepura, had addressed a public meeting and the escort accompanying him took him to various places which the respondent wanted to visit beyond the scope of the production warrant. It had come to the knowledge of the Court that though his bail had been cancelled, the accused was never taken into jail and, in fact, when he was arrested after the cancellation of bail, he was taken to Patna and an urgent Medical Board was constituted to examine him which opined that the accused required medical treatment at Patna Medical College and permitted him to stay in the said Medical College. Taking various other facts into consideration, the Court opined that the respondent had absolutely no respect for the Rule of Law nor was he, in any manner, afraid of the consequences of his unlawful acts. It was also observed that, it was evident from the fact that some of the illegal acts of the respondent were committed even when his application for grant of bail was pending. When the issue of transfer from Beur Jail, Patna to a jail outside the State arose, a contention was advanced that it would affect his fundamental right as has been enunciated in Sunil

Batra (II) 1979 Indlaw SC 329 (supra). The Court referred to Section 3 of the 1950 Act and in that context, opined that in an appropriate case, such request can also be made by an undertrial prisoner or a detenu and there being no statutory provisions contrary thereto, this Court in exercise of its jurisdiction under Article 142 of the Constitution may issue necessary direction.

The aforesaid authority stands in close proximity to the case at hand. The present case, in fact, frescoes a different picture and projects a sad scenario compelling us to take immediate steps, while safeguarding the principle of fair trial for both the sides.

73. It is fruitful to note that in Dr. Praful B. Desai 2003 Indlaw SC 320 (supra) it has been clearly held that recording of evidence by way of video conferencing is valid in law.

74. **In view of the aforesaid analysis, we record our conclusions and directions in seriatim:-**

(i) The right to fair trial is not singularly absolute, as is perceived, from the perspective of the accused. It takes in its ambit and sweep the right of the victim(s) and the society at large. These factors would collectively allude and constitute the Rule of Law, i.e., free and fair trial.

(ii) The fair trial which is constitutionally protected as a substantial right under Article 21 and also the statutory protection, does invite for consideration a sense of conflict with the interest of the victim(s) or the collective/interest of the society. When there is an intra-conflict in respect of the same fundamental right from the true perceptions, it is the obligation of the Constitutional courts to weigh the balance in certain circumstances, the interest of the society as a whole, when it would promote and instill Rule of Law. A fair trial is not what the accused wants in the name of fair trial. Fair trial must soothe the ultimate justice which is sought individually, but is subservient and would not prevail when fair trial requires transfer of the criminal proceedings.

(iii) A wrongful act of an individual cannot derogate the right of fair trial as that interest is closer, especially in criminal trials, to the Rule of Law. An accused cannot be permitted to jettison the basic fundamentals of trial in the name of fair trial.

(iv) The weighing of balance between the two perspectives in case of fair trial would depend upon the facts and circumstances weighed on the scale of constitutional norms and sensibility and larger public interest.

(v) Section 3 of the 1950 Act does not create an impediment on the part the court to pass an order of transfer of an accused or a convict from one jail in a State to another prison in another State because it creates a bar on the exercise of power on the executive only.

(vi) The Court in exercise of power under Article 142 of the Constitution cannot curtail the fundamental rights of the citizens conferred under the Constitution and pass orders in violation of substantive provisions which are based on fundamental policy principles, yet when a case of the present nature arises, it may issue appropriate directions so that criminal trial is conducted in accordance with law. It is the obligation and duty of this Court to ensure free and fair trial.

(vii) The submission that this Court in exercise of equity jurisdiction under Article 142 of the Constitution cannot transfer the accused from Siwan Jail to any other jail in another State is unacceptable as the basic premise of the said argument is erroneous, for while addressing the issue of fair trial, the Court is not exercising any kind of jurisdiction in equity.

75. In view of the aforesaid conclusions, we direct the State of Bihar to transfer the third respondent, M. Shahabuddin, from Siwan Jail, District Siwan to Tihar Jail, Delhi and hand over the prisoner to the competent officer of Tihar Jail after giving prior intimation for his transfer in Delhi. Needless to say, that the authorities escorting the third respondent from Siwan Jail to Tihar Jail would strictly follow the rules applicable to the transit prisoners and no special privilege shall be extended. The transfer shall take place within a week hence. Thereafter, the trial in respect of pending trials shall be conducted by video conferencing by the concerned trial court. The competent authority in Tihar Jail and the competent authority of the State of Bihar shall make all essential arrangements so that the accused and the witnesses would be available for the purpose of trial through video conferencing. A copy of this order shall forthwith be communicated to the Home Secretary, Government of Bihar, Superintendent of Siwan Jail and the Inspector General, Prisons, Tihar Jail, Delhi. All concerned are directed to act in aid of the aforesaid order as contemplated under Article 144 of the Constitution.

76. We have noted that the High Court of Patna has granted stay in certain proceedings. The High Court is requested to dispose of the said matters on their merits within four months hence. A copy of this order be sent to the Registrar General, High Court of Patna for placing the same before the learned Acting Chief Justice.

77. In view of the aforesaid analysis, Writ Petition (Criminal) No. 147 of 2016 stands disposed of. Similarly, Writ Petition (Criminal) No. 132 of 2016 also stands disposed of except for the prayer seeking direction to register FIR against Shri Tej Pratap Yadav, Health Minster of Bihar and S.P., Police of Siwan District, for which the matter be listed for further hearing at 2.00 p.m. on 21st of April 2017.

Balakram vs. State of Uttarakhand and others

2017(5) SCALE 220

Bench: Mohan M. Shantanagoudar, Dipak Misra, A.M. Khanwilkar, JJ.

The Judgment was delivered by: Mohan M. Shantanagoudar, J.

2. The judgment in Miscellaneous application No. 1123 of 2016, passed by the High Court of Uttarakhand at Nainital setting aside the order dated 31.8.2016 in I.A. No. 174 Kha in S.T. No. 1 of 2015 is called on question in this appeal.

3. Respondent No.3 herein, along with another accused, is facing trial in ST No. 01 of 2015 before the Sessions Court, Champawat for the offences punishable under Section 302 and 201 of IPC. During the course of the trial, after the completion of examination in chief of PW-15, an application was filed by the respondent No.3 herein (one of the accused), the contents of which read thus:-

"In the above mentioned case applicant wants to submit some key and relevant documents which are necessary for the fair and just trial of instant case.

It is therefore, humbly prayed that your Honour may kindly grant permission for the same in the interest of justice."

4. Along with the application, list of documents to be produced was also filed. The documents are stated to be copies of certain pages of Police diary maintained under Section 172 of the Code of Criminal Procedure, 1973 (for brevity, Cr.P.C), by the Investigation Officer (PW-15), which were obtained by respondent No.3 by making an application under the provisions of Right to Information Act, 2005. The respondent No. 3 proposes to confront PW 15 with those documents.

5. Such application was opposed by the appellant herein/complainant on the ground that the fresh documents cannot be allowed to be produced by the accused at the premature stage of trial and it is always open for the accused to produce such documents during the stage of recording of statements of the accused under Section 313, Cr.P.C It was further contended by the appellant that it is open for the accused to lead evidence on their behalf after recording of the statements of the accused under Section 313, Cr.P.C

6. The application came to be rejected by the Sessions Court on 31.8.2016. Being aggrieved by the same, respondent No.3 herein filed Misc. Application No. 1123 of 2016 before the High Court of Uttarakhand at Nainital under Section 482 Cr.P.C By the impugned order the High Court allowed the said miscellaneous application.

7. Learned counsel for the appellant taking us through the order of the Courts below, argued that entries made in the police diary referred to in Section 172 of the Cr.P.C cannot be used for the purpose of Section 145 of the Indian Evidence Act, 1872 unless the conditions laid down under Section 172(2) and (3) of Cr.P.C are satisfied; that the High Court is not justified in allowing the accused/respondent herein to produce certain pages of police diary obtained by the respondent under the provisions of Right to Information Act. He argued in support of the order of the Trial Court.

8. Per contra, advocate for the respondent argued in support of the order of the High Court contending that the documents sought to be produced were for confronting PW 15-Investigation Officer who is the author of those documents; the defence will lose an opportunity to confront the investigation officer, in case the respondent is not allowed to produce the documents in question. According to him, it is always open to the accused to produce the documents to be relied upon by him at the time of recording his statement under Section 313 of the Cr.P.C but the accused would not get chance to confront the Investigation Officer with such documents.

Section 145 of the Indian Evidence Act, 1872

145. Cross-examination as to previous statements in writing.-A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

10. The afore-mentioned provisions are to be read conjointly and homogenously. It is evident from sub-section (2) of Section 172 Cr.P.C, that the Trial Court has unfettered power to call for and examine the entries in the police diaries maintained by the Investigating Officer. This is a very important safeguard. The legislature has reposed complete trust in the Court which is conducting the inquiry or the trial. If there is any inconsistency or contradiction arising in the evidence, the Court can use the entries made in the diaries for the purposes of contradicting the police officer as provided in sub-section (3) of Section 172 of Cr.P.C

It cannot be denied that Court trying the case is the best guardian of interest of justice. Under sub-section (2) the criminal court may send for diaries and may use them not as evidence, but to aid it in an inquiry or trial. The information which the Court may get from the entries in such diaries usually will be utilized as foundation for questions to be put to the police witness and the court may, if necessary in its discretion use the entries to contradict the police officer, who made them. But the entries in the police diary are neither substantive nor corroborative evidence, and that they cannot be used against any other witness than against the police officer that too for the limited extent indicated above.

11. Coming to the use of police diary by the accused, sub-section (3) of Section 172 clearly lays down that neither the accused nor his agents shall be entitled to call for such diaries nor he or they may be entitled to see them merely because they are referred to by the Court. But, in case the police officer uses the entries in the diaries to refresh his memory or if the Court uses them for the purpose of contradicting such police officer, then the provisions of Sections 145 and 161, as the case may be, of the Evidence Act would apply. Section 145 of the Evidence Act provides for cross examination of a witness as to the previous statements made by him in writing or reduced into writing and if it was intended to contradict him in writing, his attention must be called to those portions which are to be used for the purpose of contradiction. Section 161 deals with the adverse party's right as to the writing used to refresh memory. It can, therefore, be seen that, the right of the accused to cross-examine the police officer with reference to the entries in the police diary is very much limited in extent and even that limited scope arises only when the Court uses the entries to contradict the police officer or when the police officer uses it for refreshing his memory.

12. In other words, in case if the Court does not use such entries for the purpose of contradicting the police officer or if the police officer does not use the same for refreshing his memory, then the question of accused getting any right to use entries even to that limited extent does not arise. The accused persons cannot force the police officer to refresh his memory during his examination in the Court by referring to the entries in the police diary.

13. ***Section 145 of the Indian Evidence Act consists of two limbs. It is provided in the first limb of Section 145 that a witness may be cross-examined as to the previous statements made by him without such writing being shown to him. But the Second limb provides that, if it is intended to contradict him by the writing, his attention must before writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. Sections 155 (3) and 145 of Indian Evidence Act deal with the different aspects of the same matter and should, therefore, be read together***.

14. Be that as it may, as mentioned supra, right of the accused to cross examine the police officer with reference to the entries in the police diary is very much limited in extent and even that limited scope arises only when the Court uses such entries to contradict the police officer or when the police officer uses it for refreshing his memory and that again is subject to provisions of Sections 145 and 161 of the Indian Evidence Act.

Thus, a witness may be cross-examined as to his previous statements made by him as contemplated under Section 145 of the Evidence Act if such previous statements are brought on record, in accordance with law, before the Court and if the contingencies as contemplated under Section 172(3) of Cr.P.C are fulfilled. Section 145 of the Indian Evidence Act does not either extend or control the provisions of Section 172 of Cr.P.C We may hasten to add here itself that there is no scope in Section 172 of the Cr.P.C to enable the Court, the prosecution or the accused to use the police diary for the purpose of contradicting any witness other than the police officer, who made it.

15. In case of Malkiat Singh and others vs. State of Punjab 1991(4) SCC 341 1991 Indlaw SC 1040, this Court while considering the scope of Section 172(3) Cr.P.C with reference to Section 145 of the Indian Evidence Act observed thus:-

"It is manifest from its bare reading without subjecting to detailed and critical analysis that the case diary is only a record of day to day investigation of the investigating officer to ascertain the statement of circumstances ascertained through the investigation. Under sub-section (2) the court is entitled at the trial or enquiry to use the diary not as evidence in the case, but as aid to it in the inquiry or trial. Neither the accused, nor his agent, by operation of sub-section (3), shall be entitled to call for the diary, nor shall he be entitled to use it as evidence

merely because the court referred to it. Only right given thereunder is that if the police officer who made the entries in the diary uses it to refresh his memory or if the court uses it for the purpose of contradicting such witness, by operation of Section 161 of the Code and Section 145 of the Evidence Act*, it shall be used for the purpose of contradicting the witness, i.e. Investigation Officer or to explain it in re-examination by the prosecution, with permission of the court. It is, therefore, clear that unless the investigating officer or the court uses it either to refresh the memory or contradicting the investigating officer as previous statement under Section 161 that too after drawing his attention thereto as is enjoined under Section 145 of the* Evidence Act*, the entries cannot be used by the accused as evidence."*

16. The police diary is only a record of day to day investigation made by the investigating officer. Neither the accused nor his agent is entitled to call for such case diary and also are not entitled to see them during the course of inquiry or trial. The unfettered power conferred by the Statute under Section 172 (2) of Cr.P.C on the court to examine the entries of the police diary would not allow the accused to claim similar unfettered right to inspect the case diary.

18. From the afore-mentioned, it is clear that the denial of right to the accused to inspect the case diary cannot be characterized as unreasonable or arbitrary. The confidentiality is always kept in the matter of investigation and it is not desirable to make available the police diary to the accused on his demand.

19. Since we are not called upon to decide the question as to whether the copy of the case diary or a portion thereof can be provided to the accused under the provisions of the Right to Information Act, we are not deciding the said question in the matter on hand.

20. Since in the matter on hand, neither the police officer has refreshed his memory with reference to entries in the police diary nor has the trial court used the entries in the diary for the purposes of contradicting the police officer (PW-15), it is not open for the accused to produce certain pages of police diary obtained by him under the provisions of Right to Information Act for the purpose of contradicting the police officer.

21. In view of the above, the High Court is not justified in permitting the accused to produce certain pages of police diary at the time of cross examination of PW-15/Investigating Officer. Accordingly, the impugned Order is liable to be set aside and the same stands set aside. The appeal is allowed.

Naresh Kumar alias Nitu vs. State of Himachal Pradesh

2017 Indlaw SC 508

Bench: Navin Sinha, L. Nageswara Rao, JJ.
The Judgment was delivered by: Navin Sinha, J.

1. The acquittal of the appellant by the Special Judge, Shimla in Sessions Trial No.7-S/7/2012, from the charge under Sections 20 and 61 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the Act') has been reversed by the High Court. The appellant has been sentenced to fifteen years imprisonment and fine of Rs.2, 00,000/-. Thus the present appeal.

2. The appellant is stated to have been apprehended at Majhotli, by the police party, on suspicion. Two kilograms of Charas is stated to have been recovered from a bag in his possession in presence of PW-2, Sita Ram an independent witness. DW-1 Shayam Singh, the depot in-charge at Nerwa, and DW-2 Khem Raj, the conductor of the bus in question were examined as defence witnesses.

3. After consideration of the entirety of the evidence, particularly that of PW-2 and DW-2, and also noticing that PW-1, Constable Rakesh Kumar, an eye-witness to the incident, had not been mentioned as a witness in the seizure memo Exhibit PW-1/B, the Special Judge opined that two theories had emerged with regard to the accusations against the appellant. The appellant was acquitted, giving him the benefit of doubt.

4. The High Court reversed the acquittal, holding that PW-2 had admitted his signatures on Exhibit PW-1/B, the bag along with the narcotic, Ex.PW-2/A seal impression, Ex.PW-2/D the arrest memo and the Ex.PW-2/E personal search memo. No complaint had been lodged by the witness that he had been compelled by the police to sign the documents under pressure. The statements of the official witnesses, PW-1 Rakesh Kumar and PW-6 Head Constable Parmanand, were trustworthy, inspiring confidence, and could not be rejected only on the ground that they were police personnel. Any discrepancy with regard to distance and travelling time between Nerwa and Majhotli could be attributed to memory loss with passage of time, and was not required to be with mathematical precision. The time with regard to purchase of bus ticket had not been established.

7. The public bus, on which the appellant was traveling, was going from Nerwa to Chamunda. The ticket issued to the appellant Exhibit DX, proved by the bus Conductor DW-2, bears the time of issuance 6.51 A.M., visible to the naked eye. The distance from Nerwa to Majhotli, is 26 kms. as deposed by DW-1. We find substance in the submission on behalf of the appellant, that the travelling time for the bus, in the hills, for this distance would be one hour or more. Prima facie, the prosecution story that the appellant was apprehended at Majhotli at 6.15 A.M. becomes seriously doubtful if not impossible. The bus would have reached Majhotli at about 8.00 A.M. or thereafter only. The conclusion of the High Court that passage of time, and memory loss, were sufficient explanation for the time difference, is held to be perverse, and without proper consideration of Exhibit DX. PW-2, the independent witness has stated that he was stopped at Majhotli by the police at 10.30 A.M. and was allowed to leave after verification of his motor cycle papers.

The witness has specifically denied that the appellant was apprehended in his presence and that any search, seizure and recovery was conducted in his presence. He had deposed that he was called to the police station at 1:00 P.M. and asked to sign the papers. The witness was declared hostile. This aspect has not been considered by the High Court, which proceeded on the only assumption that the signatures were admitted.

8. In a case of sudden recovery, independent witness may not be available. But if an independent witness is available, and the prosecution initially seeks to rely upon him, it cannot suddenly discard the witness because it finds him inconvenient, and place reliance upon police witnesses only. In the stringent nature of the provisions of the Act, the reverse burden of proof, the presumption of culpability under Section 35, and the presumption against the accused under Section 54, any reliance upon Section 114 of the Evidence Act in the facts of the present case, can only be at the risk of a fair trial to the accused. Karamjit Singh vs. State (Delhi Administration), AIR 2003 SC 1311 2003 Indlaw SC 285, is distinguishable on its facts as independent witness had refused to sign because of the fear of terrorists. Likewise S. Jeevananthanan vs. State, 2004(5) SCC 230 2004 Indlaw SC 1115, also does not appear to be a case where independent witnesses were available.

9. The presumption against the accused of culpability under Section 35, and under Section 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt. The presumptive provision with reverse burden of proof, does not sanction conviction on basis of preponderance of probability. Section 35 (2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability.

10. In the facts of the present case, and the nature of evidence as discussed, the prosecution had failed to establish the foundational facts beyond all reasonable doubt. The special judge committed no error in acquitting the appellant. The High Court ought not to have interfered with the same. The submissions regarding non-compliance with Section 50 of the Act, or that the complainant could not be the investigating officer are not considered necessary to deal with in the facts of the case.

11. In Basappa 2014 Indlaw SC 130 (supra), it was observed that the High Court before setting aside an order of acquittal was required to record a finding that the conclusions of the Trial Court were so perverse and wholly unreasonable, so as not to be a plausible view by misreading and incorrect appreciation of evidence. The conclusions of the High Court in the facts of the present case are more speculative, based on conjectures and surmises, contrary to the weight of the evidence on record.

12. The order of the High Court is set aside. The acquittal of the appellant ordered by the Special Judge is restored. The appellant is set at liberty forthwith, unless wanted in any other case. The appeal is allowed.

Amrutbhai Shambhubhai Patel vs. Sumanbhai Kantibhai Patel and others

AIR 2017 SC 774, 2017(2) SCALE 198

Bench: Amitava Roy, Dipak Misra

The Judgment was delivered by: Amitava Roy, J.

1. The assail is of the verdict dated 10.04.2015 rendered by the High Court, setting at naught the order dated 27.5.2014 passed by the Chief Judicial Magistrate, Gandhinagar, whereby the Trial Court had allowed the application filed by the appellant, the original informant, under Section 173(8) of the Code of Criminal Procedure, 1973 ("the Code/1973 Code") for further investigation by the police.

3. The appellant had lodged a First Information Report ("FIR") against the respondents under Sections 406, 420, 426, 467, 468, 471, 477B and 120B of the Indian Penal Code ("IPC"). The was a dispute between the parties relating to agricultural land and that the appellant/informant had alleged forgery of the signatures and thumb impression of his as well as of his family members in the register maintained by the Notary (Public). After the charge-sheet was submitted, charge was framed against the respondents and they stood the trial accordingly, as they denied the imputations. As would be gleanable from the records, the oral evidence of the appellant/first informant was concluded on 03.07.2012 followed by that of the investigating officer of the case on 10.09.2013. Subsequent thereto, the statements of the respondents were recorded under Section 313 Cr.PC on 03.12.2013, whereafter an application was filed at the culminating stages of the trial by the appellant/informant seeking a direction under Section 173(8) from the Trial Court for further investigation by the police and in particular to call for a report from the Forensic Science Laboratory as regards one particular page of the register of the Notary (Public), which according to the appellant/informant was of debatable authenticity, as it appeared to have been affixed/pasted with another page thereof. To be precise, this application was filed at a stage when the case was fixed for final arguments.

4. The Trial Court, however, by the order impeached before the High Court granted the prayer made and issued a direction to the police for further investigation. Significantly, prior thereto in Special Leave Petition being SLP (Crl.) No.9106 of 2010, this Court had directed expeditious disposal of the trial. It is also worthwhile to record that the application filed by the appellant/informant under Section 173(8) of Cr.PC had been opposed by the respondents herein, who being dissatisfied with the order of the Trial Court, thus impugned the same before the High Court.

5. The High Court, as the impugned decision would disclose exhaustively examined the purport of Section 173(8) in the particular context of the scope of further investigation by the police after it had submitted a charge sheet and the Trial Court had taken cognizance on the basis thereof and had proceeded with the trial, following the appearance of the accused persons. It, amongst others took note of the 41st Report of the Law Commission of India which after reflecting on the view of the Courts that once a final report under Section 173 had been submitted by the police, the latter could not touch the case again and reopen the investigation, recommended that it ought to be made clear that under the said provision of the Code, it was still permissible for the police to examine any evidence even after the submission of the charge-sheet and to submit a report to the Magistrate. Thus, the Law Commission's emphasis was to obviate any hindrance in the way of the investigating agency, which in certain fact situations could be unfair to the prosecution as well as to the accused.

6. The High Court having regard to this recommendation and the incorporation of Section 173(8) as a sequitur thereof held that it was permissible for the investigating officer or the officer-in-charge of the police station to undertake a further investigation even after the filing of the charge sheet, but neither the informant nor the accused could claim as a matter of right, any direction from the Court directing such further investigation under the said provision after a charge-sheet was filed. The High Court deduced on the basis of an in-depth survey of the state of law, on the import and ambit of Section 173(8) Cr.P.C that in absence of any application or prayer made by the investigating authority for further investigation in the case, the Trial Court had erred in allowing the application filed by the appellant/informant for the same.

11. Without prejudice to this finding, the High Court was further of the view that having regard to the sequence of events and the delay on the part of the informant to make such a prayer at the closing stages of the trial, it was not entertainable. In arriving at this determination, the High Court, amongst others marked that the evidence of the appellant/informant had been recorded in the year 2012 when he did have sufficient opportunity to scrutinise the document in question but for inexplicable reasons did wait for more than two years to register the prayer for further investigation. It was of the view that the attendant factual setting did not demonstrate any defective investigation which demanded curation through a further drill and that in any view of the matter, additional report from the Forensic Science Laboratory had not been called for. This is more so, as in the view of the High Court, the entire register of the Notary (Public) had been seized by the investigating officer and that any unusual or suspicious feature therein would have been certainly examined by the FSL and findings in connection therewith recorded. The High Court thus interfered with the order of the Magistrate permitting further investigation by the police in the case and ordered for expeditious disposal of the trial.

13. Having regard to the contentious assertions, expedient it would be to retrace the law propounded by this Court on the import and impact of Section 173 Cr.PC, with particular reference to sub-Section (8) thereof.

14. It would be appropriate at this juncture to set out as well the Section 173 of the Code of Criminal Procedure 1898.

"Section 173. Report of police-officer.-

(1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in charge of the police-station shall-

(a) forward to a Magistrate empowered to take cognizance of the offence on a police-report a report, in the form prescribed by the State Government, 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 the case, and stating whether the accused (if arrested) has been forwarded in custody, or has been released on his bond, and, if so, whether with or without sureties, and,

(b) communicate, in such manner as may be prescribed by the State Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.

(2) Where a superior officer of police has been appointed under section 158, the report shall, in any cases in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police-station to make further investigation.

(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(4) After forwarding a report under this section, the officer in charge of the police-station shall, before the commencement of the inquiry or trial, furnish or cause to be furnished to the accused, free of cost, a copy of the report forwarded under sub-section (1) and of the first information report recorded under section 154 and of all other documents or relevant extracts thereof, on which the prosecution proposes to rely, including the statements and confessions, if any recorded under section 164 and the statements recorded under sub-section (3) of section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(5) Notwithstanding anything contained in sub-section (4), if the police-officer is of opinion that any part of any statement recorded under sub-section (3) of section 161 is not relevant to the subject-matter of the inquiry or trial of that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, he shall exclude such part from the copy of the statement furnished to the accused and in such a cause, he shall make a report to the Magistrate stating his reasons for excluding such part.

Provided that at the commencement of the inquiry or trial, the Magistrate, shall after perusing the part so excluded and considering the report of the police-officer, pass such orders as he thinks fit and if he so directs, a copy of the part so excluded or such portion thereof, as he thinks proper, shall be furnished to the accused."

15. A plain comparison of these two provisions would amply demonstrate that though these relate to the report of a police officer on completion of investigation and the steps to ensue pursuant thereto, outlining as well the duties of the officer in-charge of the concerned police station, amongst others to communicate, the action taken by him to the person, if any, by whom the information relating to the commission of offence was first given, it is explicit that the recast provision of the 1973 Code did incorporate sub-clause 8 as a significant addition to the earlier provision.

16. The Forty-first Report of the Law Commission of India ("the Commission") on the Code of Criminal Procedure, 1898 dealt with the aspect of reopening of investigation in the context of the existing Section 173 of the Code 1898 and recommended in the following terms:

"14.23: A report under section 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting the report under section 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the magistrate concerned. It appears, however, that courts have sometimes taken the narrow view that once a final report under section 173 has been sent, the police cannot touch the case again and cannot re-open the investigation. This view places a hindrance in the way of the investigating agency, which can be very unfair to the prosecution and, for that matter, even to the accused. It should be made clear in section 173 that the competent police officer can examine such evidence and send a report to the magistrate. Copies concerning the fresh material must of course be furnished to the accused."

17. The Commission in the above perspective proposed a revision of Section 173 of Code 1898 in the following terms:

"14.24: We propose that section 173 should be revised as follows:-

I73. (1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a po1ice-report a report, in the form prescribed by the State Government, stating- (a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed, and if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond under section 169, and, if so, whether with or without sureties,-

(g) whether he has been forwarded in custody under section 170.

The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any cases in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct that officer in charge of the police-station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which section 170 applies, the police-officer shall forward to the Magistrate along with the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation; and,

(b) the statements recorded under.....section 161 of all persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate. Where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (5) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report under sub-section (2)."

18. The Bill to consolidate and amend the law relating to criminal procedure followed and was circulated in the Gazette of India, Extraordinary, Part II, published on December 10, 1970 proposing, the Code of Criminal Procedure. The Statement of Objects and Reasons clearly disclosed that the recommendations of the Commission to overhaul the Code 1898 as made were accepted and vis-a-vis Section 173, which corresponded to Section 176 in the aforementioned report, the amendment proposed was to facilitate collection of evidence by the police after filing the charge-sheet and production thereof before the Court, subject to the accused being given usual facilities for copies. The remodelled Section 173 was identical in form and substance to the one, as proposed by the Commission in chime with its recommendation as contained in the Report. Sub-clause (7) of the new Section 173, as proposed by the Commission and integrated in the Bill, however eventually appeared as sub-clause (8) to the Section under Code 1973.

19. The newly added sub-section (8), as its text evinces, permits further investigation by the concerned officer in-charge of the police station in respect of an offence after a report under sub-section 2 had been forwarded to the Magistrate and also to lay before the Magistrate a further report, in the form prescribed, whereafter such investigation, he obtains further evidence, oral or documentary. It is further ordained that on submission of such

further report, the essentialities engrafted in sub-sections 2 to 6 would apply also in relation to all such report or reports.

20. The integration of sub-section 8 is axiomatically subsequent to the 41st Report of the Law Commission Report of India conveying its recommendation that after the submission of a final report under Section 173, a competent police officer, in the event of availability of evidence bearing on the guilt or innocence of the accused ought to be permitted to examine the same and submit a further report to the Magistrate concerned. This assumes significance, having regard to the language consciously applied to design Section 173(8) in the 1973 Code. Noticeably, though the officer in-charge of a police station, in categorical terms, has been empowered thereby to conduct further investigation and to lay a supplementary report assimilating the evidence, oral or documentary, obtained in course of the said pursuit, no such authorization has been extended to the Magistrate as the Court is seisin of the proceedings. **It is, however no longer res integra that a Magistrate, if exigent to do so, to espouse the cause of justice, can trigger further investigation even after a final report is submitted under Section 173(8). Whether such a power is available suo motu or on the prayer made by the informant, in absence of request by the investigating agency after cognizance has been taken and the trial is in progress after the accused has appeared in response to the process issued is the issue seeking scrutiny herein.**

22. In Bhagwant Singh v. Commissioner of Police & Anr., (1985) 2 SCC 537, a three Judge Bench of this Court was seized with the poser as to whether in a case where the First Information Report is lodged and after completion of the investigation initiated on the basis thereof, the police submits a report that no offence has been committed, the Magistrate if is inclined to accept the same, can drop the proceeding without issuing notice to the first informant or to the injured or in case where the incident has resulted in death, to the relatives of the deceased. This Court in its adjudicative pursuit, embarked upon a scrutiny of the provisions of Chapter XII of the Cr.P.C, dealt with Sections 154, 156, 157 thereof before eluding to Section 173 of the Code. It noticed that under sub-Section (1) of Section 154, every information relating to the commission of a cognizable offence, if given orally to an officer in-charge of a police station has to be reduced into writing by him or under his direction and is to be read over to the informant and every such information whether given in writing or reduced to writing, shall be signed by the person giving it and that a copy thereof shall be given forthwith to the informant, free of cost.

It noticed that under Section 156(1), the officer in-charge of a police station is vested with the power to investigate any cognizable case without the order of the Magistrate and that sub-Section (3) authorized the Magistrate empowered under Section 190 Cr.P.C to order an investigation, as mentioned in sub-Section (1). The prescription under Section 157(1) requiring the officer in-charge of a police station to forthwith send a report of the information to a Magistrate empowered to take cognizance of such offence upon a police report, in case he has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, was taken note of. The mandate of Section 157(2) for the police officer to notify the informant, in case he was of the view that no sufficient ground for entering on an investigation had been made out, was also referred to.

23. It noted as well that under Section 173(2)(i), the officer in-charge, as soon as the investigation is completed, is required to forward to the Magistrate empowered, a report in the prescribed form so as to enable the Court to take cognizance of the offence based thereon. This Court also adverted to Section 190 enumerating the modes of taking cognizance of an offence by a Magistrate, as specified therein, either upon receiving a complaint of facts which constituted such offence or upon a police report of such facts or upon information received from any person other than a police officer or upon his own knowledge that such offence had been committed.

24. In the conspectus of the provisions of Cr.P.C traversed, this Court held the view that an informant who lodges the first information report does not fade away therewith and is very much concerned with the action initiated by the officer in-charge of the police station pursuant thereto, so much so, that not only a copy of the said report is to be supplied to him free of cost and in case, no investigation is intended, he has to be notified of such decision. The reason, in the contemplation of this Court, for the officer in-charge of a police station to communicate the action taken by him to the informant and a report to the Magistrate under Section 173(2) Cr.P.C was that the informant, who sets the machinery of investigation into motion, was required to know what was the result of the exercise initiated on the basis thereof, as he would be vitally interested therein and hence, the obligations cast by law on the officer in-charge.

25. This Court assayed the courses open to the Magistrate on receipt of a report by the police on the completion of the investigation. It was enunciated that if the report submitted by the police divulged that no offence had been committed, there again, the Magistrate would be left at liberty to adopt one of the three courses, namely; he could accept the report and drop the proceeding, or he could disagree with the report and taking the view that there was sufficient ground for proceeding further, take cognizance of the offence and issue process or he could direct further investigation to be made by the police under sub-Section (3) of Section 156. Noticeably,

these three courses referred to hereinabove are at the pre-cognizance stage and can be opted for by the Magistrate depending on his satisfaction on an assessment of the materials then on record.

26. Be that as it may, this Court held that whereas neither the informant nor the injured nor the relative of the deceased in case of death, would be prejudicially affected in case the Magistrate decides to take cognizance of the offence and to issue a process, they would certainly be prejudiced in case, the Court holds the view that there is no sufficient ground for proceeding further and is inclined to drop the proceeding. Having regard to the scheme of Sections 154, 157 and 173 in particular of the Cr.P.C and the pattern of consequences to follow in the two contingencies referred to herein above, this Court propounded that in case the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. Qua the requirement of issuance of such notice to the injured person or to a relative of the deceased, in case of death, who is/are not the informant(s) who had lodged the first information report, it was elucidated that it would be open for the Magistrate in the exercise of his discretion, if he thinks fit, to give such notice. However, the locus standi of the injured person or any relative of the deceased, though not entitled to notice on the Magistrate to apply for the Court at the time of consideration of the report, if he/they otherwise come to know of such stage of the proceeding, was recognized, so much so that in case he/they would want to advance any submission with regard to the report, the Magistrate would be bound to hear him/them as the case may be.

27. This verdict in re the issue presently involved is significant, so far as it outlines the different modes of taking cognizance of an offence by a Magistrate and also the procedures and powers available to him on the submission of a police report following the completion of investigation. This decision is pellucid in its statement that the Magistrate, on receipt of the report, at that stage before taking cognizance of the offence alleged, may direct further investigation under sub-Section (3) of Section 156 Cr.P.C and require the police to make further report and that such power can be exercised suo motu, contingent on its satisfaction of the necessity thereof to espouse the cause of justice.

28. The question that fell for appraisal in Randhir Singh Rana 1996 Indlaw SC 1566 (supra) was as to whether a judicial Magistrate, after taking cognizance of an offence, on the basis of a police report and after appearance of the accused in pursuance of the process issued, can order of its own, further investigation in the case. The significantly additional feature of this query is the stage of the proceedings for directing further investigation in the case i.e. after the appearance of the accused in pursuance of the process already issued. This Court reiterated that such power was available to the police, after submission of the charge-sheet as was evident from Section 173(8) in Chapter XII of the Code, 1973. That it was not in dispute as well that before taking cognizance of the offence under Section 190 of Chapter XIV, the Magistrate could himself order investigation as contemplated by Section 156(3) of the Code was noted as well. This Court also noticed the power under Section 311 under Chapter XXIV to summon any person as a witness at any stage of an inquiry/trial or other proceedings, if the same appeared to be essential to the just decision of the case.

29. It recalled its earlier rendering in Tula Ram and others v. Kishore Singh, (1977) 4 SCC 459 1977 Indlaw SC 397 to the effect that the Magistrate could order investigation under Section 156(3) only at the pre-cognizance stage under Sections 190, 200 and 204 Cr.P.C and that after he decides to take cognizance under the provisions of Chapter XIV, he would not be entitled in law to order any investigation under Section 156(3), and further though in cases not falling within the proviso to Section 202, he could order such investigation by the police, the same would be in the nature of an inquiry only as contemplated by Section 202.

30. This Court also recounted its observations in Ram Lal Narang 1979 Indlaw SC 298 (supra) to the effect that on the Magistrate taking cognizance upon a police report, the right of the police to further investigate even under the 1898 Code was not exhausted and it could exercise such right often as necessary, when fresh information would come to light. That this proposition was integrated in explicit terms in sub-Section (8) of Section 173 of the new Code, was noticed. The desirability of the police to ordinarily inform the Court and seek its formal permission to make further investigation, when fresh facts come to light, was stressed upon to maintain the independence of the judiciary, the interest of the purity of administration of criminal justice and the interest of the comity of the various agencies and institutions entrusted with different stages of such dispensation.

31. The pronouncement of this Court in Devarapalli Lakshminarayana Reddy and others v. V. Narayana Reddy and others, (1976) 3 SCC 252 emphasizing on the distinction in the power to order police investigation under Section 156(3) and under Section 202(1) of the Cr.P.C, was referred to. It was ruled that the two powers operate in separate distinct spheres at different stages, the former being exercisable at the pre-cognizance stage and the latter at the post-cognizance stage when the Magistrate is in seisin of the case. It was underlined that in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) could be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a), but once such

cognizance is taken and he embarks upon the procedure embodied in Chapter XV, he would not be competent to revert to the pre-cognizance stage and avail Section 156(3). On the other hand, it was observed that Section 202 would be invocable at a stage when some evidence has been collected by the Magistrate in the proceedings under Chapter XV, but is deemed to be insufficient to take a decision as to the next step and in such an event, the Magistrate would be empowered under Section 202 to direct, within the limits circumscribed by that provision, an investigation for the purpose of deciding whether or not, there is sufficient ground for proceeding. It was thus exposited that the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing the proceedings already instituted upon a complaint before him. It was thus concluded on an appraisal of the curial postulations above referred to, that the Magistrate of his own, cannot order further investigation after the accused had entered appearance pursuant to a process issued to him subsequent to the taking of the cognizance by him.

32. The scope of the judicial audit in Reeta Nag (supra), to reiterate, was whether, after the charge-sheet had been filed by the investigating agency under Section 173(2) Cr.P.C, and charge had been framed against some of the accused persons on the basis thereof, and other co-accused had been discharged, the Magistrate could direct the investigating agency to conduct a re-investigation or further investigation under sub-Section (8) of Section 173. The recorded facts revealed that the Magistrate had in the contextual facts directed for re-investigation and to submit a report, though prior thereto, he had taken cognizance of the offences involved against six of the original sixteen accused persons, discharging the rest. The informant had thereafter filed an application for re-investigation of the case and the prayer was acceded to. This Court referred to its earlier decisions in Sankatha Singh and others v. State of Uttar Pradesh, AIR 1962 SC 1208 1962 Indlaw SC 132 and Master Construction Company (P) Ltd. v. State of Orissa and another, AIR 1966 SC 1047 1965 Indlaw SC 81 to the effect that after the Magistrate had passed a final order framing charge against some of the accused persons, it was no longer within his competence or jurisdiction to direct a re-investigation into the case. The decision in Randhir Singh Rana 1996 Indlaw SC 1566 (supra), which propounded as well that after taking cognizance of an offence on the basis of a police report and after the appearance of the accused, a Magistrate cannot of its own order further investigation, though such an order could be passed on the application of the investigating authority, was recorded. It was reiterated with reference to the earlier determination of this Court in Dinesh Dalmia v. CBI, (2007) 8 SCC 770 2007 Indlaw SC 935 that the power of the investigating officer to make a prayer for conducting further investigation in terms of Section 173(8) of the Code was not taken away only because a charge-sheet had been filed under Section 173(2) and a further investigation was permissible even if cognizance had been taken by the Magistrate. This Court, therefore summed up by enouncing that once a charge-sheet was filed under Section 173(2) Cr.P.C and either charges have been framed or the accused have been discharged, the Magistrate may on the basis of a protest petition, take cognizance of the offence complained of or on the application made by the investigating authority, permit further investigation under Section 173(8), but he cannot suo motu direct a further investigation or order a re-investigation into a case on account of the bar of Section 167(2) of the Code. It was thus held that as the investigating authority did not apply for further investigation and an application to that effect had been filed by the defacto complainant under Section 173(8), the order acceding to the said prayer was beyond the jurisdictional competence of the Magistrate. It was, however observed, that a Magistrate could, if deemed necessary, take recourse to the provisions of Section 319 Cr.P.C at the stage of trial.

33. This decision reinforces the view that after cognizance is taken by the Magistrate on the basis of a report submitted by the police on the completion of the investigation, no direction for further investigation can be made by the Magistrate suo motu and it would be permissible only if such a request is made by the investigating authority on the detection of fresh facts having bearing on the case and necessitating further exploration thereof in the interest of complete and fair trial.

34. The query in Vinay Tyagi v. Irshad Ali @ Deepak & Ors., (2013) 5 SCC 762 was whether in exercise of powers under Section 173 Cr.P.C, the Trial Court has the jurisdiction to ignore any of the police reports, where there was more than one, whether by the same or different investigating agencies submitted in furtherance of the orders of a Court. The respondents therein were sought to be prosecuted by filing a First Information Report under Sections 120B, 121 and 122 of the IPC read with Section 25 of the Arms Act and Sections 4 and 5 of Explosives Substance Act, 1908. The FIR was filed by the Special Cell of Delhi Police, which the respondents alleged had been lodged to falsely implicate them. Being aggrieved, the respondents challenged this action before the High Court and inter alia prayed that the investigation in the case be transferred to the CBI. As the High Court did not, though it had issued notice in the writ petition, stay the investigation, eventually the Special Cell of Delhi Police did file a charge-sheet before the Trial Court. The High Court finally, while disposing of the writ petition and being satisfied, directed the CBI to undertake an inquiry into the matter and submit a report. Subsequent thereto the CBI filed its report indicating in substance that the recoveries, amongst others made from the respondents in course of the inquisition made by the Special Cell of Delhi Police did not inspire confidence and that further investigation was needed.

35. The CBI, after detailed investigation, submitted a closure report, whereafter one of the respondents filed an application before the Trial Court seeking discharge. This prayer was declined by the Trial Court as pre-matured, observing that no definite conclusion could be drawn at that stage to ascertain the truthfulness of the version of the two different agencies. The High Court, being approached under Section 482 of the Cr.P.C by one of the respondents, seeking to quash the First Information Report, it disposed of the same by holding that once the report had been filed by the CBI, it ought to be construed as a investigating agency, and thus its closure report should be considered by the Trial Court and thus remanded the case by observing that in undertaking the exercise, as directed, the Trial Court should not be influenced by the report of the Special Cell of Delhi Police. This order formed the subject matter of challenge before this Court.

36. After referring to Section 156(3) in particular and Section 190 Cr.P.C, this Court reverted to Section 173 and ruled that a very wide power was vested in the investigating agency to conduct further investigation after it had filed its report in terms of sub-Section (2) thereof. It held on an elucidation of the contents of Section 173(8) that the investigating agency was thus competent to file a report supplementary to its primary report and that the former was to be treated by the Court in continuation of the latter, and that on an examination thereof and following the application of mind, it ought to proceed to hear the case in the manner prescribed. It was elaborated that after taking cognizance of the offence, the next step was to frame charge in terms of Section 228 of the Code unless the Court found, upon consideration of the record of the case and the documents submitted therewith, that there did exist no sufficient ground to proceed against the accused, in which case it would discharge him on reasons to be recorded in terms of Section 227 of the Code. Alluding to the text of Section 228 of the Code which is to the effect that if a Judge is of the opinion that there is ground for presuming that the accused had committed an offence, he could frame a charge and try him, this Court propounded that the word "presuming" did imply that the opinion was to be formed on the basis of the records of the case and the documents submitted therewith along with the plea of the defence to a limited extent, if offered at that stage. The view of this Court in Amit Kapoor v. Ramesh Chander and another, (2012) 9 SCC 460 2012 Indlaw SC 309 underlining the obligation of the Court to consider the record of the case and the documents submitted therewith to form an opinion as to whether there did exist or not any sufficient ground to proceed against an accused was underlined. This aspect was dilated upon logically to respond to the query in the contextual facts as to whether both the reports submitted by the Special Cell of the Delhi Police and the CBI were required to be taken note of by the Trial Court.

37. Additionally, this Court also dwelt upon the three facets of investigation in succession i.e. (i) initial investigation (ii) further investigation and (iii) fresh or de novo or reinvestigation. Whereas initial investigation was alluded to be one conducted in furtherance of registration of an FIR leading to a final report under Section 173(2) of the Code, further investigation was a phenomenon where the investigating officer would obtain further oral or documentary evidence after the final report had already been submitted, so much so that the report on the basis of the subsequent disclosures/discoveries by way of such evidence would be in consolidation and in continuation of the previous investigation and the report yielded thereby. "Fresh investigation" "reinvestigation" "de novo investigation", however is an exercise, which it was held, could neither be undertaken by the investigating agency suo motu nor could be ordered by the Magistrate and that it was essentially within the domain of the higher judiciary to direct the same and that too under limited compelling circumstances warranting such probe to ensure a just and fair investigation and trial. Adverting to Section 173 of the Code again, this Court recalled its observations in State of Punjab v. CBI and others, (2011) 9 SCC 182 2011 Indlaw SC 619 that not only the police had the power to conduct further investigation in terms of Section 173(8) of the Code, even the Trial Court could direct further investigation in contradistinction to fresh investigation even where the report had been filed.

38. The decisions in Minu Kumari and another v. State of Bihar and others, (2006) 4 SCC 359 and Hemant Dhasmana v. CBI and another, (2001) 7 SCC 536 to the effect that a Court could order further investigation under Section 173(8) of the Code even after a report had been submitted under Section 173 (2) thereof, was adverted to.

39. Noticeably, none of these decisions, however pertain to a situation where after the final report had been submitted, cognizance had been taken, accused had appeared and trial is underway, the Court either suo motu or on the prayer of the informant had directed further investigation under Section 173(8) in absence of a request to that effect made by the concerned investigating officer.

40. The rendition in Bhagwant Singh 1985 Indlaw SC 48 (supra) was also relied upon. It was eventually held, by drawing sustenance from the pronouncement in Bhagwant Singh 1985 Indlaw SC 48 (supra) that a Magistrate before whom a report under Section 173(2) of the Code had been filed, was empowered in law to direct further investigation and require the police to submit a further or a supplementary report. To reiterate, in Bhagwant Singh 1985 Indlaw SC 48 (supra), this Court had in particular dealt with the courses open to a Magistrate, once a

charge-sheet or a closure report is submitted on the completion of investigation under Section 173(2) of the Code and thus did essentially concentrate at the pre-cognizance stage of the proceedings.

41. From the issues sought to be answered in this decision and having regard to the overall text thereof, it is not possible to discern that the power of the Magistrate, even at the post cognizance stage or after the accused had appeared in response to the process issued, the suo motu power of the Magistrate to direct further investigation was intended to be expounded thereby. Significantly, the adjudication was essentially related to the pre-cognizance stage.

42. In Chandra Babu alias Moses v. State through Inspector of Police and others, (2015) 8 SCC 774, the appellant had filed a FIR with the Kulasckaram Police Station against the respondents-accused alleging unlawful assembly and assault resulting in multiple injuries. After the initial investigation, the same was transferred to the District Crime Branch Police, Kanyakumari which eventually filed a final report in favour of the respondents-accused, which was accepted by the learned Magistrate. Meanwhile, however the appellant/informant filed a protest petition before the Magistrate praying for a direction to the CBCID to reopen the case and file a fresh report. As before any decision on this protest petition, the final report filed by the police had already been accepted, the appellant approached the High Court, which called for the report from the learned Magistrate and finally interfered with the order accepting the final report and directed the Magistrate to consider the same along with the protest petition. The Magistrate next held that there was no justification for ordering reinvestigation of the case and directed that the protest petition be treated as a separate private complaint.

43. This order being challenged again before the High Court, the matter was remanded to the learned Magistrate with a direction to consider the final report and the other materials on record and pass appropriate orders after hearing both the public prosecutor and the de facto complainant. This time, the learned Magistrate returned a finding that the investigation by the District Crime Branch was a biased one and that the final report was not acceptable and consequently forwarded the complaint for further investigation by the CBCID, which was a different investigating agency. The matter was taken to the High Court by one of the respondents/accused, whereupon it annulled the direction of the learned Magistrate for reinvestigation, holding that not only there were material discrepancies in the evidence brought on record, but also there was no exceptional circumstance for such a course to be adopted by the Magistrate. It was also of the view, having regard to the scheme of the Section 173(8) of the Code that the investigating officer only could request for further investigation.

44. While disapproving the approach of the High Court in reappreciating the facts in the exercise of its revisional jurisdiction, this Court adverting, amongst others to the three Judge Bench exposition in Bhagwant Singh 1985 Indlaw SC 48 (supra) reiterated that a Magistrate could disagree with the police report and take cognizance and issue process and summon the accused, if satisfied as deemed fit in the attendant facts and circumstances. The rendition in Vinay Tyagi 2012 Indlaw SC 547 (supra) was also alluded to. It was ultimately expounded that the learned Magistrate had really intended to direct further investigation, but as a different investigating agency had been chosen, the word re-investigation had been used. This Court thus construed the direction for investigation by the CBI to be one for further investigation and upheld the same, but nullified the selection of a new investigating agency therefor. As a corollary, the investigating agency that had investigated the case earlier and had submitted the final report, was directed by this Court to undertake further investigation to be supervised by the Superintendent of Police and to submit a report before the learned Chief Judicial Magistrate to be dealt with in accordance with law.

45. This decision too was concerned with a fact situation, pertaining to the pre-cognizance stage of the proceedings before the learned Magistrate and therefore, does not, in our comprehension, further the case of the appellant.

46. As adumbrated hereinabove, Chapter XIV of the Code delineates the conditions requisite for initiation of proceedings before a Magistrate. Section 190, which deals with cognizance of offences by Magistrate, sets out that any Magistrate of the first Class and any Magistrate of the second class specially empowered, as contemplated, may take cognizance of any offence either upon receiving a complaint of facts which constitute such offence or upon a police report of such facts or upon information received from any person other than the police officer, or upon his own knowledge that such offence had been committed. Section 156, which equips a police officer with the power to investigate a cognizable case mandates vide sub-section 3 thereof that any Magistrate empowered under Section 190 may order such an investigation. The procedure for dealing with complaints to Magistrate is lodged under Chapter XV of the Code. Section 202 appearing therein predicates that any Magistrate on receipt of a complaint of an offence of which he is authorized to take cognizance or which had been made over to him under Section 192, may, if he thinks fit and shall in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issue of process against the accused and either enquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit for

the purpose of deciding whether or not there is sufficient ground for proceeding. The contents of this text of Section 202(1) of the Code unmistakeably attest that the investigation that can be directed by the Magistrate, to be undertaken by a police officer would essentially be in the form of an enquiry for the singular purpose of enabling him to decide whether or another there is sufficient ground for proceeding with the complaint of an offence, of which he is authorised to take cognizance. This irrefutably is at the pre-cognizance stage and thus logically before the issuance of process to the accused and his attendance in response thereto. As adverted to hereinabove, whereas Section 311 of the Code empowers a Court at any stage of any inquiry, trial or other proceeding, to summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, if construed to be essential to be just decision of the case, Section 319 authorizes a Court to proceed against any person, who though not made an accused appears, in course of the inquiry or trial, to have committed the same and can be tried together. These two provisions of the Code explicitly accoutre a Court to summon a material witness or examine a person present at any stage of any inquiry, trial or other proceeding, if it considers it to be essential to the just decision of the case and even proceed against any person, though not an accused in such enquiry or trial, if it appears from the evidence available that he had committed an offence and that he can be tried together with the other accused persons.

47. On an overall survey of the pronouncements of this Court on the scope and purport of Section 173(8) of the Code and the consistent trend of explication thereof, **we are thus disposed to hold that though the investigating agency concerned has been invested with the power to undertake further investigation desirably after informing the Court thereof, before which it had submitted its report and obtaining its approval, no such power is available therefor to the learned Magistrate after cognizance has been taken on the basis of the earlier report, process has been issued and accused has entered appearance in response thereto. At that stage, neither the learned Magistrate suo motu nor on an application filed by the complainant/informant direct further investigation. Such a course would be open only on the request of the investigating agency and that too, in circumstances warranting further investigation on the detection of material evidence only to secure fair investigation and trial, the life purpose of the adjudication in hand.**

48. The un-amended and the amended sub-Section (8) of Section 173 of the Code if read in juxtaposition, would overwhelmingly attest that by the latter, the investigating agency/officer alone has been authorized to conduct further investigation without limiting the stage of the proceedings relatable thereto. This power qua the investigating agency/officer is thus legislatively intended to be available at any stage of the proceedings. The recommendation of the Law Commission in its 41st Report which manifesting heralded the amendment, significantly had limited its proposal to the empowerment of the investigating agency alone.

49. In contradistinction, Sections 156, 190, 200, 202 and 204 of the Cr.P.C clearly outline the powers of the Magistrate and the courses open for him to chart in the matter of directing investigation, taking of cognizance, framing of charge, etc. **Though the Magistrate has the power to direct investigation under Section 156(3) at the pre-cognizance stage even after a charge-sheet or a closure report is submitted, once cognizance is taken and the accused person appears pursuant thereto, he would be bereft of any competence to direct further investigation either suo motu or acting on the request or prayer of the complainant/informant. The direction for investigation by the Magistrate under Section 202, while dealing with a complaint, though is at a post-cognizance stage, it is in the nature of an inquiry to derive satisfaction as to whether the proceedings initiated ought to be furthered or not. Such a direction for investigation is not in the nature of further investigation, as contemplated under Section 173(8) of the Code.**

If the power of the Magistrate, in such a scheme envisaged by the Cr.P.C to order further investigation even after the cognizance is taken, accused persons appear and charge is framed, is acknowledged or approved, the same would be discordant with the state of law, as enunciated by this Court and also the relevant layout of the Cr.P.C adumbrated hereinabove. Additionally had it been the intention of the legislature to invest such a power, in our estimate, Section 173(8) of the Cr.P.C would have been worded accordingly to accommodate and ordain the same having regard to the backdrop of the incorporation thereof. In a way, in view of the three options open to the Magistrate, after a report is submitted by the police on completion of the investigation, as has been amongst authoritatively enumerated in Bhagwant Singh 1985 Indlaw SC 48 (supra), the Magistrate, in both the contingencies, namely; when he takes cognizance of the offence or discharges the accused, would be committed to a course, whereafter though the investigating agency may for good reasons inform him and seek his permission to conduct further investigation, he suo motu cannot embark upon such a step or take that initiative on the request or prayer made by the complainant/informant.

Not only such power to the Magistrate to direct further investigation suo motu or on the request or prayer of the complainant/informant after cognizance is taken and the accused person appears, pursuant to the process, issued or is discharged is incompatible with the statutory design and dispensation, it would even otherwise render the provisions of Sections 311 and 319 Cr.P.C, whereunder any witness can be summoned

by a Court and a person can be issued notice to stand trial at any stage, in a way redundant. Axiomatically, thus the impugned decision annulling the direction of the learned Magistrate for further investigation is unexceptional and does not merit any interference. Even otherwise on facts, having regard to the progression of the developments in the trial, and more particularly, the delay on the part of the informant in making the request for further investigation, it was otherwise not entertainable as has been rightly held by the High Court.

50. In the result, the appeal, being devoid of any merit, fails and is dismissed.

Ajay Singh vs. State of Chhattisgarh

(2017) 3 SCC 330

Bench: Dipak Misra, Amitava Roy, JJ.

The Judgment was delivered by: Dipak Misra, J.

1. Performance of judicial duty in the manner prescribed by law is fundamental to the concept of rule of law in a democratic State. It has been quite often said and, rightly so, that the judiciary is the protector and preserver of rule of law. Effective functioning of the said sacrosanct duty has been entrusted to the judiciary and that entrustment expects the courts to conduct the judicial proceeding with dignity, objectivity and rationality and finally determine the same in accordance with law. Errors are bound to occur but there cannot be deliberate impeccability which can never be countenanced. The plinth of justice dispensation system is founded on the faith, trust and confidence of the people and nothing can be allowed to contaminate and corrode the same. A litigant who comes to a court of law expects that inherent and essential principles of adjudication like adherence to doctrine of audi alteram partem, rules pertaining to fundamental adjective and seminal substantive law shall be followed and ultimately there shall be a reasoned verdict. When the accused faces a charge in a court of law, he expects a fair trial. The victim whose grievance and agony have given rise to the trial also expects that justice should be done in accordance with law. Thus, a fair trial leading to a judgment is necessitous in law and that is the assurance that is thought of on both sides. The exponent on behalf of the accused cannot be permitted to command the trial as desired by his philosophy of trial on the plea of fair trial and similarly, the proponent on behalf of the victim should not always be allowed to ventilate the grievance that his cause has not been fairly dealt with in the name of fair trial. Therefore, the concept of expediency and fair trial is quite applicable to the accused as well as to the victim. The result of such trial is to end in a judgment as required to be pronounced in accordance with law. And, that is how the stability of the creditability in the institution is maintained.

2. The above prefatory note has relevance, a significant one, to the case at hand. To appreciate the controversy, certain facts are requisite to be noted. The marriage between the appellant No. 1 and Ruby Singh, the deceased, was solemnized according to Hindu rites on 22.06.1997. She committed suicide at her matrimonial home on 01.12.1998. Kameshwar Pratap lodged FIR No. 194/98 at Police Station Lakhanpur, Distt. Sarguja against Ajay Singh (husband), Sureshwar Singh (father-in-law), Dhanwanti Devi (mother-in-law) and Kiran Singh (sister-in-law) for offences punishable under Section 304B, 34 of the Indian Penal Code (IPC) and other offences. After the criminal law was set in motion, investigating agency after commencement of investigation and after completion thereof laid charge sheet under Sections 304B, 498A/34, 328
IPC read with Section 3/4 of Dowry Prohibition Act, 1961 against the accused persons before the Court of Chief Judicial Magistrate, Ambikapur, who, in turn, committed the matter to the Court of Session and eventually the matter was tried by Second Additional Sessions Judge, Ambikapur. The learned trial Judge passed an order in the order sheet that recorded that the accused persons had been acquitted as per the judgment separately typed, signed and dated.

3. A member of the State Bar Council sent a complaint to the Registry of the High Court of Chhattisgarh, Bilaspur alleging that learned trial judge had acquitted the accused persons but no judgment had been rendered. The Registrar (Vigilance) of the High Court issued a memorandum to the District and Sessions Judge, Surguja at Ambikapur on 18.02.2008 to inquire into the matter and submit a report. The concerned District and Sessions Judge submitted the report to the High Court on the same date stating that no judgments were found in the records of such cases. It has also been brought to the notice of the High Court that in sessions trials being Sessions Trial No. 148 of 1999 and Sessions Trial No. 71 of 1995 though the same trial judge had purportedly delivered the judgments but they were not available on record as the judgments had not actually been dictated, dated or signed. Thereafter the matter was placed before the Full Court of the High Court on 04.03.2008 on which date a resolution was passed placing the concerned trial judge under suspension in contemplation of a departmental inquiry. At the same time, the Full Court took the decision to transfer the cases in question from the concerned trial judge to the file of District and Sessions Judge, Surguja at Ambikapur for rehearing and disposal. It is worthy to note here that the concerned officer was put under suspension and after completion of

inquiry was imposed with the punishment of compulsory retirement on 22.03.2011. We make it clear that we are not concerned with the said punishment in the case.

4. After the decision was taken for transferring the cases by the Full Court for rehearing, three writ petitions forming the subject matter of Writ Petition (Criminal) Nos. 2796 of 2008, 2238 of 2008 and 276 of 2010 were filed. The accused in Sessions Trial No. 148 of 1999 filed Writ Petition (Criminal) Nos. 2796 of 2008 and 2238 of 2008 and accused in Sessions Trial No. 71 of 1995 filed the other writ petition, that is, Writ Petition (Criminal) No. 276 of 2010.

5. The controversy really centers around two issues, namely, **whether the learned trial judge had really pronounced the judgment of acquittal on 31.10.2007 and whether the High Court could have in exercise of its administrative power treated the trial as pending and transferred the same from the Court of Second Additional Sessions Judge, Ambikapur to the Court of District and Sessions Judge, Surguja at Ambikapur for rehearing and disposal.**

8. To appreciate the controversy, it is necessary to refer to the order sheet in Sessions Trial No. 71 of 1995. The trial judge on 28.1.2008 had passed the following order:-

"28.1.2008:
State represented by Shri Rajesh Tiwari, A.G.P.
Accused along with their Counsel Shri Arvind
Mehta, Advocate
The judgment has been typed separately. The same has been dated, signed and announced.
Resultantly, Accused T.P. Ratre is acquitted of the charge under Section 306 IPC. *A copy of this judgment be sent to the District Magistrate, Surguja (Ambikapur) through A.G.P.*
Proceedings completed.
The result be noted in the register and the record be sent to the Record Room."

Be it noted, in the other Sessions Trial, i.e., Sessions Trial No. 148 of 1999 almost similar order has been passed. Be it stated, apart from the aforesaid order, as per the enquiry conducted by the learned District Judge, there was nothing on record. The trial judge had not dictated the order in open court. In such a situation, it is to be determined whether the judgment had been delivered by the trial judge or not.

15. Section 363 provides copy of judgment to be given to the accused and other persons. Section 364 provides for the situation where the judgment requires to be translated. It is apposite to note that though CrPC does not define the term "judgment", yet it has clearly laid down how the judgment is to be pronounced. The provisions clearly spell out that it is imperative on the part of the learned trial judge to pronounce the judgment in open court by delivering the whole of the judgment or by reading out the whole of the judgment or by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.

17. We have already noted that the judgment was not dictated in open court. Code of Criminal Procedure provides reading of the operative part of the judgment. It means that the trial judge may not read the whole of the judgment and may read operative part of the judgment but it does not in any way suggest that the result of the case will be announced and the judgment would not be available on record. Non-availability of judgment, needless to say, can never be a judgment because there is no declaration by way of pronouncement in the open court that the accused has been convicted or acquitted. A judgment, as has been always understood, is the expression of an opinion after due consideration of the facts which deserve to be determined. Without pronouncement of a judgment in the open court, signed and dated, it is difficult to treat it as a judgment of conviction as has been held in Re. Athipalayan and Ors AIR 1960 Mad 507. As a matter of fact, on inquiry, the High Court in the administrative side had found there was no judgment available on record. Learned counsel for the appellants would submit that in the counter affidavit filed by the High Court it has been mentioned that an incomplete typed judgment of 14 pages till paragraph No. 19 was available. The affidavit also states that it was incomplete and no page had the signature of the presiding officer. If the judgment is not complete and signed, it cannot be a judgment in terms of Section 353 CrPC. It is unimaginable that a judgment is pronounced without there being a judgment. It is gross illegality.

19. Having stated that, as is evincible in the instant case, the judgment is not available on record and hence, there can be no shadow of doubt that the declaration of the result cannot tantamount to a judgment as prescribed in the CrPC. That leads to the inevitable conclusion that the trial in both the cases has to be treated to be pending.

20. The next issue that emerges for consideration is **whether the High Court on its administrative side could have transferred the case from the Second Additional Sessions Judge, Ambikapur to the Court of**

District and Sessions Judge, Surguja at Ambikapur. In this regard, it is suffice to understand the jurisdiction and authority conferred under the Constitution on the High Court in the prescription of power of superintendence under Article 227. The aforesaid Article confers power of superintendence on the High Court over the courts and tribunals within the territory of the State. The High Court has the jurisdiction and the authority to exercise suo motu power.

22. We have already stated that the Division Bench while concurring with the opinion of the learned single Judge has also quashed the order by the learned trial judge on the ground that there was no judgment on record. There is no dispute about the fact that the Full Court of the High Court after coming to a definite conclusion that the learned trial judge had really not passed any judgment, resolved that the matter should be heard by the learned Sessions Judge and accordingly the Registrar General of the High Court communicated the decision to the concerned learned Sessions Judge. The submission of the learned counsel for the appellant is that such a power could not have been exercised by the Full Court on the administrative side, for in exercise of administrative authority, the High Court cannot transfer the case. The contention is that High Court can only transfer the case in exercise of power under Section 407 and that too on the judicial side. Our attention has also been drawn to Section 194 of CrPC. Section 194 empowers the Additional and Assistant Sessions Judges to try cases made over to them. The said provision reads as follows:-

"194. Additional and Assistant Sessions Judges to try cases made over to them.- An Additional Sessions Judge or Assistant Sessions Judge shall try such cases as the Sessions Judge of the division may, by general or special order, make over to him for trial or as the High Court may, by special order, direct him to try."

23. It is argued that Section 194 can be exercised on the administrative side before the commencement of the trial and not thereafter, whereas Section 407 can be taken recourse to on the judicial side and a case can be transferred on the basis of parameters laid down for transfer of a criminal trial. In this regard, we may usefully refer to the authority in Ranbir Yadav v. State of Bihar, (1995) 4 SCC 392 wherein under certain circumstances the High Court had transferred the sessions trial from the court of one Additional Sessions Judge to another by an administrative order at a stage when the trial had commenced. It was contended before this Court that the trial that took place before the transferee court was wholly without jurisdiction and consequently the conviction and sentence recorded by that court were null and void and were not curable under Section 465 CrPC.

25. In the case at hand, the High Court on the administrative side had transferred the case to the learned Sessions Judge by which it has conferred jurisdiction on the trial court which has the jurisdiction to try the sessions case under CrPC. Thus, it has done so as it has, as a matter of fact, found that there was no judgment on record. There is no illegality. Be it noted, the Division Bench in the appeal preferred at the instance of the present appellants thought it appropriate to quash the order as there is no judgment on record but a mere order-sheet. In a piquant situation like the present one, we are disposed to think that the High Court was under legal obligation to set aside the order as it had no effect in law. The High Court has correctly done so as it has the duty to see that sanctity of justice is not undermined. The High Court has done so as it has felt that an order which is a mere declaration of result without the judgment should be nullified and become extinct.

26. The case at hand constrains us to say that a trial Judge should remember that he has immense responsibility as he has a lawful duty to record the evidence in the prescribed manner keeping in mind the command postulated in Section 309 of the CrPC and pronounce the judgment as provided under the Code. A Judge in charge of the trial has to be extremely diligent so that no dent is created in the trial and in its eventual conclusion. Mistakes made or errors committed are to be rectified by the appellate court in exercise of "error jurisdiction". That is a different matter. But, when a situation like the present one crops up, it causes agony, an unbearable one, to the cause of justice and hits like a lightning in a cloudless sky. It hurts the justice dispensation system and no one, and we mean no one, has any right to do so. The High Court by rectifying the grave error has acted in furtherance of the cause of justice. The accused persons might have felt delighted in acquittal and affected by the order of rehearing, but they should bear in mind that they are not the lone receivers of justice. There are victims of the crime. Law serves both and justice looks at them equally. It does not tolerate that the grievance of the victim should be comatosed in this manner.

27. Consequently, appeals are dismissed. The trial court to whom the cases have been transferred is directed to proceed in accordance with law.

State of Bihar vs. Rajballav Prasad @ Rajballav Pd. Yadav @ Rajballabh Yadav

(2017) 2 SCC 178

Bench: A.K. Sikri, A.M. Sapre, JJ.

The Judgment was delivered by: A.K. Sikri, J.

1. Respondent herein is facing trial in Mahila Police Station, wherein he is charged for committing offences under Sections 376, 420/34, 366-A, 370, 370-A, 212, 120-B of the Indian Penal Code, Sections 4, 6 and 8 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO Act" for short) as well as Sections 4, 5 and 6 of the Immoral Traffic Act, 1956. He is one of the co-accused in the said trial. FIR in this behalf was registered on the basis of written complaint of the prosecutrix Preeti Kumari (minor) on 09.02.2016. During investigation, the respondent was identified as the main accused having committed the rape on the said minor. However, since at that time, he was allegedly absconding, the trial court issued process under Section 82 of the Code of Criminal Procedure, 1973 ("Cr.P.C.") and thereafter on 27.07.2006 issued process under Section 83 against the respondent. At that stage, apprehending his imminent arrest, the respondent surrendered before the trial court on 10.03.2016 and was taken into custody. After conclusion of the investigation, chargesheet in the case was filed on 20.04.2016 and the charges were framed on 06.08.2016.

2. Pending trial, the respondent filed bail application before the learned Additional Sessions Judge which was heard and dismissed by the trial court vide order dated 30.05.2016. The respondent approached the High Court for grant of bail which came up for hearing before the High Court on 27.07.2016. However, permission was sought to withdraw the said bail application and accepting this request, the bail petition was dismissed as withdrawn on 27.07.2016. Within three weeks thereafter i.e. on 19.08.2016, the respondent preferred another bail petition before the High Court. This time he has succeeded in his attempt as the High Court has, vide judgment dated 30.09.2016, directed release of the respondent on bail. Certain conditions are also imposed while granting this bail. **It is the State which feels aggrieved by the impugned order granting bail to the respondent and has challenged this order in the present proceedings**. Notice was issued in the SLP on 07.10.2016 for actual returnable date i.e. 17.10.2016. Thereafter, the material date of hearing is 08.11.2016 when the following order was passed:

"We have heard learned counsel for the parties for some time.

In the instant case, the High Court has granted bail to the respondent herein during the pendency of the trial against the respondent who is facing the charges under Sections 376, 420/34, 366-A, 370, 370-A, 212, 120-B of the Indian Penal Code *as well as the charges under Section 4, 6 and 8 of the* POCSO Act, 2012. *He is also facing trial for offences under Sections 4, 5 and 6 of the* Immoral Traffic Act, 1956. *The case is pending in the Court of Additional Sessions Judge-Ist-cum-Special Judge, Nalanda at Biharsharif. The deposition of the Prosecutrix is yet to be recorded. Without making any observation at this stage, we are of the opinion that in order to enable the Prosecutrix to give her statement fearlessly and without any pressure, it would be necessary that she deposes when the respondent is in custody. For this reason, we suspend the judgment and order dated 30th September, 2016 passed by the High Court granting bail to the respondent herein for a period of two weeks from the date the respondent is taken into custody to enable the Prosecutrix to give her evidence. We direct that the respondent shall surrender to the Trial Court tomorrow i.e. 09.11.2016 and would be taken into custody in the same manner he was facing incarceration before he was granted bail by the High Court, for a period of two weeks.*

The Trial Court is impressed upon to start recording the evidence of the Prosecutrix immediately and endeavour to complete the same within the said period of two weeks.

We also hope and expect that the respondent shall not try to exert any pressure, directly or indirectly, upon the Prosecutrix or other prosecution witnesses.

List the matter for further directions on 23.11.2016. Dasti, in addition, is permitted."

3. Pursuant to the aforesaid order, the respondent surrendered and period of two weeks expired yesterday i.e. on 23.11.2016 when this appeal was also finally heard. During this period, statement of prosecutrix has been recorded and she has been cross-examined as well.

6. It may also be pointed out at this stage that in the special leave petition, another ground taken to challenge the impugned order is that when earlier application was dismissed by a particular Judge of the High Court on 27.07.2016, as per the directives of this Court, second application should also have to be listed before the same Judge. However, the second application was taken by the Chief Justice himself wherein the impugned order has been passed rather than assigning it to the Judge who had passed the order on 27.07.2016. However, Mr. Subramaniam did not press this ground too hard, except submitting that propriety demanded that matter is posted

before the same Judge who had passed the order on 27.07.2016 before whom the first bail application had come up for hearing.

12. We may observe at the outset that we are conscious of the limitations which bind us while entertaining a plea against grant of bail by the lower court, that too, which is a superior court like High Court. It is expected that once the discretion is exercised by the High Court on relevant considerations and bail is granted, this Court would normally not interfere with such a discretion, unless it is found that the discretion itself is exercised on extraneous considerations and/or the relevant factors which need to be taken into account while exercising such a discretion are ignored or bypassed. In the judgments relied upon by the learned counsel for the respondent, which have already been noticed above, this Court mentioned the considerations which are to be kept in mind while examining as to whether order of bail granted by the court below was justified. There have to be very cogent and overwhelming circumstances that are necessary to interfere with the discretion in granting the bail. These material considerations are also spelled out in the aforesaid judgments, viz. whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tampering with the evidence. We have kept these very considerations in mind while examining the correctness of the impugned order.

16. It is a matter of record that when FIR was registered against the respondent and on the basis of investigation he was sought to be arrested, the respondent had avoided the said arrest. So much so, the prosecution was compelled to file an application under Section 82 of Cr.P.C. before the trial court and the trial court even initiated the process under Section 83 of Cr.P.C. At that stage only that the respondent surrendered before the trial court and was arrested.

17. The respondent's application was dismissed by the Additional Sessions Judge vide orders dated 30.05.2016. While passing this order of rejection, the trial court was persuaded by the submission of the Prosecutor that direct and specific allegations had been levelled against the respondent of committing rape upon the victim minor girl and he was identified by the victim during the course of investigation while he was walking in the P.O. House. It was also noted that prayer for bail of co-accused Sandeep Suman @ Pushpanjay had already been rejected and the case of the respondent was on graver footing and also that the respondent had a long criminal diary, as would be evident from the Case Diary produced before the Court.

18. It has also come on record that the prosecutrix had her family members made representations claiming that the respondent is threatening the family members of the prosecutrix. So much so, having regard to several complaints of intimidation of witnesses made on behalf of the prosecutrix and her family members, the State administration has deputed a force of 1+4 for the safety and security of the prosecutrix and her family.

19. In spite of the aforesaid material on record, the High Court has made casual and cryptic remarks that there is no material showing that the accused had interfered with the trial by tampering evidence. On the other hand, it has discussed the merits of the case/evidence which was not called for at this stage. No doubt, in a particular case if it appears to the court that the case foisted against the accused is totally false, that may become a relevant factor while considering the bail application. However, it can be said at this stage that the present case falls in this category. That would be a matter of trial. Therefore, the paramount consideration should have been as is pointed out above, whether there are any chances of the accused person fleeing from justice or reasonable apprehension that the accused person would tamper with the evidence/trial if released on bail. These aspects are not dealt with by the High Court appropriately and with the seriousness they deserved. This constitutes a sufficient reason for interfering with the exercise of discretion by the High Court.

20. The High Court also ignored another vital aspect, namely, while rejecting the bail application of co-accused, the High Court had ordered expeditious, nay, day-to-day trial to ensure that the trial comes to an end most expeditiously. When order had already been passed to fast-track the trial, and the application for bail by co-accused Sandeep Suman @ Pushpanjay was also rejected, the High Court, while considering the bail application of the respondent, was supposed to take into consideration this material fact as well. Further, while making a general statement of law that the accused is innocent, till proved guilty, the provisions of Section 29 of POCSO Act have not been taken into consideration.

21. Keeping in view all the aforesaid considerations in mind, we are of the opinion that it was not a fit case for grant of bail to the respondent at this stage and grave error is committed by the High Court in this behalf.

22. As indicated by us in the beginning, prime consideration before us is to protect the fair trial and ensure that justice is done. This may happen only if the witnesses are able to depose without fear, freely and truthfully and this Court is convinced that in the present case, that can be ensured only if the respondent is not enlarged on bail.

24. We are conscious of the fact that the respondent is only an under-trial and his liberty is also a relevant consideration. However, equally important consideration is the interest of the society and fair trail of the case. Thus, undoubtedly the courts have to adopt a liberal approach while considering bail applications of accused persons. However, in a given case, if it is found that there is a possibility of interdicting fair trial by the accused if released on bail, this public interest of fair trial would outweigh the personal interest of the accused while undertaking the task of balancing the liberty of the accused on the one hand and interest of the society to have a fair trial on the other hand. When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It is this need for larger public interest to ensure that criminal justice delivery system works efficiently, smoothly and in a fair manner that has to be given prime importance in such situations. After all, if there is a threat to fair trial because of intimidation of witnesses etc. that would happen because of wrongdoing of the accused himself and the consequences thereof, he has to suffer.

43. Almost to similar effect are the observations of Law Commission of India in its 198th Report (Report on 'witness identity protection and witness protection programmes'), as can be seen from the following discussion therein:

"The reason is not far to seek. In the case of victims of terrorism and sexual offences against women and juveniles, we are dealing with a section of society consisting of very vulnerable people, be they victims or witnesses. The victims and witnesses are under fear of or danger to their lives or lives of their relations or to their property. It is obvious that in the case of serious offences under the Indian Penal Code, 1860 and other special enactments, some of which we have referred to above, there are bound to be absolutely similar situations for victims and witnesses. While in the case of certain offences under special statutes such fear or danger to victims and witnesses may be more common and pronounced, in the case of victims and witnesses involved or concerned with some serious offences, fear may be no less important. Obviously, if the trial in the case of special offences is to be fair both to the accused as well as to the victims/witnesses, then there is no reason as to why it should not be equally fair in the case of other general offences of serious nature falling under the Indian Penal Code, 1860. *It is the fear or danger or rather the likelihood thereof that is common to both cases. That is why several general statutes in other countries provide for victim and witness protection."*

27. No doubt, the prosecutrix has already been examined. However, few other material witnesses, including father and sister of the prosecutrix, have yet to be examined. As per the records, threats were extended to the prosecutrix as well as her family members. Therefore, we feel that the High Court should not have granted bail to the respondent ignoring all the material and substantial aspects pointed out by us, which were the relevant considerations.

28. For the foregoing reasons, we allow this appeal thereby setting aside the order of the High Court. In case the respondent is already released, he shall surrender and/or taken into custody forthwith. In case he is still in jail, he will continue to remain in jail as a consequence of this judgment.

29. Before we part with, we make it clear that this Court has not expressed any observations on the merits of the case. Whether the respondent is guilty or not, of the charges framed against him, will be decided by the trial court on its own merits after analysing the evidence that surfaces on record during the trial. Appeal allowed

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Mohammed Kasab @ Abu Mujahid v. State of Maharashtra
(2012) 9 SCC 1

Hon'ble Judges: Aftab Alam and Chandramauli Kumar Prasad, JJ.

The Judgment of the Court was delivered by Justice Aftab Alam:

Summary Highlighting Issues of Right against Self Incrimination and Right to Legal Aid

In this case the issue was raised that the constitutional rights of the appellant under Article 22 (1) and Article 20 (3) was not protected because the accused was not made aware of these rights by the magistrate at the stage of recording a confession under Section 164 Code of Criminal Procedure.

The Supreme Court rejected the issue and hold that the right of an accused against self incrimination is protected through the 161 (2) and 164 (2) (3) (4) CrPC and compliance of these provisions inevitably give effect to the constitutional principle of right against self incrimination under Article 20(3) of the Constitution. A voluntary

confession taken in accordance to the framework of investigation under Section 161, 162, 163 and 164 of CrPC is admissible in law. The court ruled thus:

467. The object of the criminal law process is to find out the truth and not to shield the accused from the consequences of his wrongdoing. A defense lawyer has to conduct the trial on the basis of the materials lawfully collected in the course of investigation. The test to judge the Constitutional and legal acceptability of a confession recorded Under Section 164 Code of Criminal Procedure is not whether the accused would have made the statement had he been sufficiently scared by the lawyer regarding the consequences of the confession. **The true test is whether or not the confession is voluntary. If a doubt is created regarding the voluntariness of the confession, notwithstanding the safeguards stipulated in Section 164 it has to be trashed; but if a confession is established as voluntary it must be taken into account, not only constitutionally and legally but also morally.**

Regarding the right to legal aid during the pretrial stage the court observed thus:

484. We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate. We, accordingly, hold that it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.

488. But the failure to provide a lawyer to the accused at the pre-trial stage may not have the same consequence of vitiating the trial. It may have other consequences like making the delinquent magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation against the State for failing to provide him legal aid. But it would not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial stage had resulted in some material prejudice to the accused in the course of the trial. That would have to be judged on the facts of each case.

497. In the aforesaid facts we are firmly of the view that there is no question of any violation of any of the rights of the Appellant under the Indian Constitution. He was offered the services of a lawyer at the time of his arrest and at all relevant stages in the proceedings. We are also clear in our view that the absence of a lawyer at the pre-trial stage was not only as per the wishes of the Appellant himself, but that this absence also did not cause him any prejudice in the trial.

Pooja Pal vs. Union of India and others
(2016) 3 SCC 135

48. The casual decision of the public prosecutor to drop a material witness, a measure approved by the trial court also came to be criticized. The lapse of non-examination of the injured eye-witnesses, who were kept away from the trial, was also highlighted. It was alleged that the partisan witnesses had been examined to favour the accused persons resulting in a denial of fair trial.

49. This Court in the above disquieting backdrop, did underline that discovery, vindication and establishment of truth were the avowed purposes underlying the existence of the courts of justice. Apart from indicating that the principles of a fair trial permeate the common law in both civil and criminal contexts, this Court underscored the necessity of a delicate judicial balancing of the competing interests in a criminal trial - the interests of the accused and the public and to a great extent that too of the victim, at the same time not losing the sight of public interest involved in the prosecution of persons who commit offences.

50. It was propounded that in a criminal case, the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community and are harmful to the society in general. That the concept of fair trial entails the triangulation of the interest of the accused, the victim, society and that the community acts

through the state and the prosecuting agency was authoritatively stated. This Court observed that the interests of the society are not to be treated completely with disdain and as persona non grata. It was remarked as well that due administration of justice is always viewed as a continuous process, not confined to the determination of a particular case so much so that a court must cease to be a mute spectator and a mere recording machine but become a participant in the trial evincing intelligence and active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth and administer justice with fairness and impartiality both to the parties and to the community.

51. While highlighting the courts' overriding duty to maintain public confidence in the administration of justice, it was enunciated as well, that they cannot turn a blind eye to vexatious and oppressive conduct, discernable in relation to the proceedings. That the principles of rule of law and due process are closely linked with human rights protection, guaranteeing a fair trial, primarily aimed at ascertaining the truth, was stated. It was held as well, that the society at large and the victims or their family members and relatives have an inbuilt right to be dealt fairly in a criminal trial and the denial thereof is as much injustice to the accused as to the victim and the society. Dwelling upon the uncompromising significance and the worth of witnesses in the perspective of a fair trial, the following revealing comments of Bentham were extracted in paragraph 41:

"41. "Witnesses", as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political count and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate causalities. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slot process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. *There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert the trial getting tainted and derailed and truth becoming a causality. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose the truth without any fear of being haunted by those against whom he has deposed."*

58. Vis-a-vis the notions of 'speedy trial' and 'fair trial' as the integral constituents of Article 21 of the Constitution of India, it was observed that there was a qualitative difference between the right to speedy trial and the right of the accused to fair trial. While pointing out that unlike the accused's right of fair trial, the deprivation of the right to speedy trial does not per se prejudice the accused in defending himself, it was proclaimed that mere lapse of several years since the commencement of prosecution by itself, would not justify the discontinuance of prosecution or dismissal of the indictment. It was stated in no uncertain terms, that the factors concerning the accused's right to speedy trial have to be counterpoised with the impact of the crime on the society and the confidence of the people in the judicial system. It was noted that speedy trial secures rights to an accused but it does not preclude the rights of public justice. It was exposited that the nature and gravity of the crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former, the long delay in conclusion of trial should not operate against the continuation of the prosecution but if the right of the accused in the facts and circumstances of the case and the exigencies or situation leans the balance in his favour, the prosecution may be brought to end. It was held that the guiding factor for a retrial essentially has to be the demand of justice. It was emphasized that while protecting the right of an accused to fair trial and due process of law, the interest of the public at large who seek protection of law ought not to be altogether overlooked so much so, that it results in loss of hope in the legal system. Retrial in the facts of the case was ordered.

67. While recalling its observation in State of Bihar and another vs. JAC Saldanha and others (1980) 1 SCC 554 1979 Indlaw SC 344, that on a cognizance of the offence being taken by the court, the police function of investigation comes to an end subject to the provision contained in Section 173(8) of the Code and that the adjudicatory function of the judiciary commences, thus delineating the well demarcated functions of crime detection and adjudication, this Court did recognize a residuary jurisdiction to give directions to the investigating agency, if satisfied that the requirements of law were not being complied with and that the investigation was not being conducted properly or with due haste and promptitude. It was reiterated in Babubhai 2010 Indlaw SC 694 (supra) that in exceptional circumstances, the court in order to prevent the miscarriage of criminal justice, may direct investigation de novo, if it is satisfied that non-interference would ultimately result in failure of justice. In such an eventuality endorsement of the investigation to an independent agency to make a fresh probe may be well merited. That not only fair trial but fair investigation is also a part of the Constitutional rights guaranteed under Articles 20 & 21 of the Constitution of India and therefore investigation ought to be fair, transparent and judicious, was reemphasized. The expression "ordinarily" as used in Section 173(8) of the Code was noted again to rule that in exceptional circumstances however, in order to prevent miscarriage of criminal justice, a court may still direct investigation de novo. The above postulations being strikingly common in all these decisions, do pervade the fabric and the content thereof and thus dilation of individual facts has been avoided.

76. A "speedy trial", albeit the essence of the fundamental right to life entrenched in the Article 21 of the Constitution of India has a companion in concept in "fair trial", both being in alienable constituents of an adjudicative process, to culminate in a judicial decision by a court of law as the final arbiter. There is indeed a qualitative difference between right to speedy trial and fair trial so much so that denial of the former by itself would not be prejudicial to the accused, when pitted against the imperative of fair trial. As fundamentally, justice not only has to be done but also must appear to have been done, the residuary jurisdiction of a court to direct further investigation or reinvestigation by any impartial agency, probe by the state police notwithstanding, has to be essentially invoked if the statutory agency already in-charge of the investigation appears to have been ineffective or is presumed or inferred to be not being able to discharge its functions fairly, meaningfully and fructuously. As the cause of justice has to reign supreme, a court of law cannot reduce itself to be a resigned and a helpless spectator and with the foreseen consequences apparently unjust, in the face of a faulty investigation, meekly complete the formalities to record a foregone conclusion. Justice then would become a casualty. Though a court's satisfaction of want of proper, fair, impartial and effective investigation eroding its credence and reliability is the precondition for a direction for further investigation or reinvestigation, submission of the charge-sheet ipso facto or the pendency of the trial can by no means be a prohibitive impediment. The contextual facts and the attendant circumstances have to be singularly evaluated and analyzed to decide the needfulness of further investigation or reinvestigation to unravel the truth and mete out justice to the parties. The prime concern and the endeavour of the court of law is to secure justice on the basis of true facts which ought to be unearthed through a committed, resolved and a competent investigating agency.

78. As succinctly summarised by this Court in Committee for Protection of Democratic Right 2010 Indlaw SC 133 (supra), the extra ordinary power of the Constitutional Courts in directing the CBI to conduct investigation in a case must be exercised sparingly, cautiously and in exceptional situations, when it is necessary to provide credibility and instill confidence in investigation or where the incident may have national or international ramifications or where such an order may be necessary for doing complete justice and for enforcing the fundamental rights. In our comprehension, each of the determinants is consummate and independent by itself to justify the exercise of such power and is not inter-dependent on each other.

79. *A trial encompasses investigation, inquiry, trial, appeal and retrial i.e. the entire range of scrutiny including crime detection and adjudication on the basis thereof. Jurisprudentially, the guarantee under Article 21 embraces both the life and liberty of the accused as well as interest of the victim, his near and dear ones as well as of the community at large and therefore cannot be alienated from each other with levity. It is judicially acknowledged that fair trial includes fair investigation as envisaged by Articles 20 and 21 of the Constitution of India. Though, well demarcated contours of crime detection and adjudication do exist, if the investigation is neither effective nor purposeful nor objective nor fair, it would be the solemn obligation of the courts, if considered necessary, to order further investigation or reinvestigation as the case may be, to discover the truth so as to prevent miscarriage of the justice. No inflexible guidelines or hard and fast rules as such can be prescribed by way of uniform and universal invocation and the decision is to be conditioned to the attendant facts and circumstances, motivated dominantly by the predication of advancement of the cause of justice.*

86. A strain of piognance and disquiet over the insensitive approach of the court concerned in the textual facts in the context of fair trial in the following observations of this Court in Vinod Kumar vs. State of Punjab (2015) 3 SCC 220 2015 Indlaw SC 125 sounds an awakening caveat:

"The narration of the sad chronology shocks the judicial conscience and gravitates the mind to pose a question: Is it justified for any conscientious trial Judge to ignore the statutory command, not recognize "the felt necessities of time" and remain impervious to the cry of the collective asking for justice or give an indecent and uncalled for burial to the conception of trial, totally ostracizing the concept that a civilized and orderly society thrives on the rule of law which includes "fair trial" for the accused as well as the prosecution."

87. The observations though made in the backdrop of repeated adjournments granted by the trial court, chiefly for cross-examination of a witness resulting in the delay of the proceedings, the concern expressed is of overarching relevance demanding sentient attention and remedial response. The poser indeed stems from the indispensable interface of the orderly existence of the society founded on the rule of law and "fair trial" for the accused as well as the prosecution. That the duty of the Court while conducting a trial is to be guarded by the mandate of law, conceptual fairness and above all its sacrosanct role to arrive at the truth on the basis of material brought on record, was reiterated.

Dinubhai Boghabhai Solanki vs. State of Gujarat and Ors.

(2018)11SCC129

Facts:

An activist, who made a complaint against illegal mining, was murdered. An FIR was registered. The Appellant was an accused in offence of murder. Investigation was lackadaisical. The complainant was forced to approach High Court to seek necessary directions for proper investigation. The High Court directed de novo trial of case with specific directions. Aggrieved by present appeal was filed.

13. After taking note of the aforesaid facts and submissions, the High Court pointed out that moot question was as to whether it could order retrial in exercise of writ jurisdiction Under Article 226 of the Constitution of India. With this poser, the High Court has analyzed the said issue under the following heads:

- Concept of fair trial.
- Hostile witnesses - a menace to the criminal justice system.
- Exercise of writ jurisdiction for the purpose of retrial.
- Sections 311 and 391 of Code of Criminal Procedure and Section 165 of the Indian Evidence Act, 1872.

The High Court has given a detailed discourse on the necessity to have a fair trial, as a backdrop of the Rule of law as well as for dispensation of criminal justice. Taking cognizance of so many judgments[1] of this Court wherein the concept of fair trial with the sole idea of finding the truth and to ensure that justice is done, and extensively quoting from the said judgments, the High Court has emphasized that free and fair trial is *sine qua non* of Article 21 of the Constitution of India. It has also remarked that criminal justice system is meant not only safeguarding the interest of the Accused persons, but is equally devoted to the rights of the victims as well. If the criminal trial is not free and fair, then the confidence of the public in the judicial fairness of a judge and the justice delivery system would be shaken. Denial to fair trial is as much injustice to the Accused as to the victim and the society. No trial can be treated as a fair trial unless there is an impartial judge conducting the trial, an honest and fair defence counsel and equally honest and fair public prosecutor. A fair trial necessarily includes fair and proper opportunity to the prosecutor to prove the guilt of the Accused and opportunity to the Accused to prove his innocence.

15. It is not necessary to reproduce those copious quotes from various judgments which have been incorporated by the High Court. However, following passage from the judgment in ***Ajay Singh*** needs reiteration as it sums up the entire fulcrum astutely:

Performance of judicial duty in the manner prescribed by law is fundamental to the concept of Rule of law in a democratic State. It has been quite often said and, rightly so, that the judiciary is the protector and preserver of Rule of law. Effective functioning of the said sacrosanct duty has been entrusted to the judiciary and that

entrustment expects the courts to conduct the judicial proceeding with dignity, objectivity and rationality and finally determine the same in accordance with law. Errors are bound to occur but there cannot be deliberate peccability which can never be countenanced. The plinth of justice dispensation system is founded on the faith, trust and confidence of the people and nothing can be allowed to contaminate and corrode the same. A litigant who comes to a court of law expects that inherent and essential principles of adjudication like adherence to doctrine of audi alteram partem, Rules pertaining to fundamental adjective and seminal substantive law shall be followed and ultimately there shall be a reasoned verdict. When the Accused faces a charge in a court of law, he expects a fair trial. The victim whose grievance and agony have given rise to the trial also expects that justice should be done in accordance with law. Thus, a fair trial leading to a judgment is necessitous in law and that is the assurance that is thought of on both sides. The exponent on behalf of the Accused cannot be permitted to command the trial as desired by his philosophy of trial on the plea of fair trial and similarly, the proponent on behalf of the victim should not always be allowed to ventilate the grievance that his cause has not been fairly dealt with in the name of fair trial. Therefore, the concept of expediency and fair trial is quite applicable to the Accused as well as to the victim. The result of such trial is to end in a judgment as required to be pronounced in accordance with law. And, that is how the stability of the credibility in the institution is maintained.

16. The High Court, thereafter, described the phenomena of hostile witnesses which have assumed alarming proportion to the criminal justice system in India and adversely affecting the fair trial and justice dispensation system. In the process, the High Court has again referred to various judgments[2].

32. There is a discernible paradigm shift in the criminal justice system in India which keeps in mind the interests of victims as well. Victim oriented policies are introduced giving better role to the victims of crime in criminal trials. It has led to adopting two pronged strategy. On the one hand, law now recognises, with the insertion of necessary statutory provisions, expanding role of victim in the procedural justice. On the other hand, substantive justice is also done to these victims by putting an obligation on the State (and even the culprit of crime) by providing adequate compensation to the victims[5]. The result is that private parties are now able to assert "their claim for fair trial and, thus, an effective 'say' in criminal prosecution, not merely as a 'witness' but also as one impacted"[6].

34. The position which emerges is that in a criminal trial, on the one hand there are certain fundamental presumptions in favour of the accused, which are aimed at ensuring that innocent persons are not convicted. And, on the other hand, it has also been realised that if the criminal justice system has to be effective, crime should not go unpunished and victims of crimes are also well looked after. After all, the basic aim of any good legal system is to do justice, which is to ensure that injustice is also not meted out to any citizen. This calls for balancing the interests of Accused as well as victims, which in turn depends on fair trial. For achieving this fair trial which is the solemn function of the Court, role of witnesses assumes great significance. This fair trial is possible only when the witnesses are truthful as 'they are the eyes and ears' of the Court.

38. Trial is expedited on the directions of the Court and witnesses start turning hostile. It is difficult to say, at least, *prima facie*, that in the given scenario, the CBI, during investigation, would have compelled the witnesses to give statements against the Accused persons. In any case, that is also a matter to be finally tested at the time of trial. However, it is stated at the cost of repetition that requirement of a fair trial has to be fulfilled. When the trial takes place, as many as 105 witnesses turn hostile, out of 195 witnesses examined, is so eloquent that it does not need much effort to fathom into the reasons there for. However, when the aforesaid facts are considered cumulatively, it compels us to take a view that in the interest of fair trial, at least crucial witnesses need to be examined again.

As indicated by us in the beginning, prime consideration before us is to protect the fair trial and ensure that justice is done. This may happen only if the witnesses are able to depose without fear, freely and truthfully and this Court is convinced that in the present case, that can be ensured only if the Respondent is not enlarged on bail. This importance of fair trial was emphasised in *Panchanan Mishra* v. *Digambar Mishra*, while setting aside the order of the High Court granting bail in the following terms: (SCC pp. 147- 48, para 13)

13. We have given our careful consideration to the rival submissions made by the counsel appearing on either side. The object underlying the cancellation of bail is to protect the fair trial and secure justice being done to the society by preventing the Accused who is set at liberty by the bail order from tampering with the evidence in the heinous crime and if there is delay in such a case the underlying object of cancellation of bail practically loses all its purpose and significance to the greatest prejudice and the interest of the prosecution. It hardly requires to be stated that once a person is released on bail in serious criminal cases where the punishment is quite stringent and deterrent, the Accused in order to get away from the clutches of the same indulge in various

activities like tampering with the prosecution witnesses, threatening the family members of the deceased victim and also create problems of law and order situation.

Such sentiments were expressed much earlier as well by the Court in *Talab Haji Hussain* v. *Madhukar Purshottam Mondkar* in the following manner: (AIR p. 379, para 6)

6.. There can be no more important requirement of the ends of justice than the uninterrupted progress of a fair trial; and it is for the continuance of such a fair trial that the inherent powers of the High Courts are sought to be invoked by the prosecution in cases where it is alleged that Accused persons, either by suborning or intimidating witnesses, are obstructing the smooth progress of a fair trial. Similarly, if an Accused person who is released on bail jumps bail and attempts to run to a foreign country to escape the trial, that again would be a case where the exercise of the inherent power would be justified in order to compel the Accused to submit to a fair trial and not to escape its consequences by taking advantage of the fact that he has been released on bail and by absconding to another country. In other words, if the conduct of the Accused person subsequent to his release on bail puts in jeopardy the progress of a fair trial itself and if there is no other remedy which can be effectively used against the Accused person, in such a case the inherent power of the High Court can be legitimately invoked.

Vinod Kumar vs. State of Punjab

(2015) 3 SCC 220

3. The narration of the sad chronology shocks the judicial conscience and gravitates the mind to pose a question, is it justified for any conscientious trial Judge to ignore the statutory command, not recognize "the felt necessities of time" and remain impervious to the cry of the collective asking for justice or give an indecent and uncalled for burial to the conception of trial, totally ostracizing the concept that a civilized and orderly society thrives on rule of law which includes "fair trial" for the accused as well as the prosecution.

4. In the aforesaid context, we may recapitulate a passage from Gurnaib Singh V. State of Punjab, (2013) 7 SCC 108 2013 Indlaw SC 727.

"..... We are compelled to proceed to reiterate the law and express our anguish pertaining to the manner in which the trial was conducted as it depicts a very disturbing scenario. As is demonstrable from the record, the trial was conducted in an extremely haphazard and piecemeal manner. Adjournments were granted on a mere asking. The cross-examination of the witnesses was deferred without recording any special reason and dates were given after a long gap. The mandate of the law and the views expressed by this Court from time to time appears to have been totally kept at bay.

The learned trial Judge, as is perceptible, seems to have ostracised from his memory that a criminal trial has its own gravity and sanctity. In this regard, we may refer with profit to the pronouncement in Talab Haji Hussain v. Madhukar Purshottam Mondka, AIR 1958 SC 376 1958 Indlaw SC 61 *wherein it has been stated that an accused person by his conduct cannot put a fair trial into jeopardy, for it is the primary and paramount duty of the criminal courts to ensure that the risk to fair trial is removed and trials are allowed to proceed smoothly without any interruption or obstruction."*

A fair trial is to be fair both to the defense and the prosecution as well as to the victim. An offence registered under the Prevention of Corruption Act is to be tried with all seriousness. We fail to appreciate how the learned trial Judge could exhibit such laxity in granting so much time for cross- examination in a case of this nature. It would have been absolutely appropriate on the part of the learned trial Judge to finish the cross-examination on the day the said witness was examined. As is evident, for no reason whatsoever it was deferred and the cross-examination took place after 20 months. The witness had all the time in the world to be gained over.

It is anathema to the concept of proper and fair trial. The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safe-guarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, "Awake! Arise!" There is a constant discomfort. Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross-examination of a witness at their pleasure or at the leisure of the defence counsel, for it

eventually makes the trial an apology for trial and compels the whole society to suffer chicanery. Let it be remembered that law cannot allowed to be lonely; a destitute.

State of Haryana vs. Ram Mehar and others

(2016) 8 SCC 762

Bench: Dipak Misra, Uday Umesh Lalit

The Judgment was delivered by: Dipak Misra, J.

1. Present appeals, by special leave, assail the order dated 09.03.2016 passed by the High Court of Punjab and Haryana at Chandigarh in CRM-M No. 482 of 2016 and CRM-M No. 484 of 2016 whereby the learned single Judge in exercise of the power under Section 482 of the Code of Criminal Procedure (for short "CrPC") has annulled the order of the learned First Additional Sessions Judge, Gurgaon passed on 16.12.2015 wherein he had rejected the prayer of the accused persons seeking recall of the witnesses under Section 311 read with Section 231(2) CrPC.

2. The prosecution case before the trial court is that on 18.07.2012 about 7 p.m. the accused persons being armed with door beams and shockers went upstairs inside M1 room of the Manesar Factory of Maruti Suzuki Limited, smashed the glass walls of the conference room and threw chairs and table tops towards the management officials, surrounded the conference hall from all sides and blocked both the staircases and gave threats of doing away with the lives of the officials present over there. As the allegations of the prosecution further unfurl, the exhortation continued for quite a length of time. All kind of attempts were made to burn alive the officials of the management. During this pandemonium, the entire office was set on fire by the accused persons and the effort by the officials to escape became an exercise in futility as the accused persons had blocked the staircases. The police officials who arrived at the spot to control the situation were assaulted by the workers and they were obstructed from going upstairs to save the officials. Despite the obstruction, the officials were saved by the police and the fire was brought under control by the fire brigade. In the incident where chaos was the sovereign, Mr. Avnish Dev, General Manager, Human Resources of the Company was burnt alive. The said occurrence led to lodging of FIR No. 184/2012 at Police Station Manesar. After completion of the investigation, the police filed charge sheet against 148 workers in respect of various offences before the competent court which, in turn, committed the matter to the court of session and during trial the accused persons were charged for the offences punishable under Sections 147/ 148/ 149/ 452/ 302/ 307/ 436/ 323/ 332/ 353/ 427/ 114/ 201/ 120B/ 34/ 325/ 381 & 382 IPC.

3. The evidence of the prosecution commenced in August, 2013 and was concluded on 02.03.2015.

Recording of statements of the accused persons under Section 313 CrPC was concluded by 13.04.2015. After the statements under Section 313 CrPC were recorded, the defence adduced its evidence by examining number of witnesses.

5. When the matter stood thus, on 30.11.2015, two petitions under Section 311 CrPC were filed by different accused persons. The learned trial Judge noted the contentions advanced by the learned counsel for the defence and the prosecution and observed that:-

"7. The present application has been moved at a very belated stage at a time when 102 prosecution witnesses have already been examined during this trial in which larger number of 148 accused are involved and they have been examined way back as prosecution evidence was concluded on 2.3.15. Long time was consumed for recording the statements of the accused under section 313 Cr.P.C. *and for the last more than six months, the case is being adjourned for recording the defence evidence and in this regard number of opportunities have been availed by the defence and 15 defence witnesses have been examined so far. At this juncture it may be recalled that Hon'ble Supreme Court has directed this court to decide this trial expeditiously. x x x x x x*

9. Nothing has been explained as to what are the left out questions and how the questions already put to the said witnesses created inroad into the defence of the said accused. In para 3 of the application, it is stated that the manner and circumstances as to how the incident took place and further the questions pertaining to weapons used and the injuries to the said witnesses and to others are certain other questions, which are to be put to them. A perusal of the statements of the aforesaid four witnesses clearly reveal that they have been cross examined at length and there is nothing that defence counsel faltered by not putting relevant questions to them. Putting it differently it is not a case of giving walk over by the defence to the prosecution witnesses by not properly conducting the cross examination. It is rightly argued by learned PP that if the present application is allowed then there will be no end of moving such applications and who knows that another changed defence counsel may come up with similar sort of application stating that the previous defence counsel inadvertently could not put

material questions. It may be recalled that the present applicants are in custody but that does not mean that they cannot move the application to delay the trial which has already been delayed considerably. The defence has already availed numerous opportunities. This court in order to ensure the fair trial allowed the successive applications moved by the defence to examine the witnesses to support their respective pleas. An old adage of a fair trial to accused does not mean that this principle is to be applied in favour of accused alone but this concept will take in its fold the fairness of trial to the victim as well as to the society. The court being neutral agency is expected to be fair to both the parties and its duty is also to ensure that the process of law is not abused by either of them for extraneous reasons. The speedy trial is essence of justice but such like applications like the present one should not come in the way of delivery of doing complete and expeditious justice to both the parties."

9. After so stating, the learned trial Judge came to hold that when the material questions had already been put, there was no point to entertain the application and mere change of the counsel could not be considered as a ground to allow the application for recalling the witnesses for the purpose of further cross-examination. It is worthy to note that two separate orders were passed by the trial court but the analysis is almost the same.

10. Dissatisfied with the aforesaid orders, the accused persons preferred CRM-M No. 482 of 2016 and CRM-M No. 484 of 2016 before the High Court under Section 482 CrPC. The High Court took note of the common ground that the leading counsel for the defence was critically ill during the trial and due to inadvertence, certain important questions, suggestions with respect to the individual roles and allegations against the respective accused persons, the injuries sustained by the witnesses, as well as the alleged weapons of offence used, had not been put to the said witnesses. It also took note of the fact that the senior lawyer had been engaged at the final stage and such inadvertent errors were discovered by him and they needed to be rectified in order to have a meaningful defence and a fair trial.

The High Court proceeded to opine that the accused-petitioners were charged with heinous offences including one under Section 302 IPC and recalling is not for the purpose of setting up a new case or make the witnesses turn hostile but only to have a proper defence as it is to be judicially noticed that for lack of proper suggestions by the defence to the prosecution witnesses, the trial courts at times tend to reject the raised defence on behalf of the accused.

12. On the basis of the aforesaid reasoning, the High Court allowed the petitions and set aside the impugned orders and directed as follows:-

"... in case the learned trial Court during the cross examination of the such recalled witnesses is of the opinion that such opportunity is being misused to make the witnesses resile from their earlier testimonies, in that eventuality the trial Court would be at full liberty to put a stop to that effort."

13. We have referred to the contents of the applications, delineation by the trial court and the approach of the High Court under Section 482 CrPC in extenso so that we can appreciate whether the order passed by the High Court really requires to be unsettled or deserves to be assented to.

16. Before we advert to the ambit and scope of Section 311 CrPC and its attractability to the existing factual matrix, we think it imperative to dwell upon the concept of "fair trial". There is no denial of the fact that fair trial is an insegregable facet of Article 21 of the Constitution. This Court on numerous occasions has emphasized on the fundamental conception of fair trial as the majesty of law so commands.

23. In Bablu Kumar and others v. State of Bihar and another [(2015) 8 SCC 787] the Court referred to the authorities in Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi) [(2010) 6 SCC 1], Rattiram 2012 Indlaw SC 43 (supra), J. Jayalalithaa 2013 Indlaw SC 646 (supra), State of Karnataka v. K. Yarappa Reddy [(1999) 8 SCC 715] and other decisions and came to hold that keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the court, it can irrefragably be stated that the court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a farcical one. It has been further stated that the law does not countenance a "mock trial". It is a serious concern of society. Every member of the collective has an inherent interest in such a trial. No one can be allowed to create a dent in the same. The court is duty-bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. We may note with profit though the context was different, yet the message is writ large. The message is - all kinds of individual notions of fair trial have no room.

24. The decisions of this court when analysed appositely clearly convey that the concept of the fair trial is not in the realm of abstraction. It is not a vague idea. It is a concrete phenomenon. It is not rigid and there cannot

be any strait- jacket formula for applying the same. On occasions it has the necessary flexibility. Therefore, it cannot be attributed or clothed with any kind of rigidity or flexibility in its application. It is because fair trial in its ambit requires fairness to the accused, the victim and the collective at large. Neither the accused nor the prosecution nor the victim which is a part of the society can claim absolute predominance over the other. Once absolute predominance is recognized, it will have the effect potentiality to bring in an anarchical disorder in the conducting of trial defying established legal norm. There should be passion for doing justice but it must be commanded by reasons and not propelled by any kind of vague instigation. It would be dependent on the fact situation; established norms and recognized principles and eventual appreciation of the factual scenario in entirety. There may be cases which may command compartmentalization but it cannot be stated to be an inflexible rule. Each and every irregularity cannot be imported to the arena of fair trial. There may be situations where injustice to the victim may play a pivotal role. The centripodal purpose is to see that injustice is avoided when the trial is conducted. Simultaneously the concept of fair trial cannot be allowed to such an extent so that the systemic order of conducting a trial in accordance with CrPC or other enactments get mortgaged to the whims and fancies of the defence or the prosecution. The command of the Code cannot be thrown to winds. In such situation, as has been laid down in many an authority, the courts have significantly an eminent role. A plea of fairness cannot be utilized to build Castles in Spain or permitted to perceive a bright moon in a sunny afternoon. It cannot be acquiesced to create an organic disorder in the system. It cannot be acceded to manure a fertile mind to usher in the nemesis of the concept of trial as such.

From the aforesaid it may not be understood that it has been impliedly stated that the fair trial should not be kept on its own pedestal. It ought to remain in its desired height but as far as its applicability is concerned, the party invoking it has to establish with the support of established principles. Be it stated when the process of the court is abused in the name of fair trial at the drop of a hat, there is miscarriage of justice. And, justice, the queen of all virtues, sheds tears. That is not unthinkable and we have no hesitation in saying so.

25. Having dwelled upon the concept of fair trial we may now proceed to the principles laid down in the precedents of this Court, applicability of the same to a fact situation and duty of the court under Section 311 CrPC.

34. Keeping in mind the principles the defensibility of the order passed by the High Court has to be tested. We have already reproduced the assertions made in the petition seeking recall of witnesses. We have, for obvious reasons, also reproduced certain passages from the trial court judgment. The grounds urged before the trial court fundamentally pertain to illness of the counsel who was engaged on behalf of the defence and his inability to put questions with regard to weapons mentioned in the FIR and the weapons that are referred to in the evidence of the witnesses. That apart, it has been urged that certain suggestions could not be given. The marrow of the grounds relates to the illness of the counsel. It needs to be stated that the learned trial Judge who had the occasion to observe the conduct of the witnesses and the proceedings in the trial, has clearly held that recalling of the witnesses were not necessary for just decision of the case. The High Court, as we notice, has referred to certain authorities and distinguished the decision in Shiv Kumar Yadav 2015 Indlaw SC 619 (supra) and Fatehsinh Mohansinh Chauhan 2006 Indlaw SC 376 (supra). The High Court has opined that the court has to be magnanimous in permitting mistakes to be rectified, more so, when the prosecution was permitted to lead additional evidences by invoking the provisions under Section 311 CrPC. The High Court has also noticed that the accused persons are in prison and, therefore, it should be justified to allow the recall of witnesses.

35. The heart of the matter is whether the reasons ascribed by the High Court are germane for exercise of power under Section 311 CrPC. The criminal trial is required to proceed in accordance with Section 309 of the CrPC.

37. The decisions which have used the words that the court should be magnanimous, needless to give special emphasis, did not mean to convey individual generosity or magnanimity which is founded on any kind of fanciful notion. It has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not necessarily mean "the liberal approach" shall be the rule and all other parameters shall become exceptions. Recall of some witnesses by the prosecution at one point of time, can never be ground to entertain a petition by the defence though no acceptable ground is made out. It is not an arithmetical distribution. This kind of reasoning can be dangerous. In the case at hand, the prosecution had examined all the witnesses. The statements of all the accused persons, that is 148 in number, had been recorded under Section 313 CrPC. The defence had examined 15 witnesses. The foundation for recall, as is evincible from the applications filed, does not even remotely make out a case that such recalling is necessary for just decision of the case or to arrive at the truth. The singular ground which prominently comes to surface is that the earlier counsel who was engaged by the defence had not put some questions and failed to put some questions and give certain suggestions. It has come on record that number of lawyers were engaged by the defence. The accused persons had engaged counsel of their

choice. In such a situation recalling of witnesses indubitably cannot form the foundation. If it is accepted as a ground, there would be possibility of a retrial. There may be an occasion when such a ground may weigh with the court, but definitely the instant case does not arouse the judicial conscience within the established norms of Section 311 CrPC for exercise of such jurisdiction. It is noticeable that the High Court has been persuaded by the submission that recalling of witnesses and their cross-examination would not take much time and that apart, the cross-examination could be restricted to certain aspects. In this regard, we are obliged to observe that the High Court has failed to appreciate that the witnesses have been sought to be recalled for further cross-examination to elicit certain facts for establishing certain discrepancies; and also to be given certain suggestions. We are disposed to think that this kind of plea in a case of this nature and at this stage could not have been allowed to be entertained.

38. At this juncture, we think it apt to state that the exercise of power under Section 311 CrPC can be sought to be invoked either by the prosecution or by the accused persons or by the Court itself. The High Court has been moved by the ground that the accused persons are in the custody and the concept of speedy trial is not nullified and no prejudice is caused, and, therefore, the principle of magnanimity should apply. Suffice it to say, a criminal trial does not singularly centres around the accused. In it there is involvement of the prosecution, the victim and the victim represents the collective. The cry of the collective may not be uttered in decibels which is physically audible in the court premises, but the Court has to remain sensitive to such silent cries and the agonies, for the society seeks justice. Therefore, a balance has to be struck. We have already explained the use of the words "magnanimous approach" and how it should be understood. Regard being had to the concept of balance, and weighing the factual score on the scale of balance, we are of the convinced opinion that the High Court has fallen into absolute error in axing the order passed by the learned trial Judge. If we allow ourselves to say, when the concept of fair trial is limitlessly stretched, having no boundaries, the orders like the present one may fall in the arena of sanctuary of errors. Hence, we reiterate the necessity of doctrine of balance.

39. In view of the proceeded analysis we allow the appeals, set aside the order passed by the High Court and restore that of the learned trial Judge. We direct the learned trial judge to proceed with the trial in accordance with the law. Appeals allowed

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State (NCT of Delhi) vs. Shiv Kumar Yadav and another

(2016) 2 SCC 402

Bench: Adarsh Kumar Goel, Jagdish Singh Khehar

The Judgment was delivered by: Adarsh Kumar Goel, J.

1. Leave granted. The issue raised for consideration in these appeals is **whether recall of witnesses, at the stage when statement of accused under Section 313 of the Code of Criminal Procedure ("Cr.P.C.") has been recorded, could be allowed on the plea that the defence counsel was not competent and had not effectively cross-examined the witnesses, having regard to the facts and circumstances of this case.**

2. On 6th December, 2014, a First Information Report was lodged alleging that the respondent accused who was the driver of cab, hired by the victim on 5th December, 2014 for returning home from her office committed rape on her. The statement of the prosecutrix was recorded under Section 164 Cr.P.C. on 8th December, 2014. After investigation, charge sheet was filed before the Magistrate on 24th December, 2014. Since the accused was not represented by counsel, he was provided legal aid counsel. Thereafter on 2nd January, 2015, the accused engaged his private counsel M/s. Alok Kumar Dubey and Ankit Bhatia in place of the legal aid counsel. Thereafter, the case was committed to the Court of Session. Charges were framed on 13th January, 2015. Prosecution evidence commenced on 15th January, 2015 and was closed on 31st January, 2015. The witnesses were duly cross-examined by the counsel engaged by the accused. Statement of the accused under Section 313 Cr.P.C. was recorded on 3rd February, 2015.

Thereafter, on 9th February, 2015, the accused engaged another counsel, who filed another application under Section 311 Cr.P.C. for recall of all the 28 prosecution witnesses on 16th February, 2015. The said application was dismissed on 18th February by the trial court but the same was allowed by the High Court vide impugned order dated 4th March, 2015 in a petition filed under Article 227 of the Constitution of India read with Section 482 Cr.P.C. Even though the specific grounds urged in the application were duly considered and rejected, it was observed that recall of certain witnesses was deemed proper for ensuring fair trial.

3. Aggrieved by the order of the High Court, the victim as well as the State have moved this Court.

4. On 10th March, 2015, when the matter came up for hearing before this Court, stay of further proceedings was granted but since the prosecutrix had already been recalled in pursuance of the impugned order and further

cross-examined, the said deposition was directed to be kept in the sealed cover and publication thereof by anyone in possession thereof was restrained.

10. It can hardly be gainsaid that fair trial is a part of guarantee under Article 21 of the Constitution of India. Its content has primarily to be determined from the statutory provisions for conduct of trial, though in some matters where statutory provisions may be silent, the court may evolve a principle of law to meet a situation which has not been provided for. It is also true that principle of fair trial has to be kept in mind for interpreting the statutory provisions.

11. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The Legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties.

15. The above observations cannot be read as laying down any inflexible rule to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant.

Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. Witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination.

16. The interest of justice may suffer if the counsel conducting the trial is physically or mentally unfit on account of any disability. The interest of the society is paramount and instead of trials being conducted again on account of unfitness of the counsel, reform may appear to be necessary so that such a situation does not arise. Perhaps time has come to review the Advocates Act and the relevant Rules to examine the continued fitness of an advocate to conduct a criminal trial on account of advanced age or other mental or physical infirmity, to avoid grievance that an Advocate who conducted trial was unfit or incompetent. This is an aspect which needs to be looked into by the concerned authorities including the Law Commission and the Bar Council of India.

20. In Mir. Mohd. Omar vs. Stateof W.B. (1989) 4 SCC 436 1989 Indlaw SC 681 after the statement of the accused under Section 313 was recorded, the public prosecutor filed an application for his re-examination on the ground that some more questions are required to be asked. The application was rejected by the trial court but allowed by the High Court. This Court disapproved the course adopted and held :

"16. .....Here again it may be noted that the prosecution has closed the evidence. The accused have been examined under Section 313 of the Code. The prosecution did not at any stage move the trial Judge for recalling PW 34 for further examination. In these circumstances, the liberty reserved to the prosecution to recall PW 34 for re-examination is undoubtedly uncalled for."

21. We may also note that the approach to deal with a case of this nature has to different from other cases. We may refer to the judgment of this court in Gurmit Singh case, wherein it was observed:

"8. .....The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the

courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable....."

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21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity...."

22. We may now refer to the orders passed by the trial Court dated 18th February, 2015 and the High Court dated 4th March, 2015. Referring to the ground of the earlier counsel not being competent, the trial court observed that the counsel was of the choice of the accused. The accused was not facing a criminal trial for the first time. The cross-examination of witnesses was deferred time and again to enable the counsel to seek instructions from the accused. The cross-examination of the prosecutrix was deferred on 15th January, 2015 to enable the counsel to have legal interview with the accused. After part of cross-examination on 16th January, 2015, further cross-examination was concluded on 17th January, 2015. Cross-examination of PW 13 was deferred on the request of the accused. Similarly, cross-examination of PWs 22, 26 and 27 was deferred on the request of the defence counsel. After referring to the record, the trial court observed as under :

"22. The aforesaid proceedings clearly bely the claim of the accused/applicant that the case has been proceeding at a "hurried pace" or that he was not duly represented by a defence counsel of his choice. The claim of the applicant that he was unwilling to continue with his earlier counsel is also nothing but a bundle of lie in as much as the accused never submitted before the court that he wants to change his counsel. Rather, it is revealed from the record that the earlier counsel, Sh. Alok Kumar was acting as per his instructions and having legal interview with him. The accused cannot be permitted to take advantage of his submissions made on the first date i.e. 13/01/2015 that he wants to engage a new counsel as his subsequent conduct does not support this submission. I may also add that before proceeding with the case further, I had personally asked the accused in the open court whether he wants to continue with his counsels and only on getting a reply in the affirmative, were the proceedings continued further. It thus appears that the endeavor of the accused by filing this application is only to delay the proceedings despite the fact that all along the trial his request for adjournment have been duly considered and allowed and he has been duly represented by a private counsel of his choice.

23. *I am also unable to accept the plea of the accused that the counsel representing him earlier was incompetent, being a novice and that he is entitled to recall all the prosecution witnesses now that he has engaged a new counsel. Although, Sh. Alok Kumr Dubey and Sh. Ankit Bhatia, both have enrolment number of 2014 as per the Power of Attorney executed by the accused in their favour, however, to my mind the competence of a Lawyer is subjective and the date of his enrolment with the Bar Council can certainly not be said to be a yardstick to measure his competence.*

24. *Moreover, the competence of the new counsel may again be questioned by another counsel, who the accused may choose to engage in future. This fact was also admitted by Sh. D.K. Mishra during the course of arguments on the application under consideration.*

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27. At this stage, to judge as to whether certain questions should have been put to the witnesses in cross examination or should not have been put to them, would in my view result in pre-judging as to what are the material portions of the evidence and would also amount to re-appraising the entire cross examination conducted by the earlier counsel to conclude whether he had done a competent job or not. This certainly is not within the scope and power of the court u/s. 311 Cr.P.C. *I am supported in my view by the observations of Hon'ble Delhi High Court in its order dated 20/02/2008 in case titled as Raminder Singh vs. State* 2008 Indlaw DEL 1171, *Criminal MC 8479/2006, where it has been held as under :*

"In the first place, it requires to be noticed that scope of Section 311 CrPC *does not permit a court to go into the aspect whether material portions of the evidence on record should have been put to the witness in cross-examination to elicit their contradictions. If the court is required to perform such an exercise every time an*

application is filed under Section 311 then not only would it be pre-judging what according to it are 'material portions' of the evidence but it would end up reappraising the entire cross-examination conducted by a counsel to find out if the counsel had done a competent job or not. This certainly is not within the scope of the power of the trial court under Section 311 CrPC. *No judgment has been pointed out by the learned Counsel for the petitioner in support of such a contention. Even on a practical level it would well-nigh be impossible to ensure expeditious completion of trials if trial courts were expected to perform such an exercise at the conclusion of the examination of prosecution witnesses every time."*

28. It may also be relevant to mention that Article 22(1) of the Constitution of India *confers a Fundamental Right upon an accused, who has been arrested by the police to be defended by a*

legal practitioner of his choice. This Fundamental Right has been duly acknowledged by the Hon'ble Superior Courts in numerous pronouncements including the case of State of Madhya Pradesh vs. Shobha Ram and others, AIR 1966 SC 1910 1966 Indlaw SC 92 *wherein it has been observed as under:*

"Under Art. 22, a person who is arrested for whatever reason, gets three independent rights. The first is the right to be told the reasons for the arrest as soon as an arrest's made, the second is the right to be produced before a Magistrate within 24 hours and the third is right to be defended by advocate of his choice. When the Constitution *lays down in absolute terms a right to be defended by one' own counsel, it cannot be taken away by ordinary law, and, it is not sufficient to say that the accused was so deprived, of the right, did not stand in danger of losing his personal liberty."*

29. In the case of State vs. Mohd. Afzal & Ors. 2003 IV AD (Cr.) 205, the Hon'ble Delhi High Court addressed the issue of Fundamental Right of the accused to be represented by a counsel from the point of his arrest especially in a case involving capital punishment. The case of US Supreme Court in Strickland vs. Washington 466, U.S. 688 (1984) was cited before the Delhi High Court and the ld. Counsel for the accused in that case had argued that the law required a conviction to be set aside where counsel's assistance was not provided or was ineffective. Hon'ble Delhi High Court took note of the observations in the said case as well as the Rulings of the Hon'ble Supreme Court in the case of (1991) 1 SCC 286 Kishore Chand vs. State of Himachal Pradesh 1990 Indlaw SC 12*, (1931) 1 SCC 627 Khatri & Ors. vs. State of Bihar & Ors., (1980) 1 SCC 108 Hussainara Khatoon & Ors. vs. Home Secretary, State of Bihar* 1979 Indlaw SC 558*, (1983) 3 SCC 307 Rajan Dwivedi vs. Union of India* 1983 Indlaw SC 276*, (1978) 3 SCC 544 Madhav Hayawadanrao Hoskot vs. State of Maharashtra* 1978 Indlaw SC 192 *while dealing with this issue. It was however observed that from hindsight it is easy to pick wholes in the cross examination conducted but applying the test in Strickland's case, it cannot be said that it was the constructive denial of the counsels to accused Mohd. Afzal. The observations of the Hon'ble Delhi High Court were met with the approval by Hon'ble Supreme Court when the matter was decided by the Hon'ble Apex Court by its ruling titled as State vs. Navjot Sandhu & Ors. AIR 2005 SC 3820* 2005 Indlaw SC 1026.

30. The Hon'ble Apex Court, after considering the facts of the case, nutshell that "we do not think that the court should dislodge the Counsel and go on searching for some other counsel to the liking of the accused. The right to legal aid cannot be taken thus far." While relying upon the ruling in the case Strickland's (supra), the Hon'ble Supreme Court observed that scrutiny of performance of a counsel who has conducted trial should be highly deferential.

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34. It may be noted that the recall of IO and prosecutrix has been sought on the ground besides others, that she has to be questioned as to why she did not give her sim of her mobile to the IO and why the IO did not ask her for the same. Similarly, it has been submitted that the accused though admitted his potency report but has not admitted the time and process of the potency test as stated by the IO and thus the 10 needs to be recalled. Further, SI Sandeep is required to be recalled for cross examination in order to cross examine him with regard to the document given by the Transporter, who brought the cab in question from Mathura to Delhi. It may also be mentioned that in his zest to seek recall of all the prosecution witnesses, the applicant has also sought recall of one lady constable Manju, who as per record was not even examined as a prosecution witness.

35. It is further necessary to mention that on 04/02/2015 accused had moved an application u/s 311 Cr.P.C., *thereby seeking recall of prosecutrix PW-2 and PW-23 Ayush Dabas. The application was dismissed. The present application has been filed now seeking recall of all PWs, including PW-2 and PW-23, while the order dated 04/02/2015 still remains unchallenged.*

36. The application under consideration is thus nothing but an attempt to protract the trial and in fact seek an entire retrial. There is no change in circumstances except change of Counsel, which, to my mind, is no ground

to allow the application. Interestingly, in para 17 of the application, it has been contended that the present counsel is not aware of the scheme and design of defence of the previous counsel and is thus at a loss and disadvantageous position to defend the accused and for conducting the case as per his acumen and legal expertise, the recalling of PWs are necessary. It may be noted that the defence of an under trial is not expected to vary from counsel to counsel and irrespective of change of counsel, an under trial is expected to have a single and true line of defence which cannot change every time he changes a counsel. Nor can a new counsel defend the case of such an under trial as per the new scheme and design in accordance with his acumen and legal expertise."

23. The High Court made a reference to the Criminal Law Amendment Act, 2013 providing for trial relating to offences under Section 376 and other specified offences being completed within two months from the date of filing of the charge sheet. Reference has also been made to circular issued by the Delhi High Court drawing the attention of the judicial officers to the mandate of speedy disposal of session cases.

24. After rejecting the plea of the accused that there was any infirmity in the conduct of the trial after detailed reference to the proceedings, the High Court concluded:

"31. The aforesaid narration of proceedings before the learned Additional Sessions Judge clearly reflects that while posting the matter on day to day basis, the Court's only endeavour was to comply with the provisions of Section 309 Cr.P.C. *as far as possible while ensuring the right of the accused to a fair trial. The earlier counsel had been seeking adjournment for consulting the petitioner which was duly granted and under these circumstances the submission of learned counsel for the petitioner that justice hurried is justice buried, deserves outright rejection."*

25. It was then observed that competence of a counsel was a subjective matter and plea of incompetence of the counsel could not be easily accepted. It was observed :

"32. The other submission of learned counsel for the petitioner that Sh. Alok Dubey, Advocate was not competent to appear as an Advocate inasmuch as he had not even undergone screening test as required by Bar Council of Delhi Rules *and was not issued practice certificate, this submission is not fortified by any record. Much was said against the competency of the earlier counsel representing the petitioner. However, learned standing counsel for the State was right in submitting that competency of an Advocate is a subjective issue which should not have been attacked behind the back of the concerned Advocate. ... ...*

33. Learned Additional Standing counsel for the State has furnished details of the number of questions put by the earlier counsel to the prosecution witnesses for showing the performance of the earlier counsel. Moreover, one cannot lose sight of the fact that the Advocate was appointed by the petitioner of his own choice."

26. Inspite of the High Court not having found any fault in the conduct of the proceedings, it held that "although recalling of all the prosecution witnesses is not necessary" recall of certain witnesses was necessary for the reasons given in para 15 (a) to (xx) on the application of the accused. It was observed that the accused was in custody and if he adopted delaying tactics it is only he who would suffer.

27. It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 Cr.P.C. is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined.

28. It will also be pertinent to mention that power of judicial superintendence under Article 227 of the Constitution and under Section 482 Cr.P.C. has to be exercised sparingly when there is patent error or gross injustice in the view taken by a subordinate court 47 Jasbir Singh vs. State of Punjab (2006) 8 SCC 294 2006 Indlaw SC 1239. A finding to this effect has to be supported by reasons. In the present case, the High Court has allowed the prayer of the accused, even while finding no error in the view taken by the trial court, merely by saying that exercise of power was required for granting fair and proper opportunity to the accused. No reasons have been recorded in support of this observation. On the contrary, the view taken by the trial court rejecting the stand of the accused has been affirmed. Thus, the conclusion appears to be inconsistent with the reasons in the impugned order.

29. **We may now sum up our reasons for disapproving the view of the High Court in the present case:**

(i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross-examination. They were under no handicap;

(ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel;

(iiii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;

(iv) The trial Court as well as the High Court rejected the reasons for recall of the witnesses;

(v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;

(vi) ***Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;***

(vii) Mere change of counsel cannot be ground to recall the witnesses;

(viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;

(ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall, i.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.

30. Accordingly, we allow these appeals, set aside the impugned order passed by the High Court and dismiss the application for recall. Appeals allowed

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Bablu Kumar and others vs. State of Bihar and another

(2015) 8 SCC 787

Bench: Dipak Misra, Prafulla C. Pant

The Judgment was delivered by: Dipak Misra, J.

1. **The pivotal issues, quite disturbing and disquieting, that emanate in this appeal by special leave for scrutiny, deliberation and apposite delineation, fundamentally pertain to the role of the prosecution and the duty of the court within the requisite paradigm of fair trial which in the ultimate conceptual eventuality results in appropriate stability of criminal justice dispensation system.** The attitude of callousness and non-chalance portrayed by the prosecution and the total indifferent disposition exhibited by the learned trial Judge in shutting out the evidence and closing the trial after examining a singular formal witness, PW 1, in a trial where the accused persons were facing accusations for the offences punishable under Sections 147, 148, 149, 341, 342 and 302 of the Indian Penal Code (IPC), which entailed an acquittal u/s. 232 of the Criminal Procedure Code, 1973 (CrPC), are really disconcerting; and indubitably cause discomfort to the judicial conscience. It seems that everyone concerned with the trial has treated it as a farce where the principal protagonists compete with each other for gaining supremacy in the race of closing the case unceremoniously, burying the basic tenets of fair trial,

and abandoning one's duty to serve the cause of justice devoutly. It is a case where the prosecution has played truant and the learned trial Judge, with apathy, has exhibited impatience. Fortunately, the damage done by the trial court has been rectified by the High Court in exercise of the revisional jurisdiction u/s. 401 CrPC; but what is redemption for the conception of the fair trial has caused dissatisfaction to the accused persons, for they do not intend to face the retrial. It is because at one point of time, the High Court had directed for finalization of trial within a fixed duration and the learned trial Judge, in all possibility, harboured the impression that even if the prosecution witnesses had not been served the notice to depose in court, and the prosecution had not taken any affirmative steps to make them available for adducing evidence in court, yet he must conclude the trial by the target date as if it is a mechanical and routine act. The learned trial Judge, as it appears to us, has totally forgotten that he could have asked for extension of time from the High Court, for the High Court, and we are totally convinced, could never have meant to conclude the trial either at the pleasure of the prosecution or desire of the accused.

2. The sad scenario has to have a narration. The informant lodged an FIR on 29.11.2004 at Tikari Police Station about 8.00 p.m. that the accused persons came armed with various weapons, took away her husband Brahamdeo Yadav, the deceased, and threatened the family members not to come out from their house. The deceased was taken towards the house of Krishna Yadav and next morning he was found dead having several wounds. It was mentioned in the FIR that the occurrence had taken place as the family of the informant and the accused persons were in litigating terms. On the basis of the FIR, criminal law was set in motion and eventually, the investigating agency submitted the charge-sheet for the offences which we have already mentioned hereinbefore. After the accused persons were sent up for trial, charges were framed on 10.8.2007. Be it noted, the appellants in this case were tried as accused in Session Trial No. 350/2006 and trial of different accused-persons had been split up. It is apt to mention here that applications for grant of bail were preferred by certain accused persons before the High Court and the High Court by order dated 17.07.2007, while declining to admit the accused persons to bail, directed that the trial should be concluded as early as possible and in any case within nine months from the date of receipt/production of the copy of the order passed by the High Court. After the charges were framed, the learned trial Judge, that is, Additional Session Judge, FTC-II Gaya, passed orders to issue summons to the witnesses and they were issued on 17.8.2007. Thereafter the learned trial Judge issued bailable as well as non-bailable warrants against the informant on 5.12.2007. The learned trial Judge on various occasions recorded that witnesses were not present and ultimately vide order dated 17.5.2008 directed the matter to be posted on 23.5.2008 for orders u/s. 232 CrPC and on the dated fixed recorded the judgment of acquittal.

3. Being aggrieved by the aforesaid judgment, the informant preferred criminal revision no. 919 of 2008. The learned Single Judge upon perusal of the record found that there was no service report/execution of warrant of arrest against the informant and there was also no service report on record to show that either summons were served on other witnesses or bailable or non-bailable warrants issued against the witnesses were executed. The High Court also took note of the fact that after the accused persons were examined u/s. 313 CrPC, case was adjourned to 17.5.2008 for evidence of the defence and hearing and finally the matter was taken up for consideration u/s. 232 CrPC and judgment was passed acquitting the accused persons. It has been clearly stated by the High Court that the Superintendent of Police, Gaya had not taken steps to produce the evidence and the learned trial Judge had not taken effective steps for production of witnesses and tried to conclude the trial without being alive to the duties of the trial court. The learned Single Judge has placed reliance on the decision rendered in Zahira Habibulla H. Sheikh and Another v. State of Gujarat and others (2004) 4 SCC 158 2004 Indlaw SC 408 and opined there has been no fair trial and accordingly remanded the matter for retrial by the trial court.

6. On a scrutiny of the orders passed by the learned trial Judge from time to time, we find that the learned trial Judge has really not taken pains to verify whether the summons had really been served on the witnesses or not. The High Court has rightly observed that the trial court has also not tried to verify from the record whether the warrants had been executed or not. As is manifest, he had directed the prosecution to produce the witnesses and mechanically recorded that the witnesses were not present and proceeded to direct the prosecution to keep them present. Eventually, as we have stated earlier, the trial Judge posted the matter to 23.5.2008 and passed an order u/s. 232 CrPC. **The question that arises for consideration is whether under these circumstances the High Court while dealing with the revision u/s. 401 CrPC should have interfered and directed for retrial of the case.**

18. Keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the Court, it can irrefragably be stated that the Court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or highjack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a farcical one. Law does not countenance a 'mock trial'. It is a serious concern of the society. Every member of the collective has an inherent interest in such a trial. No one can be allowed to create a dent in the same. The court is

duty bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. The court is under the legal obligation to see that the witnesses who have been cited by the prosecution are produced by it or if summons are issued, they are actually served on the witnesses. If the court is of the opinion that the material witnesses have not been examined, it should not allow the prosecution to close the evidence. There can be no doubt that the prosecution may not examine all the material witnesses but that does not necessarily mean that the prosecution can choose not to examine any witness and convey to the court that it does not intend to cite the witnesses. The Public Prosecutor who conducts the trial, has a statutory duty to perform. He cannot afford to take things in a light manner. The Court also is not expected to accept the version of the prosecution as if it is sacred. It has to apply its mind on every occasion. Non-application of mind by the trial court has the potentiality to lead to the paralysis of the conception of fair trial.

19. In the case at hand, it is luculent that the High Court upon perusal of the record has come to hold that notices were not served on the witnesses. The agonised widow of deceased was compelled to invoke the revisional jurisdiction of the High Court against the judgment of acquittal as the trial was closed after examining a formal witness. The order passed by the High Court by no stretch of imagination can be regarded as faulty. That being the position, we have no spec of doubt in our mind that the whole trial is nothing, but comparable to an experimentation conducted by a child in a laboratory. It is neither permissible nor allowable. Therefore, we unhesitatingly affirm the order passed by the High Court as we treat the view expressed by it as unexceptionable, for by its order it has annulled an order which was replete with glaring defects that had led to miscarriage of justice.

20. Consequently, the appeal, being sans merit, stands dismissed. The order be communicated to the Registrar General of the High Court to communicate to the concerned learned trial Judge to proceed with the trial in accordance with law. Appeal dismissed

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Dr. Vinod Bhandari vs. State of Madhya Pradesh

2015(2) SCALE 195

Bench: Adarsh Kumar Goel, T.S. Thakur

The Judgment was delivered by: Adarsh Kumar Goel, J.

2. This appeal has been preferred against final judgment and order dated 11th August, 2014 passed by the High Court of Madhya Pradesh at Jabalpur in Misc. Criminal Case No.10371 of 2014 whereby a Division Bench of the High Court dismissed the bail application filed by the appellant.

3. M.P. Vyavsayik Pareeksha Mandal (M.P. Professional Examination Board) known as Vyapam conducts various tests for admission to professional courses and streams. It is a statutory body constituted under the provisions of M.P. Professional Examination Board Act, 2007. As per FIR No.12 of 2013 registered on 30th October, 2013 at police station, S.T.F., Bhopal under Sections 420, 467, 468, 471, 120B of the Indian Penal Code ("IPC") read with S. 3(d), 1, 2/4 of the Madhya Pradesh Manyata Prapt Pariksha Adhiniyam, 1937 and u/ss. 65 and 66 of the I.T. Act, Shri D.S. Baghel, DSP (STF), M.P. Police Headquarters, Bhopal during the investigation of another case found that copying was arranged in PMT Examination, 2012 at the instance of concerned officers of the Vyapam and middlemen who for monetary consideration helped the undeserving students to pass the entrance examination to get admission to the M.B.B.S course in Government and Private Medical Colleges in the State of M.P. As per the material collected during investigation, in pursuance of conspiracy, the appellant Dr. Vinod Bhandari, who is the Managing Director of Shri Aurbindo Institute of Medical Sciences, Indore, received money from the candidates through co-accused Pradeep Raghuvanshi who was working in Bhandari Hospital & Research Centre, Indore as General Manager and who was also looking after the admissions and management work of Shri Aurbindo Institute of Medical Sciences, Indore, for arranging the undeserving candidates to pass through the MBBS Entrance Examination by unfair means. He gave part of the money to Nitin Mohindra, Senior Systems Analyst in Vyapam, who was the custodian of the model answer key, along with Dr. Pankaj Trivedi, Controller of Vyapam. During investigation, disclosure statement was made by Pradeep Raghuvanshi which led to the recovery of money and documents. The candidates, their guardians, some officers of the Vyapam and middlemen were found to be involved in the scam.

It appears that there are in all 516 accused out of which 329 persons have been arrested and 187 are due to be arrested. Substantial investigation has been completed and charge sheets filed but certain aspects are still being investigated and as per direction of this Court in a Petition for Special Leave to Appeal (C).... CC No.16456 of 2014 titled "Ajay Dubey versus State of M.P. & Ors.", final charge sheet is to be filed by the Special Task Force on or before March 15, 2015 against the remaining accused. Allegations also include that some high scorer candidates were arranged in the examination centre who could give correct answers and the candidates who paid

money were permitted to do the copying. Other modus operandi adopted was to leave the OMR sheets blank which blank sheets were later filled up with the correct answers by the corrupt officers of Vyapam.

Further, the model answer key was copied and made available to concerned candidates one night before the examination. Each candidate paid few lakhs of rupees to the middlemen and the money was shared by the middlemen with the officers of the Vyapam. The appellant received few crores of rupees in the process from undeserving candidates to get admission to the M.B.B.S. and, as per allegation in the other connected matter, i.e., FIR No.14 of 2013 registered on 20th November, 2013 with the same police station, to the PG medical courses.

4. In the present case, the appellant was arrested on 30th January, 2014 while in the other FIR he was granted anticipatory bail on 16th January, 2014. Second Bail application of the appellant in the present case was considered by the 9th Additional Sessions Judge, Bhopal and dismissed vide Order dated 9.5.2014. Earlier, first bail application had been dismissed on 5th February, 2014. While declining prayer for bail, it was, inter- alia, observed:

"In the present case, it is alleged against the accused that he in connivance with the officers of coordinator State level institution (VYAPAM) in lieu of huge amount got the candidates selected in the examination after getting them passed in the Pre-Medical Test (PMT) Examination, which is mandatory and important for admission in the medical education institution. According to the prosecution, applicant snatched right of deserving and scholar students, he got selected ineligible candidates in the field of medical education. This case is not only related to economic offence, rather apart from depriving rights of deserving and scholar students, it is related to the human life and health."

5. The Division Bench of the High Court, in its Order, referred to the supplementary challan filed against the appellant on 24th April, 2014, indicating the following material :

"Offence of the accused:

The accused Dr. Vinod Bhandari has been the Managing Director of S.A.I.M.S., Indore and prior to the P.M.T. Examination 2012 he had in collusion with Nitin Mohindra, Senior System Analyst of Vyapam, for getting some of his candidates passed in the P.M.T. Examination, 2012 and stating to send list of his candidates and cash amount through his
General Manager Pradeep Raghuvanshi, subsequently he sent list of his 08 candidates and 60 lakh rupees in cash through his General Manager and 07 candidates out of aforesaid candidates were got passed by using unfair means with the connivance of Nitin Mohindra by way of filling up the circles in their O.M.R. sheets and received the amount in illegally manner by hatching conspiracy which has been recovered/seized from his General Manager Pradeep Raghuvanshi. In this manner, the accused has committed a serious crime in well-designed conspiracy by hatching conspiracy and committed organized crime.

Evidences available against the accused:-

(1) The certified copy of the excel sheet of the data retrieved from the hard disc seized from the office of the accused Nitin Mohindra;

(2) The documents, note sheets and the activity chart of P.M.T. Examination, 2012 seized from Vyapam;

(3) The list of 150 candidates seized from Shri Aurbindo Institute of Medical Sciences College, Indore in respect of M.B.B.S. admission for the session 2012-13 at the instanced of the accused Dr. Bhandari;

(4) Memorandums of other accused persons;

(5) The seizure memo of the amount seized from Pradeep Raghuvanshi."

6. While declining bail, the High Court observed:

"To put it differently after considering all aspects of the matter as the material already placed along with the first charge-sheet prima facie indicates complicity of the applicant in the commission of the crime and is not a case of no evidence against the applicant at all; coupled with the fact that if the charge is proved against the applicant, the offence is punishable with life sentence; as the role of the applicant is being part of the conspiracy and is the kingpin; further that the applicant is allegedly involved in huge money transaction including to sponsor 8 candidates who were to appear in the
VYAPAM examination; and is also prosecuted for another offence of similar type of having sponsored 8 other candidates; and has the potential of influencing the witnesses and other evidence and more importantly the investigation of the large scale conspiracy is still incomplete; as also keeping in mind the past conduct of the applicant in going abroad soon after the registration of the Crime
No.12/2013 and returning back to India on

21.1.2014 only after grant of anticipatory bail on 16.1.2014, for all these reasons, for the time being, the applicant cannot be admitted to the privilege of regular bail."

7. We have heard learned counsel for the parties.

8. Main contention advanced on behalf of the appellant is that the appellant has already been in custody for about one year and there is no prospect of commencement of trial in the near future. Even investigation is not likely to be completed before March 15, 2015. There are about 516 accused and large number of witnesses and documents. Thus, the trial will take long time. In these circumstances, the appellant cannot be kept in custody for indefinite period before his guilt is established by acceptable evidence. Our attention has been invited to order dated 27th November, 2014 passed by the trial Court, recording the request of the Special Public Prosecutor for deferring the proceedings of the case till the cases of other accused against whom supplementary charge sheets were filed were committed to the Court of Session and till supplementary charge sheet was filed against several other accused persons.

In the said order, the Court directed the Investigating Officer to indicate as to against how many accused persons investigation is pending and the time frame for filing charge sheets/supplementary charge sheets. In response to the said order, the Investigating Officer, vide letter dated 25th December, 2014 filed before the trial Court, stated that 329 persons had already been arrested and 187 were yet to be arrested and efforts were being made to file the charge sheets by March 15, 2015 in compliance of the directions of this Court. Thus, the submission on behalf of the appellant is that in view of delay in trial, the appellant was entitled to bail.

9. On the other hand, learned counsel for the State opposed the prayer for grant of bail by submitting that this Court ought not to interfere with the discretion exercised by the trial Court and the High Court in declining bail to the appellant. He points out that the trial Court and the High Court have dealt with the matter having regard to all the relevant considerations, including the nature of allegations, the material available, likelihood of misuse of bail and also the impact of the crime in question on the society. He pointed out that the Courts below have found that there is a clear prima facie case showing complicity of the appellant, the offence was punishable with life sentence, the appellant was the kingpin in the conspiracy, he had the potential of influencing the witnesses, investigation was still pending and the appellant had earlier gone abroad to avoid arrest.

10. Referring to the counter affidavit filed on behalf of the State, he points out that in the excel sheet recovered from Nitin Mohindra, the appellant has been named and in the statement u/s. 164 Cr.P.C. Dr. Moolchand Hargunani disclosed that he had met the appellant who asked him to meet Pradeep Raghuvanshi for admission to PMT and he was asked to pay Rs.20 lakhs. He could not pay the said amount and his son could not get the admission. A sum of Rs.50 lakh for PMT Examination and 1.2 crores for Pre PG Examination, 2012 was received from Pradeep Raghuvanshi who was General Manager of the appellant's hospital and in charge of admission to the institute of the appellant.

12. It is well settled that at pre-conviction stage, there is presumption of innocence. The object of keeping a person in custody is to ensure his availability to face the trial and to receive the sentence that may be passed. The detention is not supposed to be punitive or preventive. Seriousness of the allegation or the availability of material in support thereof are not the only considerations for declining bail. Delay in commencement and conclusion of trial is a factor to be taken into account and the accused cannot be kept in custody for indefinite period if trial is not likely to be concluded within reasonable time. Reference may be made to decisions of this Court in Kalyan Chandra Sarkar vs. Rajesh Ranjan, (2005) 2 SCC 42 2005 Indlaw SC 24, State of U.P. vs. Amarmani Tripathi, (2005) 8 SCC 21 2005 Indlaw SC 1225, State of Kerala vs. Raneef, (2011) 1 SCC 784 2011 Indlaw SC 1 and Sanjay Chandra vs. CBI, (2012) 1 SCC 40 2011 Indlaw SC 775.

13. In Kalyan Chandra Sarkar (supra), it was observed :

"8. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a Constitutional guarantee. However, Art. 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Art. 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled to bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances

then prevailing require that such persons be released on bail, in spite of his earlier applications being rejected, the courts can do so."

16. In Sanjay Chandra 2011 Indlaw SC 775 (supra), it was observed:

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

24. In the instant case, we have already noticed that the "pointing finger of accusation" against the appellants is "the seriousness of the charge". The offences alleged are economic offences which have resulted in loss to the State exchequer. Though, they contend that there is a possibility of the appellants tampering with the witnesses, they have not placed any material in support of the allegation.

In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor: the other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Penal Code *and the* Prevention of Corruption Act*. Otherwise, if the former is the only test, we would not be balancing the Constitutional rights but rather "recalibrating the scales of justice".*

17. In the light of above settled principles of law dealing with the prayer for bail pending trial, we proceed to consider the present case. Undoubtedly, the offence alleged against the appellant has serious adverse impact on the fabric of the society. The offence is of high magnitude indicating illegal admission to large number of undeserving candidates to the medical courses by corrupt means. Apart from showing depravity of character and generation of black money, the offence has the potential of undermining the trust of the people in the integrity of medical profession itself. If undeserving candidates are admitted to medical courses by corrupt means, not only the society will be deprived of the best brains treating the patients, the patients will be faced with undeserving and corrupt persons treating them in whom they will find it difficult to repose faith. In these circumstances, when the allegations are supported by material on record and there is a potential of trial being adversely influenced by grant of bail, seriously jeopardising the interest of justice, we do not find any ground to interfere with the view taken by the trial Court and the High Court in declining bail.

18. It is certainly a matter of serious concern that the appellant has been in custody for about one year and there is no prospect of immediate trial. When a person is kept in custody to facilitate a fair trial and in the interest of the society, it is duty of the prosecution and the Court to take all possible steps to expedite the trial. Speedy trial is a right of the accused and is also in the interest of justice. We are thus, of the opinion that the prosecution and the trial Court must ensure speedy trial so that right of the accused is protected. This Court has already directed that the investigation be finally completed and final charge sheet filed on or before March 15, 2015. We have also been informed that a special prosecutor has been appointed and the matter is being tried before a Special Court. The High Court is monitoring the matter. We expect that in these circumstances, the trial will proceed day to day and its progress will be duly monitored. Material witnesses may be identified and examined at the earliest. Having regard to special features of this case, we request the High Court to take up the matter once in three months to take stock of the progress of trial and to issue such directions as may be necessary. We also direct that if the trial is not completed within one year from today for reasons not attributable to the appellant, the appellant will be entitled to apply for bail afresh to the High Court which may be considered in the light of the situation which may be then prevailing.

19. The appeal is accordingly disposed of with the above observations. We make it clear that observations in our above judgment will not be treated as expression of any opinion on merits of the case and the trial Court may decide the matter without being influenced by any such observation.
