Judicial Academy Jharkhand

For Private Circulation only

READING MATERIAL ON CRIMINAL TRIAL

Prepared by:-
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Preface

"To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft."

- Lewis Mayers

The need and urgency to revisit the law pertaining to absconding accused was felt in the light of the orders dated 18.05.2019 passed in CrMP No. 1090/2019 and dated 25.05.2019 passed in CrMP No. 1060/2019 passed by Hon'ble Mr. Justice Kailash Prasad Deo wherein His Lordship has raised serious concern over the constantly increasing number of cases before the Hon'ble Court for quashing of the orders passed by the Trial Courts under Sections 82,83 and 299 of the Cr.P.C. These challenges are mainly on the ground of non-compliance with the mandatory procedural requirements for issuance of processes under Sections 82 and 83 of the CrPC. As we are well aware that when a statute lays down a particular procedure it is to be complied with in letter and spirit. Non-compliance or failure to observe the procedure in a particular circumstance may entail legal consequences depending on the nature of infringement. The test that is often applied in such situation is whether the said non-observance has caused prejudice to the accused. Chapter XXXV from Ss 460 to 466 deals with the effect of the irregularities of proceeding during investigation, inquiry or trial. The law has been further evolved by the Hon'ble Courts as to when

such irregularities amount to cause prejudice to the accused and thereby vitiate the proceeding. The problem becomes acute, particularly when in a very large number of cases adjudication suffers and is delayed at different stages due to the abscondance of the accused persons. There is a definite procedure laid down in the code to meet such contingency, but if that is not followed and orders under Sections 82, 83 or 299 are passed mechanically, such orders are challenged and are liable to be set aside in revision or in Cr.M.P proceedings before the Hon'ble Court. The net result is that such orders not only clog the Justice Delivery System to delay adjudication but also consume valuable court hours. Faced with this situation, where despite a long line of Judicial precedents on the point, the processes under these provisions have been issued mechanically without following the set norm, the Hon'ble Court has been constrained to express anguish and issue directions to prepare a training module related to the aforementioned provisions of law. The Order passed by the Hon'ble High Court on 25.05.2019 itself , contains inter alia the procedural guidelines to be followed in the issuance of processes and proclamations under Chapter VI of the CrPC, in concise and precise terms. It is against this background that reading material has been compiled to revisit the basic provisions concerning it.

INTRODUCTION

There are consecrated principles of criminal law within the four corners of which the criminal adjudication follows. One of the condition precedent to a trial is securing the attendance of the accused, witnesses or other necessary persons before the Court and also the production of the documents necessary for the trial. Appearance is required not only of the accused but also of the witnesses. The Criminal Procedure Code prescribes different processes to compel the attendance of such persons – Summons (Section 61-69); Warrant for Arrest (Section 70-81); Proclamation under section 82 and Attachment under Section 83.

In all Summons cases, a summons should be issued in the first instance [Section 204(1)(a)]. [Section 204(1)(b)] In a Warrant case, a warrant may be issued; but even in such a case, the Court has the power to issue summons at the first instance, if the Court thinks fit in terms of Section 87 of the Cr.P.C. The Court has an option to issue warrant in terms of Section 87, but where a summon has been issued, Section 87(b) mandates that warrant can be issued only *if at such time he fails to appear and the summon is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.* Thus, wherever summons are issued the warrant can be issued only after due service of summon and subsequent non-appearance without any reasonable excuse. A Magistrate ought not , after the issue of a summons, order the issue a warrant unless he placed on record his reasons for considering that the accused has been duly served and that in spite of such service he had failed to appear without a reasonable cause.

A warrant may also be issued for the arrest of a person who fails to appear in Court (Section 89), upon the failure to comply with the order related to the "bond for appearance" passed under Section 88. The Court may also issue a summons to any witness on the application of the accused or the prosecution and in case of avoidance, a warrant may be issued, under Section 87 in this case also. In any case where a warrant cannot be executed owing to the person having absconded or concealed himself, a proclamation under Section 82 can be issued and his property can be attached under Section 83 as a means of compelling his attendance.

The Criminal Procedure Code (*hereinafter referred to as "the CrPC"*) is the part of procedural law and as per the Hon'ble Supreme Court, there is major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are handmaiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the court to expand or enlarge the meanings of such provisions in order to elicit the truth and do justice to the parties.[1] However, it is also to be remembered that

1 *Mahender Chawla and Ors.v. Union of India, 2018 SCC OnLine SC 2679*

procedural laws cannot be made so flexible as to make them redundant. The procedures laid down in the CrPC have been made with a particular purpose and in accordance with the principles laid down in the Constitution of India. Some flexibilities and in some cases even slight irregularities in the procedures are not fatal, as evident from Sections 460, 462, 463, 464, 465 and 466 of the CrPC.

The process to compel the appearance of persons before the Court in a trial under Chapter VI of the CrPC affects the personal liberty of the person against whom the process under the Chapter has been issued. Therefore, under such circumstances, it is mandatory for the Courts to follow the principle of procedural due process and strictly adhere to the procedures laid down in the provisions contained in the Chapter the non-compliance of which is bad in the eyes of law and the irregularity therein is not curable under the Code, which is evident from catena of judgments passed by the Hon'ble Jharkhand High Court especially in cases where proclamation under Section 82 and attachment under Section 83 as ordered by the Trial Courts were set aside on technical grounds. Such irregularities of same nature in spite of the regular directions of the Hon'ble High Court, not only creates unnecessary litigations before the Hon'ble High Court thereby wasting the valuable time of the Hon'ble Court but also causes undue avoidable delay in the trials conducted in the Lower Courts.

In this regard, it is pertinent to quote the **observations made by the Hon'ble Court in the Order passed in CrMP No. 1060/2019 at Page No. 20** thereof –

> "*1. It appears that there is utter confusion in the learned trial court with regard to compliance of process to compel appearance of the accused as envisaged under Chapter VI of the Code of Criminal Procedure, 1973. A large number of quashing applications under Section 482 Cr.P.C. are being filed before this court, challenging the issuance of non-bailable warrant of arrest, process of proclamation of person absconding under Section 82 Cr.P.C. and attachment of the property of the person absconding under Section 83 Cr.P.C.Further it creates a problem that records are being consigned to record rooms and are also being split-up under Section 299 Cr.P.C. by showing the accused permanent absconder.*"

WARRANT

TYPES OF WARRANT

Though the CrPC does not specifically categorise warrants into different types, they are of two kinds – Bailable and Non-bailable. Section 71 deals with bailable warrants. As per Sec. 71 (1), any court issuing a warrant for the arrest of any person may it its discretion direct by an

endorsement on the warrant that if such person executes a bond with sufficient sureties for his attendance before the court at a specified time and thereafter until otherwise directed by the court, the officer to whom the warrant is directed shall take such security and shall release such person from custody. The endorsement shall state the number of sureties, amount in which they and the person for whose arrest warrant issued and to be respectively bound, the time at which he attend before court. Whenever security is taken under this section, the officer who whom warrant is directed shall forward the bond to the court.

All other warrants which do not contain the above endorsement, are non-bailable warrants.

ISSUANCE OF WARRANT

According to the Hon'ble Supreme Court, in ***Inder Mohan Goswami and Another v. State of Uttaranchal and Others***[2], the issuance of non- bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants. But, just as liberty is precious for an individual so is the interest of the society in maintaining law and order.

Both are extremely important for the survival of a civilized society. Sometimes in the larger interest of the public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.

In the Judgment, the Hon'ble Court laid down the procedure as to when non-bailable warrants should be issued and thereby held as under :-

"53. Non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when:

- *it is reasonable to believe that the person will not voluntarily appear in court;or*
- *the police authorities are unable to find the person to serve him with a summon;or*
- *it is considered that the person could harm someone if not placed into custody immediately.*

54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be

2 *(2007) 12 SCC 1*

issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive.

55. *In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the court's proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.*

56. *The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straitjacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided.*

57. *The court should try to maintain proper balance between individual liberty and the interest of the public and the State while issuing non-bailable warrant.".(emphasis supplied)*

Reiterating the principles laid down in **Inder Goswami** case (supra),the Hon'ble Apex Court in ***Raghuvansh Dewanchand Bhasin v. State of Maharashtra***[3], made the following observations:-

"9. It needs little emphasis that since the execution of a non-bailable warrant directly involves curtailment of liberty of a person, warrant of arrest cannot be issued mechanically, but only after recording satisfaction that in the facts and circumstances of the case, it is warranted. The Courts have to be extra-cautious and careful while directing issue of non-bailable warrant, else a wrongful detention would amount to denial of constitutional mandate envisaged in Article 21of the Constitution of India. At the same time, there is no gainsaying that the welfare of an individual must yield to that of the community. Therefore, in order to maintain rule of law and to keep the society in functional harmony, it is necessary to strike a balance

3 *(2012) 9 SCC 791*

between an individual's rights, liberties and privileges on the one hand, and the State on the other. Indeed, it is a complex exercise. As Justice Cardozo puts it "on the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice." Be that as it may, it is for the court, which is clothed with the discretion to determine whether the presence of an accused can be secured by a bailable or non-bailable warrant, to strike the balance between the need of law enforcement on the one hand and the protection of the citizen from highhandedness at the hands of the law enforcement agencies on the other. The power and jurisdiction of the court to issue appropriate warrant against an accused on his failure to attend the court on the date of hearing of the matter cannot be disputed. Nevertheless, such power has to be exercised judiciously and not arbitrarily, having regard, inter-alia, to the nature and seriousness of the offence involved; the past conduct of the accused; his age and the possibility of his absconding."

The Hon'ble Court also discussed about the procedural flexibility which is available with the Court under its discretion and held that it is for the court concerned to assess the situation and exercise discretion judiciously, dispassionately and without prejudice. However, the Hon'ble Court also laid down the following guidelines in relation to the issuance and execution of a warrant of arrest:-

"*23. However, before parting with the judgment, we feel that in order to prevent such a paradoxical situation, we are faced with in the instant case, and to check or obviate the possibility of misuse of an arrest warrant, in addition to the statutory and constitutional requirements to which reference has been made above, it would be appropriate to* ***issue the following guidelines to be adopted in all cases*** *where non-bailable warrants are issued by the Courts :-*

(a) All the High Court shall ensure that the Subordinate Courts use printed and machine numbered Form No.2 for issuing warrant of arrest and each such form is duly accounted for;

(b) Before authenticating, the court must ensure that complete particulars of the case are mentioned on the warrant;

(c) The presiding Judge of the court (or responsible officer specially authorized for the purpose in case of High Courts) issuing the warrant should put his full and legible signatures on the process, also ensuring that Court seal bearing complete particulars of the Court is prominently endorsed thereon;

(d) The Court must ensure that warrant is directed to a particular police officer (or authority) and, unless intended to be open-ended, it must be returnable whether executed or unexecuted, on or before the date specified therein;

(e) Every Court must maintain a register (in the format given below), in which each warrant of arrest issued must be entered chronologically and the serial number of such entry reflected on the top right hand of theprocess;

(f) No warrant of arrest shall be issued without being entered in the register mentioned above and the concerned court shall periodically check/monitor the same to confirm that every such process is always returned to the court with due report and placed on the record of the concernedcase;

A register similar to the one in clause (e) supra shall be maintained at the concerned police station. The Station House Officer of the concerned Police Station shall ensure that each warrant of arrest issued by the Court, when received is duly entered in the said register and is formally entrusted to a responsible officer for execution;

(g) Ordinarily, the Courts should not give a long time for return or execution of warrants, as experience has shown that warrants are prone to misuse if they remain in control of executing agencies for long;

(h) On the date fixed for the return of the warrant, the Court must insist upon a compliance report on the action taken thereon by the Station House Officer of the concerned Police Station or the Officer In-charge of the concerned agency;

(i) The report on such warrants must be clear, cogent and legible and duly forwarded by a superior police officer, so as to facilitate fixing of responsibility in case of misuse;

(j) In the event of warrant for execution beyond jurisdiction of the Court issuing it, procedure laid down in Sections 78 and79of the Code must be strictly and scrupulously followed; and

(k) In the event of cancellation of the arrest warrant by the Court, the order canceling warrant shall be recorded in the case file and the register maintained. A copy thereof shall be sent to the concerned authority, requiring the process to be returned unexecuted forthwith. The date of receipt of the unexecuted warrant will be entered in the aforesaid registers. A copy of such order shall

also be supplied to the accused.".".

(emphasis supplied)

After the aforementioned discussion it is pertinent to discuss the provisions laid down under **Section 73** of the CrPC, which lays down the following:-

"Warrant may be directed, to any person -

(1) The Chief Judicial Magistrate or a Magistrate of the first class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non- bailable, offence and is evading arrest.

(2) Such person shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, any land or other property under his charge.

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section71."

From reading the provisions of Section 73, it would appear that warrant of arrest can be issued under the Code in three circumstances: - *firstly*, for arrest of escaped convict; *secondly*, for arrest of proclaimed offender and *thirdly*, for arrest of any person who is accused of non-bailable offence and is evading arrest. In the third circumstance, a warrant can be issued even pending investigation[4].

POINTS TO REMEMBER WHILE PASSING AN ORDER FOR THE ISSUANCE OF A NON- BAILABLE WARRANT OF ARREST

(i) The law where a summon or a warrant of arrest is to be issued against an accused person is emphatically and unequivocally been laid down in section 204 Cr. P.C. which applies both to complaint cases and the cases where cognizance is taken on the basis of a police report. Section 204 of the Cr.P.C. reads as hereunder :

204. Issue of process.

(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

4 *Randhir Sharma v. State of Bihar, 2009 CrLJ 3889 (Pat)*

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.

From the above it is manifest that in a warrant triable case the court is empowered to issue a warrant without recording any reason for it. However, from the very expression used under section 204 (i)(b) it is manifest that the court has a discretion to issue a summon for causing the accused to be brought or to appear at a certain time before such Magistrate or other Magistrate having jurisdiction.

UP Pollution Control Board Vs. Mohan Meakins Ltd. 2000 (2) Supreme 520

Under section 204(1) Cr.P.C. a Magistrate has to form an opinion that there was sufficient ground for proceeding. Section 204 of the code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance there is sufficient ground for proceeding then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is no where mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a prerequisite for deciding the validity of the summons issued.

The view has been followed in ***Nupur Talwar Vs. CBI 2012 (11) SCC 465*** wherein it was observed by the Lordships in para 29--

"**Therefore, even though the Magistrate was not obliged to record reasons**, having passed a speaking order while issuing process, the Magistrate adopted the more reasonable course, though the same was more ponderous, cumbersome and time consuming."

The question may be raised whether it is mandatory to comply with the conditions mentioned under section 73 Cr.P.C. before a warrant can be issued? From the head note of section 73 it is evident that this section deals with the person to whom the warrant may be directed and it no where limit the power the Magistrate to issue warrant in warrant triable cases as laid down under section 204 Cr.P.C. Section 73 states that the Chief Judicial Magistrate or a Magistrate of 1st Class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non-bailable offence and is evading arrest. It is only an enabling provision with regard to issuance of warrant and it in no way effects the power of the Magistrate in warrant triable cases.

Further, in cases where summons is issued in a summons triable case or in a warrrant triable cases section 87 Cr.P.C. requires that warrant of arrest in such cases may be issued by the Magistrate after recording its reason in writing in two of the conditions given hereinbelow :-

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons ; or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

What is interesting to note that whereas section 87 mandates recording of reasons in writing as mentioned above. Section 204 (i)(b) does not mention that reason is to be recorded before issuance of warrant. Therefore, any insistance of recording of reason of issuance of warrant in warrant triable cases against the accused is not justified.

Ram Harsh Das v. State Of Bihar, 1998 1 PLJR 502

From a reading of Sec. 204, together with the object and reasons, it is clear that a summons has to be issued in all summons-cases and warranted in all warrant-cases, except where the Magistrate orders to issue summons as provided under Sec. 204(1)(b) of the Code. In other

words, issuance of warrant in a warrant-case is a rule and issuance of summons is exception, which is to be made by the Magistrate if there is reason or ground to do so.

(ii) The provisions of Section 73, CrPC and the guidelines issued by the Hon'ble Apex Court in *Raghuvansh Dewanchand Bhasin case* (supra) must be adhered to.

(iii) It is also pertinent to mention here that vide order dated 25.05.2019 passed in Cr.M.P. No. 1060/2019 (***Shiv Kumar Thakur v. The State of Jharkhand***) along with 16 other analogous cases, Hon'ble court laid down the following guidelines related to the order for the issuance of warrant of arrest :-

"4. After due service of summon or report, showing reason and after recording satisfaction by the learned trial court, if the accused person did not appear against whom summon has been issued and served, the warrant of arrest may be issued as per the cases. Section 70 of the Cr.P.C. deals with form of warrant of arrest and duration. Sub-section (1) of Section 70 provides that every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court and shall bear the seal of the Court. Sub-section (2) of Section 70 says every such warrant shall remain in force until it is canceled by the Court which issued it, or until it is executed.

Where an accused is released on bail, pending investigation, he cannot be directed to appear before the court prior to filing of charge-sheet, issuance of warrant of arrest was held illegal. A Judicial Magistrate under this section can convert warrant of arrest into a bailable warrant.

5. The word "person" in section 70 can be attracted to the accused, as well as the witnesses.

6. Under sub-section-2 of Section 70, the Magistrate has all the powers to consider the orders with regard to issuance of non-bailable warrants but that should ordinarily be issued as a last resort. Before issuing a non- bailable warrant, the Magistrate may issue summons, then a bailable warrant and only if the presence of the accused is not secured, he may take resort to the provisions of issuance of non-bailable warrant."

(emphasis supplied)

PROCLAMATION UNDER SECTION 82

SECTION 82

If Any Court **has reason to believe (whether after taking evidence or not)** that any person against whom a warrant has been issued by it **has absconded or is concealing himself** so that such warrant cannot be executed, **such Court may publish a written proclamation** requiring him to appear at a specific place and at a specified time not less than thirty days from the date of publishing such proclamation.

The proclamation shall be published as follows— (i) a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides; b) it shall be affixed to some conspicuous part of the house or home-stead in which such person ordinarily resides or to some conspicuous place of such town or village; c) a copy thereof shall be affixed to some conspicuous part of the Court house; (ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of Sub-Section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on suchday.

Where a proclamation published under Sub-Section (1) is in respect of a person accused of an offence punishable under section 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449,459 or 460 of the Indian Penal Code (45 of 1860) and such person fails to appear at the specified place and time required by the proclamation, the Court may, **after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.**

The provisions of Sub-Sections (2) and (3) shall apply to a declaration made by the Court under Sub-Section (4) as they apply to the proclamation published under Sub-Section (1).

As per the Hon'ble Jharkhand High Court in, ***Mahendra Kumar Ruiya v. State of Jharkhand***[5], Section 82 of the CrPC has mainly three parts. As per the *first* part of the Section, it is well settled that the issuance of warrant is condition precedent for the issuance of process of proclamation under Section 82 of the Code. The Court must be satisfied that it has ***reason to believe*** that the accused has been absconding or concealing himself so that such warrant

5 *2013 (3) JLJR 407 (Jhar).*

cannot be executed. The *second* part suggests as to how proclamation has to be given effect to or published to make the accused acquainted that his appearance is required in connection with a particular case before a particular court. The *third* part as indicated under sub-section (4) of Section 82 gives more discretion to make inquiry against an accused who has committed offence indicated under sub-section (4)[6] and after recording reasons, the Court can declare an accused of such offence as proclaimed offender.

The Section empowers the Court to issue proclamation against a person when a warrant against him is returned unexecuted for evasion, concealment or abscondance. The proclamation cannot be issued without first issuing a warrant. The Court must await the return of the warrant. If there is no authority to issue warrant, the order of proclamation is necessarily illegal. As the Section entails penal consequence and affects the personal liberty, it must be strictly construed. Proclamation and attachment affects certain valuable rights of a person although he might be facing a criminal case as an accused and the same is not to be interfered with in a casual and mechanical manner, but is to be affected by strict adherence to the provision of law.[7]

The *sine qua-non* for the issuance of a proclamation under Section 82 is the prior issuance of warrant of arrest by the Court and subsequent subjective satisfaction of the Court that the person against whom the warrant had been issued, is concealing himself or is absconding so that the warrant cannot be executed against him. According to the Hon'ble Jharkhand High Court, in ***Mahendra Kumar Ruiya v. The State of Jharkhand and Another***[8],

> *"..... Sub-section (1) empowers the Court to issue written proclamation with certain direction to appear at a specified place and a specified time against a person who has either absconded or concealing himself so that the warrant issued against him could not be executed. Sub-section (2) of Section82 of the Code indicates the manner in which a proclamation shall be published or executed. In this connection compliance of Sub- Section (3) of Section 82 of the Code is very much important. This sub-section speaks about the subjective satisfaction of the Court and such subjective satisfaction of the Court must be reduced into writing to the effect that the proclamation was duly published on a specific date in the manner specified in clause (i) of sub-section (2) and that shall be the conclusive evidence that requirement of this section had been complied with and the proclamation was duly published. Such statement recorded in writing shall be the consequence for the next step for issuance of process under Section 83 of the Cr.P.C., therefore, before proceeding*

6 *See, Sanjay Bhandari v. State (NCT of Delhi), 2018 SCC OnLine Del 10203 where the Hon'ble Delhi High Court has differentiated between a "proclaimed person" and a "proclaimed offender".*

7 *Md. Nazrul Islam v. State of Assam, 2008 CrLJ 3374 (Gau). The principle that the procedure under the CrPC which affects the valuable rights of a person such as his right to personal liberty must follow the procedural due process, has also been enunciated by the Apex Court in Raghuvansh Dewanchand Bhasin(supra)and in Inder Mohan Goswami case (supra).*

8 *2013 (3) JLJR 407 (Jhar).*

with provision contained under Section 83 of the Cr.P.C. the Court issuing a proclamation under Section 82 must record a reason in writing that even after issuance of proclamation the accused did not comply the direction and remained absconding or concealing himself or evading his appearance. The primary meaning of the word abscond is to hide and when a person is hiding from the place of his residence he is said to be absconder. A person may hide even in his place of residence or away from it and in either case he would be absconding when he hides himself. In that view of the matter, I feel that strict compliance of sub-section (3) of Section 82Cr.P.C. is very much required for declaring any accused as absconder. I would further like to explain that Section 82Cr.P.C. has mainly three parts. As per first part of the Section it is well settled that issuance of warrant is condition precedent for issuance of process of proclamation under Section 82 of the Code. The Court must be satisfied that it has reason to believe that the accused has been absconding or concealing himself so that such warrant cannot be executed. Second part suggest as to how proclamation has to be given effect or published to make the accused acquaint that his appearance is required in connection with particular case before a particular Court. The third part as indicated under sub- section (4) of Section 82 of the Cr.P.C. gives more discretion to make inquiry against an accused who has committed offence indicated under sub-section (4). After recording reasons the Court can declare an accused of such offence as proclaimed offender. To make the view more clear, I would like to refer Section 174 (A) I.P.C. under which disobedience of proclamation has been made punishable, which reads asfollows:-

> *" 174-A. Non-appearance in response to a proclamation under Section 82 of Act 2 of 1974.- Whoever fails to appear at the specified place and the specified time as required by a proclamation published under sub-section (1) of Section 82 of the Code of Criminal Procedure, 1973 (2 of 1974) shall be punished with imprisonment for a term which may extend to three years or with fine or with both, and where a declaration has been made under sub-section (4) of that section pronouncing him as a proclaimed offender, he shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine."*

12. *This inserted Section 174A of the I.P.C. has two parts 'the first part of the Section relates for the punishment against a person against whom proclamation has been issued and published under sub-section (1) & (2) of Section 82 of the Code and the punishment is up-to three years or with fine or with both whereas 'the second part of the offence relates to a declaration made under sub-section (4) of Section 82 under*

which a person has been pronounced as proclaimed offender and the punishment is severe than the first part which may extend to 7 years and shall also be liable to fine."

Reiterating the principles laid down by the Hon'ble Apex Court in ***Lavesh v. State (NCT of Delhi)***[9], it was also held by the Hon'ble Court in this case that if the proclamation under Section 82 has been issued against a person, such person cannot move the Court under Section 438 of the CrPC for the grant of anticipatory bail.

"THE COURT HAS REASON TO BELIEVE" -MEANING

Section 26 of the Indian Penal Code defines the meaning of "reason to believe". The words "reason to believe" contemplate ***"subjective satisfaction"*** of the Court on the basis of the materials before the Magistrate acting under Section 82.[10] According to the provisions of the Section which has been held by the Hon'ble Jharkhand High Court, through several cases, to be mandatory, a proclamation can be issued only when the Court is clearly *satisfied by examining the serving officer* ***or in any other manner*** that a warrant has already been issued and that the accused is absconding or concealing and warrant cannot be executed for that reason, whatever be the intention. <u>There should be a judicial finding as to the abscondance or concealment on sufficient materials.</u> Where materials on record show that the accused having knowledge of the court proceedings avoids process of the Court, he can be declared as proclaimed offender under Section 82 of the CrPC.[11] An accused will be declared absconder when the court is satisfied that the accused had left his permanent residence or he is avoiding service or there is no chance of his arrest in near future. As held by the Hon'ble Jharkhand High Court in the case of *Mahendra Kumar Ruiya* (supra) and in other cases that non-submission of execution/report in the Court is not the only sole criterion to adjudge that the person against whom warrant has been issued is concealing himself or absconding so that the warrant may not be executed. The court, in such cases, may rely on other materials available on record or may take evidences which may lead the Court to reasonably believe that the person is absconding or concealing himself. But, under no circumstances, an order under Section 82 must be passed mechanically. The order must reflect that the Court has applied its judicial mind and only after its ***subjective satisfaction,*** the Court has reason to believe that the person has absconded and a proclamation under Section 82 is essential.

9 *(2012) 8 SCC 730.*

10 *Rohit Kumar v. State (NCT of Delhi), 2008 CrLJ 3561 (Del)*

11 *Nachi Sports v. Thiruvengadam and Sons, 2008 CrLJ (NOC) 278 (Mad).*

POINTS TO REMEMBER BEFORE PASSING AN ORDER UNDER SECTION 82, CR.P.C.

I. The proclamation under Section 82 can be passed only if non- bailable warrant had been issued previously and the warrant could not be executed because the person against whom it had been issued is either concealing himself or is absconding so that the warrant may not be executed. Any other reason for the failure of the execution of the warrant does not call for an order under this Section.

II. The fact that the person against whom the warrant had been issued is absconding or concealing himself to avoid the execution of warrant is the sine qua-non for the issuance of proclamation under Section 82. Since the ascertainment of this fact is essential for an order under Section 82, **the Court must, through the execution report or *otherwise*, have *reason to believe* that the person is absconding.** The only discretion available with the Court at this stage is that it can either rely on the materials available on record, or on the execution report or can call for evidence or examine the Investigating Officer in relation to the execution of the warrant. Apart from this flexibility and discretion, the Court is otherwise bound by the mandates of the provisions of Section 82 and, therefore, the Court must not only have *reason to believe* that the person against whom warrant has been issued is absconding or concealing himself, but that satisfaction of the Court shall in all cases be reflected in the order, i.e. the order must be a speaking order where it is shown that the Court had, in fact, reason to believe that the person is absconding a proclamation under Section 82 is essential for the trial. Mechanical orders as the one hereunder, must in all cases, be avoided as the same has been held to be in contravention to the provisions of Section 82 and the established principles of law :-

''अभियुक्तगण अनुपस्थित हैं। अभियुक्तों पर निर्गत N.B.W. का तामिला अप्राप्त है। कार्यालय अभियुक्तों के विरूद्ध धारा 82 सीआरपीसी निर्गत करें।''

III. The Court can call for the execution report of the warrant from the Investigating Officer or the Agency and if it is not submitted within the time given by the Court, it can issue a reminder for the same to the concerned Police Officer. Even after the reminder, if the concerned Police Officer fails to submit the execution report, the Court can take recourse of Section 175[12] of the Indian Penal Code against the concerned Police Officer. The failure to comply with the production of execution report (which is a document)

12 *Section 175, IPC – "Omission to produce [document or electronic record] to public servant by person legally bound to produce it – Whoever, being legally bound to produce or deliver up any [document or electronic record] to any public servant, assuch, intentionally omits sotoproduce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;Or, if the [document or electronic record] is to be produced or delivered up to a court of justice, with simple imprisonment for a term which may extend to one thousand rupees, or with both."*

when called for by the Presiding Officer of a Court falls within the ambit of Section 175 IPC. Such actions will expedite the process and will not only take care of the delays in the processes but will also minimize the error committed by the Courts.

IV. Once a proclamation under Section 82 has been issued, the person against whom the order has been passed is not entitled for anticipatory bail. Apart from this, the proclamation also affects the rights of the person against whom the order has been passed under Section 82 and, therefore, in accordance with the judgment of the Hon'ble Supreme Court in *Raghuvansh Dewanchand Bhasin* (supra), the Court shall strictly adhere to the mandates of the provisions of Section 82 which must necessarily be reflected in the order of the Court.

V. If upon calling for service report, the Investigating Officer or the concerned Police officer does not produce the execution report to the court concerned, the court may in cases of gross negligence initiate the proceedings under section 175 I.P.C. by following the procedure mentioned under section 340 Cr.P.C. in appropriate cases with due care and caution[13].

VI. The Court must also take recourse of Section 174A of the Indian Penal Code which is related to the prosecution against the absconding accused persons and for that purpose, registering of F.I.R.is not mandatory as the same can be done through a complaint. However, this too must be done only after recording subjective satisfaction of the Court through a speaking order declaring the person an absconder as observed in ***A. Krishna Reddy v. CBI***.[14] It may be further added that under Section 82(3) Cr.P.C a statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a special day, in the manner specified in clause (i) of Sub-section (2) , shall be conclusive evidence that the requirement of this section has been complied with, and that the proclamation was published on such day.

VII. The problem as observed by the Hon'ble Jharkhand High Court in the order dated 25.05.2019 passed in ***Shiv Kumar Thakur v. The State of Jharkhand***, Cr.M.P. No 1060 of 2019, is that after proclamation, no compliance report is submitted for more than 30 days by the Police Officer and the court has reason to believe that the person against whom proclamation under section 82 has been issued has been served or complied with and as such the entire functioning of the court depends in the hands of the police officer/executing agency. The solution for the same, as mentioned in the order, is to be found under Section 175 of the Indian Penal Code, which is to be invoked but with care

13 *Shiv Kumar Thakur and Ors v.. St. of Jharkhand, Cr.M.P No. 1060 of 2019*

14 *2017 SCC OnLine Del 7266*

and caution. If no response or service of summon is brought on record by the executing agency, i.e., the police or by the Investigating Agency, the court, after 30 days, can issue a reminder directing the concerned officer-in-charge of a police station or Investigating Officer to produce document with respect to the compliance of process under Section 82 CrPC, failing which the Court may invoke the provisions as contained in Section 175 of the IPC after resorting to the procedure laid down under Section 340 of the CrPC. This process will expedite the things and minimize the chances of error by the Learned Trial Court and also minimize the chances of persons absconding or evading the process of law.

VIII. Apart from recording the subjective (*case to case basis*) satisfaction of the Court, *vis-à-vis* the abscondance of the person against whom warrant has been issued, the Court should also ensure that the proclamation under Section 82 is executed in the manner provided for under Sections 82 (2) and 82 (3), and the same should also be reflected in the order sheet.

IX. The person against whom a proclamation under Section 82 has been issued, can be declared a "proclaimed offender" only if he has been accused of an offence falling within those enumerated in Section 82 (4). Therefore, before declaring a person, against whom the order under Section 82 has been issued, as a "proclaimed offender", the requirements of Section 82(4) must be complied with.

X. It is also pertinent to mention here the guidelines laid down by the Hon'ble Jharkhand High Court in the order dated 25.05.2019 passed in Cr.M.P. No. 1060/2019 in relation to the issuance of proclamation under Section 82, which are as follows:-

"6. High Court of Madras in the case of ***M/s Nachi Exports rep. by its M/s T.K. Thiruvengandam and Sons and Anr; 2008 (1) MWN (Cr.)*** *Para-4 to 7 as under :*

"4. The Criminal Procedure Code by means of various provisions, provided ample powers to the authorities concerned to execute a warrant. If an NBW remais unexecuted, the Code comes to the rescue of the aggrieved person with two remedies, one for issuing proclamation under section 82 and the second, attachment or sale of property under section 83.

5. The sine qua non for initiation of action under section 82, Cr.P.C. is prior issuance of warrant of arrest by the Court and there must be a report before the Magistrate concerned, that the person against whome the warrant was issued by him had absconded or had been concealing himself so that the warrant could be issued, the essential requirement of which is discernible from the phraseology

"reason to believe", which suggests that the Metropolitan Magistrate must be subjectively satisfied with the report of the authority, who is burdened with the duty of executing the NBW, then, he may proceed to initiate action under this provision. For the said purpose, the Magistrate should be satisfied that the accused was well aware of the NBW of arrest, issued against him, and also regarding the efforts taken by the officer concerned for its execution, and that obviously the accused was evading arrest, by adopting foul play or tactful means, Once the Magistrate is satisfied with the above circumstances, there could be no legal obstacle for him to invoke the procedure under Section 82.

6. *The word "absconded" is not to be understood as implying neccessarily that a person leaves the place in which he resides. Its etymological and its ordinary sense is to hide oneself; and it matter not whether a person departs from a place or remains in it, if he conceals himself; nor does the term apply only to the commencement of the concealment.*

7. *The Magistrate should have materials before him to infer that the accused i wantonly avoiding arrest, knowing full well that the warrant is executable against him. It is the duty cast on the Magistrate to record his satisfaction also, while dealing with under section 82, as to the knowledge on the part of the accused and his evasive attitude. However, mere issuance of a notice or summons will not fulfil the requirements of this Section."*

warrant, bailable or non-bailable are not executed the only option remains with the criminal court is issuancc of proclamation but the court should be satisfied before issuance of proclamation for person absconding by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such court may publish a written proclamation requiring him to appear at a specific place and specific time not less than 30 days from the date of publishing such proclamation.

7. *It goes without saying that such satisfaction of the court is on the basis of requisition/ application filed by the investigating officer or police, who has been authorised to execute the warrant, as such, such requisition must contain the reason for praying proclamation for person absconding, those reason must explain that accused after having knowledge or concealing himself, as such, that warrant cannot be executed, on the basis of such reason mentioned in the requisition/application, the court must*

record the same in its ordered and after recording reasons the Court ought to have recorded its satisfaction for issuance of proclamation under section 82 Cr.P.C.

Thus, both the ingredients must appear in the order sheet regarding reason and satisfaction by the Court.

8. *While issuing the process under section 82 Cr.P.C, the court concerned must satisfy with the mandate of law while issuing such process for proclamation of person absconding. Section 82 reads as follows:*

> *"82. Proclamation for person absconding-(1) If any Court has reason to believe (whether after taking evidenee or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation."*

But before issuance of proclamation against a person absconding the requisition/ application of the investigating Officer must contain the reasons that on what basis the investigating officer has prayed for issuancc of proclamation under Section 82 Cr.P.C. The application must contain the detailed process exhausted against the accused from the stage of issuance of summon, its method of service as well as satisfaction of the court, issuance of warrant-bailable and its method of service, satisfaction of court, issuance of warrant-non-bailable, its method of service, satisfaction of court and after seeing the reasoning of the prosecution/investigating officer in the requisition/ application the court concerned will record the same in the order-sheet and thereafter record his satisfaction for issuance of the same.

9. *It appears from perusal of a large number of orders passed by several criminal courts and it is observed that cryptic orders are being passed or the reasoning has not been taken note of in the learned order-sheet nor the satisfactions have been recorded by the learned court below while issuing the process under Section 82 Cr.P.C. and the orders appear to be passed in a mechanical manner.*

It may be because of the reason of expediting the trial but it should be kept in mind that court cannot convict a person except in accordance with law and violation of the procedural law may further delay the trial because of setting aside of any order by the appellate or revisional court, as such it is duty of the court to consider all these matters when any order infringing right of a person is passed. 'justice hurried is justice burried' and as such court below should be very circumvent while passing

such order minimizing the interference by the appellate or revisional court, in their order so that trial should move smoothly to a logical conclusion and in a way saving, the time of the trial. After issuance of the proclamation 30 days time is mandatory but in certain cases the order under Section 83 Cr.P.C. can be passed simultaneously but those are the exceptional circumstances, where necessary requirement of law is invoked by the investigating agency for urgent and emergent situation and to be supported by adequate material in this regard. The court concerned, while issuance of process under sections 82 and 83 Cr.P.C. simultaneously should be cautions and careful about the requisition filed by the investigating officer, the contents regarding absconding of an accused as explained above and the fact that any further delay will give time to accused to remove the property and thereafter the accused will abscond and his apprehension and bringing him to the law will be a difficult task for the prosecution. If such situations are there mentioned in the requisition filed by the investigating officer, then after recording the reasons and satisfaction by the court, the same can also be issued but normally after process under Section 82 Cr.P.C. the proclamation for person absconding, 30 days time as mentioned in the section is to be followed and after service of the same, as stated above or by serving upon the close relative, affixing the same on the house, serving copy of the same to the employer, which must be mentioned in the requisition of the investigating officer, then only process under Section 83 Cr.P.C. can be issued for attachment of the property of a person absconding. It is observed that a person has been found to be absconder but even then court feels helpless in procuring his appearance.

10. *The court of law is not toothless, there is provision under Section 174 A IPC with regard to prosecution against such absconding accused persons. Here again, it is made clear to the court concerned, that while declaring an accused proclaimed absconder as envisaged under Section 82 Cr.RC. the order must be reasoned, recording the satisfaction of the court and while issuing the process under Section 82 Cr.P.C. for proclamation of a person absconding. The court can also initiate process after issuance of proclamation as there is a provision under section 174 (A) of the Indian Penal Code, which provides punishment in case of non-appearance in response to the proclamation under section 82 Cr.P.C. The situation may be, that after proclamation, no compliance report is submitted for more than 30 days by the Police Officer, court has no reason to believe that the person against whom proclamation of person absconding under section 82 Cr.P.C. has been issued has been served or complied and as such, the entire functioning of the court depends in the hands of the police officer/executing agency. Law has taken care of such situation under section 175 of the IPC, which is to be invoked but with care and caution. If*

no response or service of summon is brought on record by the executing agency i.e. police or by the Investigating agency, the court after 30 days can issue a reminder directing the concerned officer-in-charge of a police station or Investigating Officer to produce document with respect to compliance of process under section 82 Cr.P.C. and on failure to do so, court may invoke the provisions as contained under section 175 IPC which reads as follows:-

"175. Omission to produce [document or electronic record] to public servant by person legally bound to produce it.- Whoever, being legally bound to produce or deliver up any [document or electronic record] to any public servant, as such, intentionally omits so to produce or deliver, up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the [document or electronic record] is to be produced or delivered up to a court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

The provisions of Section 175 IPC. has been tested in the case of ***Arun Paswan, SI vs. State of Bihar and Others; (2004) 5 SCC 53*** *where it has been taken note of section 345 procedure in certain cases of contempt, para-16 and 17 are profitably quoted hereunder:*

"16. To answer this question, it will be relevant to make a quick survey of Section 345 of the Code of Criminal Procedure, 1973 which corresponds to Section 480 of the earlier Criminal Procedure Code. Section 345 reads:

"345. Procedure in certain cases of contempt. - (1) When any such offence as is described in section 175, section 178, section 179,section 180 or section 228 of the Indian Penal Code (45 of I860) is committed in the view or presence of any civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and may at any time before the rising of the Court on the same day, take . cognizance of the offence and, after giving the offender a reasonable opportunity of showing cause why he should not be punished under this section, sentence the offender to fine not exceeding two hundred rupees, and, in default of payment of fine, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

(2) In every such case the Court shall record the facts constituting the offence, with the statement (if any) made by the offender as well as the finding and sentence.

(3) If the offence is under section 228 of the Indian Penal Code (45 of I860), the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult."

17. *On a fascicule reading of Sect ion 345 of the Code it is clear that offences under Section 175, J 78, J 79,180 or 228 would constitute contempt only if they are committed in the view or presence of the Court. This would also show that offences under Sections 175, 178, 179, 180 or 228 per se do not amount to contempt. They are contempt only if they are committed "in the view presence of the Court", otherwise they remain offences under the Indian Penal Code simpliciter."*

As the same is not contempt as they are not committed in the view or presence of the court, as such they remain offence under Indian Penal Code simplicitor and process under section 340 Cr.P.C. may also be resorted to. The punishment mentioned under section 175 I.P.C. is simple imprisonment for a term which may extend to six months or with fine or which may extend to one year or with both, as such, when the reminder of the court, with regard to compliance of process under section 82 CrP.C., has not been done by bringing on record, the document in letter and spirit, such provision can be invoked. This process will expedite the things and minimise the chances of error by the learned trial court and also minimise the chance of person absonding, as it has been found that some of the accused persons are absonding for 29 years. This is not only a case of lethargic approach by the Police Department but also non-application of the mind by the concerned court. Had they have issued such reminders from their record or maintaining record of absconder in a separate register, large number of absconder shown by the State, approximately 33,000 and odd would not have piled up, as such, the same should not re-occur in future.

11. *The court concerned arc directed to be cautious while issuing process. The orders passed by the learned courts below under Chapter-VI regarding issuance of summons, warrant-bailable or non-bailable, process under section 82 and 83 Cr.P.C. are not new to this Court.*

ATTACHMENT UNDER SECTION 83

SECTION 83-ATTACHMENT OF PROPERTY OF PERSON ABSCONDING

1. The Court issuing a proclamation under section 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person;

Provided that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued;

a) is about to dispose of the whole or any part of his property, or

b) is about to remove the whole or any part of his property from the local jurisdiction of the Court

It may order the attachment simultaneously with the issue of the proclamation.

2. Such order shall authorise the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of any property belonging to such person without such district when endorsed by the District Magistrate within whose district such property is situate.

3. If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made—

a) by seizure; or

b) by the appointment of a receiver; or

c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

d) by all or any two of such methods, as the Court thinks fit.

4. If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to the State Government, be made through the Collector of the district in which the land is situate, and in all other cases—

a) by taking possession; or

b) by the appointment of a receiver; or

c) by an order in writing prohibiting the payment of rent on delivery of property to the proclaimed person or to any one on his behalf; or

d) by all or any two of such methods, as the Court thinks fit.

5. If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

6. The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908).

The object of the Section is to compel the appearance of the person against whom proclamation has been issued by the penalty of attachment and sale of his property. Only the court issuing a valid proclamation, and no other court, may, for reasons to be recorded in writing, at any time after the issuance of proclamation, attach his property. Before issuing the order of attachment, a proclamation under Section 82 must be issued directing the person concerned to appear.[15]

Since the purpose of Section 83 is not to punish the absconder but to compel his appearance, once the absconding accusedsurrenders before the Court and the Standing warrants canceled, he is no longer an absconder. The purpose of attaching his property comes to an end. It is to be released subject to the provisions of the Code.[16]

The procedure laid down under Section 83 has to be followed strictly. Jurisdiction to pass attachment order cannot be assumed unless a proclamation under Section 82 Cr.P.C. has been issued. The normal rule is that the court has to wait until the expiry of 30 days, to enable the accused to appear in terms of proclamation. The words *'at any time after the issue of proclamation'* are not to be interpreted in isolation. The key for gathering the intention of the law makers is to be found in Section 82 Cr.P.C. Section 82 and 83 Cr.P.C. areto be read in harmony. Thus except in cases covered by the proviso to Section 82(1) the attachment order has to maintain a distance of not less than 30 days from the date of the publication under Section 82. The words 'at any time' in Section83(1) only mean that if after the issue of proclamation either of the two conditions mentioned in Clause (a) and (b) of the proviso to Section 83(1) come into existence, an order of attachment may be made without waiting

15 *Dipnarayan Singh v. State of Bihar, 1981 CrLJ 1672 (Pat)*

16 *Vimalben Ajitbhai Patel v. Vatslaben Ashokbhai Patel (2208) 4 SCC 649.*

for 30 days to expire. Even in such a case the Court has to record its reasons for arriving at the judicial satisfaction that such conditions as mentioned in the proviso to have come into existence. Subsection(1) provides that the Court shall wait for thirty days after publication of the proclamation for the appearance of the accused and it is only after processes under Section 82, Cr.P.C. are exhausted that the next step under Section 83 is to be taken by the court.

Section 83 enjoins upon the Court to record the reasons in writing for ordering the attachment of any property belonging to the person who has been proclaimed as an offender under Section82, Cr.P.C. Even the order of attachment of property has two pre- requisites – *firstly*, the Court has to satisfy itself either by affidavit or otherwise that the person in relation to whom the proclamation is to be issued is about to dispose of whole or any part of the property or *secondly*, that he is about to remove whole or part of the property from the local jurisdiction of the Court.[17]

The attachment under Section 83 can, therefore, be issued simultaneously with the proclamation under Section 82 as provided under the proviso to Section 83(1) of the CrPC only if the conditions contained therein are satisfied and the Court records the reasons for the satisfaction of the court justifying the exercise of the proviso.

As observed by the Hon'ble Jharkhand High Court in ***Shiv Kumar Thakur v. The State of Jharkhand***[18] the order for attachment must be done through a speaking order whereby the Court must record its subjective satisfaction which created in its judicial mind, the reason to believe that the circumstances existed which necessitated the order under Section 83. When the order of attachment is simultaneously issued with the proclamation under Section 82, the Court must record the special reasons and also that the conditions laid down for the exercise of the proviso have been satisfied. The non-compliance of such mandates of procedure invalidates the order of attachment, which is evident from the following observations made in the order passed by the Hon'ble Jharkhand High Court in ***Nanhku Ganjhu v. State of Jharkhand***[19] :

> *"7. After hearing both the counsels and going through the record of the case and especially the certified copy of the order sheet enclosed with the writ application, I find that the case has been lodged under Section 414 of I.P.C. only and the maximum sentence prescribed in this offence is three years or with fine or with both but the court concerned without following the mandates of the Hon'ble Supreme Court without taking any step for issuance of summons and bailable warrant, issued non- bailable warrant of*

17 *Anita Aggarwal v.The Govt. of Nct of Delhi.*

18 *Cr.M.P. No. 1060/2019.*

19 *W.P.(Cr.) No. 272 of 2015. See also, Ramjeet Prajapati v. State of Jharkhand and Anr, W.P.(Cr) No. 172 of 2015.*

arrest against the petitioners on requisition filed by the Investigating Officer and on the very next date when the Investigating Officer submitted the execution report of the warrant to the court and prayed for issuance of proclamation under Section 82 of the Code without applying judicial mind issued the proclamation and on the very next date, the process under Section 83 of the Code was also issued.

10. *Apparently, the court below has not considered the mandates given in the above two judgments and without applying his judicial mind and without following the guidelines and showing any reason or recording any satisfaction, issued non-bailable warrant and subsequently passed orders for issuance of proclamation and attachment of property under Sections 82 and 83 of the Code respectively. The submission of the learned standing counsel Mr. Mishra that on a requisition filed by the Investigating Officer showing that the petitioner was evading arrest, warrant and subsequent proclamation and processes were issued, I do not find any substance his submission. Hence,I am constrained to hold that theorders issuing non-bailable warrant, the proclamation and the attachment of property under Sections 73, 82 and 83 of the Code respectively by the order impugned are liable to be set aside."*

Apart from the numerous judgments of the Hon'ble Jharkhand High Court on the issuance of warrants, proclamation under Section 82 and the order of attachment under Section 83, it would also be pertinent to mention here the judgment of the Hon'ble Calcutta High Court (Appellate Side) in ***Naveen Agarwal v. State of West Bengal and Anr***[20] and the observations made therein which are as follows:-

"Satisfaction of the Magistrate, that the accused is evading or concealing arrest, is a sine qua non to issue a warrant of arrest against any person in a case where such person has committed a non-bailable offence. Whereas the proclamation may be published against an accused in a case where it is found that such accused person, against whom a warrant of arrest has already been issued, is deliberately absconding arrest or concealing himself, which is patent in nature causing resistance to the execution of warrant of arrest. Section 82(1)(2) of Cr. P.C. lays down the requirement of law and the formalities to be observed while making order issuing the proclamation by the Magistrate.

Section 82(3) enunciates that the statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified date, in the manner specified, in clause (1) of subSection (2), shall be conclusive evidence and that the requirements of the Section have been complied with, and further that the proclamation was published on such day. So a recording of statement of satisfaction of the Magistrate

20 *C.R.R. No. 2096 of 2018*

to the effect that the person sought to be arrested is either evading, or concealing arrest is a prerequisite to the issuance of proclamation in terms of Section 82 Cr. P.C., and further a statement in writing by the Court issuing proclamation revealing adherence to the procedure prescribed in Sub- Section 2 of Section 82 is a must prior to passing order of attachment of the property of the person, said to be either absconding or concealing arrest.

After adhering to the procedure laid down in Section 82 of the Code of Criminal Procedure, a person evading arrest may be pronounced to be proclaimed offender.

As soon as the formalities connected with the proclamation is completed, the Magistrate issuing proclamation, for reasons to be recorded in writing at any time after the issue of proclamation, may order the attachment of any property, movable or immovable, or both belonging to the proclaimed person.

Therefore, the demand of the law, while making approach by the Court to take recourse to Sections 82 and 83 of the Code of Criminal Procedure Code, the requirements, and the formalities to be observed have to be duly discharged, contravention thereof has no sanction under the law. There is little departure evident from Section 83 Cr.P.C. by reason of the proviso being appended to Section 83 (1) Cr. P.C, when the Court can issue proclamation and attachment simultaneously. The proviso incorporated in SubSection 1 of Section 83 of the Code of Criminal Procedure enunciates that if at the time of issuing the proclamation, the Court is satisfied by affidavit, or otherwise, the order of attachment simultaneously with the issue of proclamation may be passed on the following contingencies:

a) When the person evading or concealing arrest is about to dispose of the whole or any part of his property.

b) When the person evading or concealing arrest is about to remove the whole or any part of his property from the local jurisdiction of the case.

The case referred to hereinabove is not covered by the contingencies mentioned in proviso of in SubSection 1 of Section 83 of Cr. P.C., the approach adopted by the Court below by issuing warrant of arrest and proclamation of attachment conjointly and simultaneously is devoid of the sanction of the law. The requirement of law as regards simultaneous issuance of warrant of arrest and proclamation of attachment was taken up by a Coordinate Bench of this case, and in an unreported decision rendered in the case of Nanki Bhayna @ Ratan Bhayna & Ors. vs. The State of West Bengal, being CRR No. 3554 of 2013, it was decided that the Court below committed a gross illegality in passing an order of proclamation and attachment simultaneously with the order of warrant of arrest."

POINTS TO REMEMBER WHILE PASSING AN ORDER FOR ATTACHMENT UNDER SECTION 83

I. The order of attachment under Section 83 can only be passed if there has been a valid proclamation under Section 82 and the same has not been complied with within the period given in the order of proclamation.

II. Only when the Court is satisfied that the aforementioned conditions are satisfied, the Court must record the reasons in its order in relation to the subjective satisfaction of the Court due to which the court had the reason to believe that the conditions are satisfied and the situation demands for the issuance of an order of attachment under Section 83.

III. The conjoint reading of Section 82 and Section 83 entails that the order for attachment must ordinarily be made after the expiry of 30 days from the date of issuance of the proclamation under Section 82. However, the proviso to section 83(1) lays down that if the court has reason to believe that the person against whom a proclamation under Section 82 has been issued is about to dispose of the whole or any part of his property; or is about to remove the whole or any part of his property from the local jurisdiction of the Court. In such a case, the court, in addition to the recording of the aforesaid reasons, must also record the special reasons which necessitated the simultaneous issuance of orders of proclamation and attachment.

PRACTICAL PROBLEMS OF THE TRIAL COURT

The instances of accused absconding at different stages of investigation, inquiry and trial are rampant and every court has to grapple with it to ensure that the adjudicatory process does not suffer due to non-appearance of accused person. In serious offences the non-appearance in large number of cases are deliberate to delay the trial. The biggest impediment in following the due process by which an accused has to be declared an absconder on the basis of subjective satisfaction by the trial court, is the non-receipt of service and execution report by the executing agency i.e. police. It will be therefore desirable to set out a practical format to enable the trial courts to deal with the problem.

NON-RECEIPT OF SERVICE REPORT, EXECUTION REPORTS OF WARRANTS AND PROCESS UNDER SECTION 82 ISSUED AGAINST ACCUSED

As discussed above in summons cases at the first instance a summon is to be issued against the accused under section 204 Cr.P.C. and in warrant cases the court has discretion to either issue

warrant at the first instance or summon against the accused, depending upon the gravity of the case. The problem arises when summon is issued and the service report is not sent to the court and the court has to take step forward for issuing warrant. In all such cases the accused after arrest or appearance takes a plea of no notice and cites the non-receipt of service report by the court. It becomes therefore important before warrant is issued against the accused after summon there should be a service report on record. The following steps are proposed to be taken to ensure that service reports are promptly received against the accused:

(a) **In cases where the investigation is pending** the I.O must be asked to submit the service report of the summons along with the requisition for issuance of warrant.

(b) The service report should be in terms of section 62, 63, 64, 65 or 66 as the case maybe.

(c) It must be pointed out that the court has to be vigilant that thereare instances where service reports are received in the court but not properly placed with the case record. The Presiding Officer in order to ensure that service reports are properly annexed with the case record may issue appropriate office orders for the Bench Clerk and Office Clerk or the staff concerned in the court's order book regarding issuance, receipt and placing the service report with the concerned case record. The receipt of the service reports must also reflect in the ordersheet.

(d) Where summons are issued **in cases other than pending for investigation,** a service report may be called for from the Police Officer or the officer incharge of the P.S concerned in terms of section 62 ofCr.P.C.

(e) In the event of non-receipt of service report of the summons sent to the police officer, concerned the service report be specifically called for by giving reminder failing which the Police Officer concerned may, in appropriate cases be proceeded against under section 340 Cr.P.C. for omission to produce document or electronic record etc. under section 175 IPC.[21]

(f) In **cases of warrant not being executed** the list of suchcases to be referred to the district level monitoring cell. The ordersheets must be drawn in unambiguous terms mentioning the exact date of issuance of summons, warrants etc. and also the date of receipt of service report or E.R. as the case may be before advancing to further steps or issuance of processes compelling appearance of accused.

21 *Cr.M.P. NO.1060 of 2019 (Shiv Kumar Thakur & Ors. Vs. State of Jharkhand at Paragraph 10)*

PROCEDURAL REQUIREMENTS TO DRAW A PROCEEDING UNDER SECTION 299CR.P.C.

(a) Section 299 provides that **if it is proved that** an accused person has absconded **and there is no immediate prospect of arresting him**, the court competent to try, or commit for trial such person may in his absence examine the witnesses. The question arises as what should be the material on the basis of which the court can draw its subjective satisfaction that accused person has absconded and that there is no immediate prospect of arresting him. The processes duly issued against the absconding accused along with the service reports and the execution reports are the basic materials on the basis of which the court can exercise its discretion by recording its reasons for the satisfaction of the **two conditions** viz (1) The proof that the **accused has absconded** and (2) There is **no immediate prospect of his arrest** (Pl see Jayendra Vishnu Thakur Vs State of Maharastra 2009(7) SCC 104). Once these materials are there on record the court can proceed in terms of section 299 after recording its reason and satisfaction on both counts. In cases where there are more than one accused and some of them are in attendance , the case of the absconding accused to be separated under section 317(2) after a proper ordersheet needs to be drawn recording the satisfaction of the court for drawing the proceeding under section 299 against the absconding accused so that the evidence being recorded in his absence can be used against him as per the conditions laid down under section 299. The following steps need to be followed in case of such accused is taken up or tried separately:

(a) The split up record must be registered in the CIS and the absconder register be maintained properly.

(b) Split up records be entered in court diary and the date for evidence in the absence of accused be forwarded and steps be taken for recording of prosecution witnesses.

(c) Where the main trial is proceeding for prosecution evidence the deposition of all such witnesses produced in the court must be recorded in the split-up record also. It must be pointed out and clarified that where the evidence is being recorded in the main record against the accused in attendance, the evidence should also be simultaneously be recorded in the split-up record to avoid hardship of the witnesses being called time and again in the same case.

(d) After the evidence is recorded the split-up record will be consigned to record room.

STEPS TO BE TAKEN ON ARREST / APPEARANCE OF ABSCONDING ACCUSED

1. Once the absconding accused is arrested on the strength of the permanent warrant issued against him he is to be remanded in the concerned case. If the accused had absconded before commitment and is a sessions triable case, the case is to be committed under section 209 after furnishing police papers to theaccused.

2. If the accused has absconded before framing of charge, the charge is to be framed against him and the case is to be posted for evidence.

3. **Where the evidence of some or all of the witnesses have been recorded under section 299 the question may be raised whether the cross examination is only to be recorded or both the examination in chief and cross examination is to be recorded of the witnesses earlier examined?**

   Section 299 is an exception to section 273 which mandates that evidence is to be taken in presence of the accused. Even in cases where the appearance of accused has been dispensed with under section 205 or he is represented by pleader under section 317 the evidence recorded in the absence of the accused can be used against him. Where a proceeding under section 299 has beendrawn in due process by the court concerned after recording their reasons for doing so and the examination in chief has already been recorded of such witness, there is no further requirement of recording the examination in chief before giving opportunity of cross examination to the defence. This is manifest from the plain reading of section 299 which provides that **any such deposition may on the arrest of such person be given in evidence against him on the inquiry into or the trial of the offence with which he is charged.** Further, very purpose of recording evidence under section 299 will be defeated if even the examination in chief is also to be re-recorded after the arrest or appearance of the accused who has been formally declared after due process to have absconded. It may lead to piquant situations where after long lapse the witness may not be able to accurately depose in his examination in chief or he may some times even disown his earlier testimony. There is no direct authority on this point but the entire object of Section 299 is that the accused is not prejudiced and opportunity to the defence for cross examination is to be given so that the accused is not prejudiced on that count. The criminal procedure balances the interest of the accused with that of the victim and witnesses and there cannot be any justification for re-recording of examination in chief after a proceeding has been drawn under section 299. It will be relevant to quote the observation made in AIR 1938 Pat 49 at 51 Emperor Vs. Baharuddin. *"It is not necessary that for the purpose of being used under this section*

the deposition of witnesses at the trial of the associates of the absconding accused should be recorded over again in a separate proceeding. It will suffice if at the commencement of the hearing, the prosecutor brings to the notice of the court the fact that such a person is absconding". Another fall out that can be on account of re-recording of examination in chief will be that the witness may turn hostile when his statement is re- recorded. This may result on account of long lapse of time or under pressure from the absconding accused, which shall ultimately defeat the ends of justice.

The right of cross-examination of the accused has been recognized in ***Abu Salem Abdul Qayoom Ansari v. State of Maharastra (2011) 11 SCC 214*** **at para 73 which reads as follows:** *"Coming to the direction of the Designated Court directing separation of the trial of the appellant, it is the grievance of the appellant that because of the separation, he would forgo the opportunity to cross-examine the witnesses. This grievance has been dealt in separate set of proceeding which we have adverted to in the earlier part of our Judgment. The order dated 24.8.2009 has granted the appellant an opportunity to submit a list of witnesses examined in the main trial for cross-examination.*" (emphasis supplied)

From the above it is manifest that what has been conceded is right to cross-examination otherwise there would have been an order for examination of the witness afresh.

Further in **B.A. 8958 of 2018**, ***Prabha Muni v. The State of Jharkhand***, **Hon'ble High Court of Jharkhand observed as follows:** ***"As per settled law, once the statement of witness is recorded under Section 299 Cr.P.C in absence of accused, later on, the accused has the only right to cross-examine the witness".***

The above stated line of purposive interpretation of Section 299 Cr.P.C is in tune with law on this point being followed in common law countries where once the accused deliberately absconds and evidence is recorded in his absence, the absconding accused on his arrest or appearance cannot even have the right of cross-examination of witnesses already examined in his absence. Law being followed in the common law countries can adequately be demonstrated by the following authorities:

R Vs. Jones {Rew}{2} 1972 2 All E R 731 – If the accused during the trial absents himself from court voluntarily, however, as, for example, by escaping from custody or failing to consider or failing to surrender to custody whilst on bail, the court, in his discretion may allow the trial to continue; and, if the accused is convicted, the Judge may sentence him in his absence.

Bingham in Para 10 of his judgment stated that, 'if a criminal defendant of full age and sound mind, with full knowledge of a forthcoming trial, voluntarily absents himself, there is no reason in principle why his decision to violate his obligation to appear and not to exercise

his right to appear should have the automatic effect of suspending the criminal proceedings against him until such time, if ever, as he chooses to surrender himself or is apprehended'.

CF Crosby V. U.S., 506 U.S. 255, 262 (1993) – The Federal Distreict Court permitted the proceedings to go forward in his absence, and he was convicted and subsequently arrested and sentenced. In this case, Crosy failed to appear at the beginning of his criminal trial, though he attended various preliminary proceedings. Crosby appealed to the Court of Appeal challenging the verdict delivered by the Federal District Court. In affirming his convictions, the Court of Appeals rejected his argument that his trial was prohibited by Federal Rule of Criminal Procedure 43, which provides that a defendant must be present at every stage of trial, 'except as otherwise provided' by the Rule and which lists situations in which a right to be present may be waived, including when a defendant, initially present, 'is voluntarily absent after the trial has commenced'.

4. There are two provisions which have been enacted in the penal code by 2005 amendment which makes the act of non- appearance before the court penal on the grounds stated therein. These provisions can be used against the accused persons who deliberately abscond and thereby delay the investigation, inquiry or trial in a particular case. As far as Section 229A is concerned this provision can be invoked by the court concerned and the absconding accused can be put on trial for the offence defined for the act of not appearing before the court on being released on bail or on bond and not appearing in terms of the bail for bond. There is no requirement of filing a separate complaint under section 340 of the Cr.P.C. for the reason that this provision does not come within the ambit of section 195Cr.P.C..

5. As far section 174A IPC is concerned it can be invoked against the absconding accused who does not appear before the court after due proclamation under section 82 of the Cr.P.C..Hon'ble Delhi High Court in the case of A. Krishna Reddy Vs. CBI through its Director, 2017 SCC online Delhi 7266 has held that the prosecution if files a supplementary chargesheet cognizance of the offence under section 174A IPC can be taken and the offence under section 174A IPC can be added in the main chargesheet. From the above it is manifest that there are sufficient penal provisions which can be used against the absconding accused and a separate complaint may not be required under section 340 but such accused can also be charged for deliberately non appearing in the light of the above discussed case law.

JUDGMENT IN ABSENCE OF THE ACCUSED

Section 353(6) If the accused is not in custody, he shall be required by the Court to hear the Judgment pronounced, except where his personal appearance is dispensed with and the sentence is only of fine or he is acquitted:

> provided that, where there are more accused than one, and one or more of them do not attend the Court when the Judgment is to be pronounced, the presiding officer, may in order to avoid undue delay in the disposal of the case, pronounce the Judgment notwithstanding their absence.
>
> No Judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader.

STATE OF BIHAR VS NIL 2012 CRILJ 4114

The case involves death sentence awarded to 16 accused persons and several others were awarded life imprisonment. Out of them on the date of Judgment petition under Section 317 was filed on behalf of four accused persons. The Court rejected their representation canceled their bail and warrants were issued. The trial of these accused persons was not separated, rather Judgment was pronounced against them along with other accused persons. While hearing the Death reference the Court considered the question, whether Judgment and sentence can be awarded against the accused in their absence?

The proviso to section 353(6) makes the mandate of the law ample clear that to pass a judgment in absentia there must be more than one accused and on the date fixed for pronouncement of judgment some of them are absent but at least one of the accused must be physically present, meaning thereby a judgment cannot be pronounced when all the accused persons are absent on the day fixed for delivery of judgment . Reference may be had to 2014 (4) SCC 747 Ashok Deb Burman Vs. State of Tripura (at Para 6) in this regard.

Held: Before the Judgment is delivered the person must be heard. It must be clarified that hearing a person and the person being present in Court are two different matters. All that the law prescribes is that the before a Judgment is delivered a person must be heard. If the accused absconds or is not present on the date fixed, the Judgment will not be postponed. Section 353(7) makes it clear that no Judgment shall be deemed to be invalid merely because of absence of one party. With respect to the Sentence awarded in absentia it was held following the Apex authorities that before confirming the sentence at the appellate stage the offender need to be arrested. This defect of not hearing the convicted person can adequately by hearing him at the appellate stage.

STEPS AGAINST BAILORS TO SECURE APPEARANCE OF THE ACCUSED

Hon'ble Court in Criminal Appeal (SJ) No. 893 of 2004 (R) arising out of S.T. No. 161/2002 has taken cognizance of the problem of fake bailors being used while securing the release of the accused. Any discussion on the rampant instances of absconding of accused, particularly those on bail, shall not be complete, unless we address the question as to why the system of furnishing Bail Bond with sureties has failed to secure the appearance of the accused after their release on Bail?

To be candid this problem can be studied under the following heads:

Firstly, None-proper verification of the identity of the surety and their identifier.

The documents in support of the identity is not verified properly. In order to ensure proper identification of the surety and identifier it is incumbent on the part of the office and the presiding officer to obtain proper documents of identification like , Govt ID, Passport, voter Id, driving license or aadhar (UID) etc or any other like photo identity card.

Secondly, The document in support of the property of the surety is not verified

It is not practicable to initiate the verification of document in each and every case as it may lead to delay in release of the under trial prisoner. There is however provision of inquiry by the Magistrate under section 441(4), but it can be used sparingly where the court considers it necessary, he many himself or by a Magistrate subordinate to the Court cause an inquiry to be made regarding sufficiency or the fitness of the surety. In the alternative the Court can have the following technological solutions to this issue:

1. Where the original owner book of any vehicle is produced it may verified from the site of parivahan.gov.in

2. Where the document like upto date land revenue receipt of the land is produced the same may be verified from the website jharbhumi.nic.in

   After verification the original document should be stamped without defacing the original document with the case no. in which it has been deposited on behalf of the surety.

   Thirdly, strict compliance with section 441A Cr.P.C. requiring every person standing surety shall make a declaration as to the number of persons to whom he has stood surety including he accused by giving all the relevant particulars supported by affidavit.

Fourthly, After cancellation of bail notice should be issued to the sureties under section 446 Cr.P.C. for forfeiture of the bond amount. The court shall record the grounds after issuing show cause and may call upon any person bound by such bond to pay the penalty thereof or to show-cause why it should not be paid. If sufficient cause is not shown and the penalty is not paid, the court may proceed to recover the same as if such penalty where a fine imposed by it and therefore the procedure under section 421 Cr.P.C. needs to be followed. Further, if the bond amount is not not recovered by the above process and the surety is apprehended and produced before the court concerned, he shall be liable to imprisonment in civil jail for a term which may extend to six months under Section 446(2) as amended with effect from 23/9/1980. It may also be clarified that in police cases since state is the party therefore any amount to be deposited for civil imprisonment shall be made by the government. In case of insolvency or death of the surety or when a bond is forfieted recourse be taken to section 447.

CHARGE : CHAPTER XVII, SECTIONS 211-224 Cr.P.C.

Charge is the foundation which makes precise accusation on the basis of evidence collected during investigation. It is on this foundation that a criminal trial proceeds and finally culminates into acquittal or conviction and sentence. The judgment is to be written and finding recorded with respect to the charge framed. There may be circumstances where a judgment of conviction can be passed even though charge has not been framed as provided under Section 212 of the CrPC. On the other hand, there may be circumstances where although conviction has been recorded under different Sections but separate sentence may not be called for in the light of Section 71 IPC. It is, therefore, necessary to have a clear grasp on the provisions related to the framing of charge.

Section 211 to 214 deals with what charge should contain; Section 216 and 217 with power of court to alter charge and the procedure to be followed after such alteration. Section 218 gives the basic rule that for every distinct offence there shall be a separate charge and every such charge shall be tried separately. Sections 219, 220,221 and 223 are exception to Section 218. Section 215 and Section 464 deal with effect of error in stating the offence or other particulars in the charge and omission to frame or error in the charge.

SECTION 211 – CONTENT OF CHARGE

Every charge must contain the following:-

- The offence with which the accused is charged

- Specific name of the offence if any – If the law does not give it a specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.
- Law and the Section of the law against which the offence is said to have been committed shall be mentioned in the charge.
- The fact that the charge is made is equivalent to say that every legal condition required by the law to constitute the offence charged in the particular case was fulfilled.
- The charge shall be written in the language of the Court.
- Previous conviction need to be mentioned.

SECTION 212 - PARTICULARS AS TO TIME PLACE AND PERSON

The charge shall contain such particulars as to time and place of the alleged offence, and the person against whom, or the thing in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter which he is charged.

When the accused is charged with criminal breach of trust or dishonest misappropriation of property or money, it shall be sufficient to specify the gross sumor,as the case may be, describe the movable property in respect of which the offence is said to be committed and the dates within which the offence is said to be committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be one offence within the meaning of Section 219, provided that the time included between the first and last of such dates shall not exceed one year.

SECTION 213 – WHEN THE MANNER OF COMMITTING OFFENCE MUST BE STATED

When the nature of case is such that the particulars as mentioned in Sections 211 and 212 do not give accused sufficient notice of the matter with which he is charged, charge shall also contain such particulars of the manner in which the offence was committed as will be sufficient for that purpose.

According to Section 214, the words in the charge should be taken in sense of law under which offence is punishable.

SECTION 215 – EFFECT OF ERRORS

No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error oromission, and it has occasioned a failure of justice.

SECTION 464 - EFFECT OF OMISSION TO FRAME, OR ABSENCE OF, OR ERROR IN, CHARGE

No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommended from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

CHARGE WITH SUBSTANTIVE OFFENCE AND CONVICTION FOR CONSTRUCTIVE OFFENCEAND VICE-VERSA

Where a person is charged with substantive offence it is known to him that he has been charged to have committed the offence, but when an accused is charged constructively to have committed an offence by the said Section 149 or Section 34 of the IPC, it makes him understand that he is the accused because somebody in furtherance of the common intention or for the prosecution of the common object has committed the substantive offence.

The question, in this case, arises as to whether a person charged for having committed an offence constructively with the help of Section 149 or Section 34 IPC can be convicted for

having committed the substantive offence for which he had not been charged, the answers of which can be found in the following cases:-

- B.N. Srikanthia v. State of Mysore, AIR 1958 SC672
- William Slaney v. State of MP, AIR 1956 SC116

B.N.SRIKANTHIA V. STATE OF MYSORE, AIR 1958 SC 672

The question before the three-judges Bench in this case was raised that there was no charge under Section 34 of the Indian Penal Code and therefore the accused cannot be convicted of liability as sharers in an offence by the 'application of Section 34, i.e., in prosecution of the common intention of all.

The Hon'ble Court held that the omission to mention s. 34 of the Indian Penal Code in the charge cannot affect the case unless prejudice is shown to have resulted in consequence thereof. The charge was that the appellants and others were members of an unlawful assembly, the common object of which was to murder the deceased. Although there is a difference in common object and common intention, they both deal "with combination of persons who become punishable as sharers in an offence", and a charge under Section 149, Indian Penal Code is no impediment to a conviction by the application of s. 34 if the evidence discloses the commission of the offence in furtherance of the common intention of all. In the second charge it was clearly stated that the appellants and Accused Nos. 5 & 6 committed the murder by intentionally causing the death of the deceased. No doubt it would have been better if in the charge Section 34 had been specified. But the mere omission to specify it cannot in the circumstances of this case have any effect as no prejudice has been alleged or shown.

The Hon'ble Court, referring to the judgment of the Constitutional Bench in ***Willie (William) Slaney v. The State of Madhya Pradesh***, held that the imperfection in the charge is curable provided no prejudice has been shown to have resulted because of it. In the present case, the appellants had notice that they were being tried as "sharers in the offence "' and their liability was collective and vicarious and not individual. No doubt they, were charged, under Section 149 of the Indian Penal Code with being members of an unlawful assembly the common object of which was murder of the deceased but they were also charged that they with accused Nos. 5 & 6 had committed murder by intentionally causing the death of the deceased. The prosecution led evidence to show that at least two of the appellants were waiting for the arrival of the evening Bus by which the deceased and his companions were traveling and that the appellants and others met them at the bund and there was a concerted attack by them followed by a chase and assault with choppers by all the appellants resulting in death because of 24 injuries of a serious nature given by the appellants collectively. Of these injury

No. 5 individually and others cumulatively were sufficient in the ordinary course of nature to cause death. Section 34 is only a rule of evidence and does not create a substantive offence. It means, that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done individually. As the Privy Council have pointed out in ***Barendra Kumar Ghosh v. King Emperor.***

WILLIE (WILLIAM) SLANEY V. THE STATE OF MADHYA PRADESH, AIR 1956 SC 116

Issue – Where a charge simplicitor u/s 302 is not framed and the accused is charged under Section302 read with Section 34 of the IPC, whether a judgment of conviction can be passed u/s 302 if Section 34 is not proved?

Held – The Hon'ble Supreme Court, through Constitution Bench, in this case, answered the question in the affirmative and held that the object of the Code is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities.

PRASANA KUMAR V. ANANDA CHANDRA, AIR 1970 ORI 10

Issue – Can a person charged for the principal offence be convicted for the abetment?

Held – When only the principal offence has been charged, and no charge of the abetment framed and accused has no notice of fact constituting abetment, conviction on a charge of abetment is improper.

N.C. SHAH V. STATE OF GUJARAT, 1972 CRILJ 200 (GUJ)

Issue – Can a person charged with abetment, be convicted for the principal offence?

Held – The Gujarat High Court answered the question in the affirmative relying on the decision rendered by the Patna High Court in State v. Ruplal, AIR 1953 Pat 394 in which it was held that, where it has been held that an accused can be convicted of the substantive offence if he is charged only with abetment of the offence, but not when he has been prejudiced in his defence of a case based on substantive charge.

NANAK CHAND V. ST OF PUNJAB, AIR 1945 SC 274

Issue – Whether there could be conviction for the offence u/s 302 simplicitor when the charge was for the offence u/s 302 read with 149 of the IPC?

Held – It was held by the Hon'ble Court that when there is no separate charge under/s 302 the conviction under 302 simplicitor is not sustainable.

The legal position is clear that if the charge framed discloses the overt act committed by particular accused, though the charge is for the offence u/s302 read with Section 149 of the IPC and the accused faced trial with the knowledge that the particular over act which caused death, non framing of a distinct charge for the offence under 302 will not cause prejudice to the accused ,even though the charge was under Section 302 read with Section 149 IPC. What is required is that the charge discloses the over act by a particular accused which caused the death of the victim even though an alternate charge u/s302 simplicitor is not framed.

The accused could be convicted with the aid of Section 34 were Section 149 becomes in applicable, if the evidence disclose the ingredient of Section 34.

STATE OF BIHAR V. BISWANATH RAI, 1997 CRLJ 4426 SC

Issue – Whether a conviction can be passed regarding the principal offence read with Section 34 where the charge has been framed under Section 149?

Held – A charge under Section 149 is no impediment to conviction by application of 34 if the evidence discloses the commission of the offence in furtherance in common intention. There is no hard and fast rule laid down as to when the prejudice has been caused to the accused. It is for the Court in each case to decide whether the defect in the charge has caused prejudice to the accused.

Omission to state common object of unlawful assembly does not vitiate conviction based on those charges unless accused has been prejudiced in his defence because of the general nature of charge under Section149.

The accused is entitled to know with certainty and accuracy exact nature of the charge against him, and unless he has knowledge, his defence will be prejudiced.

For example let us take a case where there is an allegation of committing an offence of murder by a single gunshot injury and physical assault, and there are altogether seven accused persons in total. As per the prosecution case out of seven one fired the shot on the deceased and the other three participated in the assault with deadly weapon. The remaining three were just the members of the unlawful assembly. The question is how to frame charge?

- In this case charge simplicitor under section 302 IPC. Section 148 IPC and Section 27 Arms Act is to be framed against the person who used his fire arm to shoot the deceased.
- Other three who assaulted the deceased with deadly weapons conjointly with the common intention to cause death, to be charged under section 302 IPC read with 34 IPC and 148 IPC.

- The other co-accused who were the members of the unlawful assembly and shared the common object of the assembly to cause death, are to be charged under section 302/149 and 148 IPC. Although the charge with aid of Section 149 is being framed only against three persons but it also needs to be mentioned that they were members of unlawful assembly with the above four accused persons.

- Further if a person who was not at the place of occurrence but was behind this incidence and was in agreement with main assailants to bring about the criminal act and there are evidences to this effect, then section 120 B IPC charge can be framed against all the accused persons along with that distant conspirator. This is so because conspiracy is a distinct offence and in terms of section 218 Cr.P.C. there need to be a separate charge for it.

- It may be clarified that as discussed in different case laws absence of charge under section 34 IPC or even a charge simplicitor under section 302 IPC will not be an impediment to conviction if the charge is framed under section 149 IPC and the content of it discloses the complicity of the main assailant or the other assailants.

- The following judgments illustrates the law on this point :-

(2010) 8 SCC 407 (Virendra Singh Vs. State of Maharastra)

"36. Referring to the facts of this case, the short question which arises for adjudication in this appeal is whether the appellant Virendra Singh can be convicted under Section 302 with the aid of Section 34 IPC. Under the Penal Code, the persons who are connected with the preparation of a crime are divided into two categories: (1) those who actually commit the crime i.e. principals in the first degree; and (2) those who aid in the actual commission i.e. principals in the second degree. The law does not make any distinction with regard to the punishment of such persons, all being liable to be punished alike.

37. Under the Penal Code, a person is responsible for his own act. A person can also be vicariously responsible for the acts of others if he had a common intention to commit the acts or if the offence is committed by any member of the unlawful assembly in prosecution of the common object of that assembly, then also he can be vicariously responsible. Under the Penal Code, two sections, namely, Sections 34 and 149, deal with the circumstances when a person is vicariously responsible for the acts of others.

38. The vicarious or constructive liability under Section 34 IPC can arise only when two conditions stand fulfilled i.e. the mental element or the intention to commit the criminal

act conjointly with another or others; and the other is the actual participation in one form or the other in the commission of the crime.

39. *The common intention postulates the existence of a prearranged plan implying a prior meeting of the minds. It is the intention to commit the crime and the accused can be convicted only if such an intention has been shared by all the accused. Such a common intention should be anterior in point of time to the commission of the crime, but may also develop on the spot when such a crime is committed. In most of the cases it is difficult to procure direct evidence of such intention. In most of the cases, it can be inferred from the acts or conduct of the accused and other relevant circumstances. Therefore, in inferring the common intention under Section 34 IPC, the evidence and documents on record acquire a great significance and they have to be very carefully scrutinised by the court. This is particularly important in cases where evidence regarding development of the common intention to commit the offence graver than the one originally designed, during execution of the original plan, should be clear and cogent.*

40. *The dominant feature of Section 34 is the element of intention and participation in action. This participation need not in all cases be by physical presence. Common intention implies acting in concert.*

41. *The essence of Section 34 IPC is a simultaneous consensus of the minds of the persons participating in criminal action to bring about a particular result. Russell in his celebrated book Russell on Crime, 12th Edn., Vol. 1 indicates some kind of aid or assistance producing an effect in future and adds that any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony. It was observed by Russell that any act of preparation for the commission of felony is done in furtherance of the act.*

42. *Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a prearranged and premeditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the premeditation and though the plan may be formed suddenly. In order that Section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. In fact, the section is intended to cover a case where a number of persons act together and on the facts of the case it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the*

crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with Section 34.

43. *The other section under which a person can be vicariously responsible for the acts of others is Section 149 of the Penal Code. We would briefly like to deal with the scope and ambit of Section 149 IPC also. Section 149 IPC reads as under:*

> *"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."*

44. *Both Sections 34 and 149 IPC deal with combinations of persons who become punishable as sharers in an offence. In both these sections, the persons are vicariously responsible for the acts of others. Simultaneously, there is a basic resemblance in both these sections and to some extent they also overlap.*

Distinction between Section 34 and Section 149 of the Penal Code

46. (i) Section 34 does not by itself create any specific offence, whereas Section 149 does so;

(ii) Some active participation, especially in crime involving physical violence, is necessary under Section 34, but Section 149 does not require it and the liability arises by reason of mere membership of the unlawful assembly with a common object and there may be no active participation at all in preparation and commission of the crime;

(iii) Section 34 speaks of common intention, but Section 149 contemplates common object which is undoubtedly wider in its scope and amplitude than intention; and

(iv) Section 34 does not fix a minimum number of persons who must share the common intention, whereas Section 149 requires that there must be at least five persons who must have the same common object."

(2012) 10 SCC 256 (Dahari Vs. State of U.P)

"16. Another question worth consideration is whether the appellants can be convicted under Section 302 read with Section 149 IPC in the event that the High Court has acquitted three

persons among the accused and the number of convicts has thus, remained at a number that is less than 5, which is in fact, necessary to form an unlawful assembly as described under Section 141 IPC.

17. *This Court in Amar Singh v. State of Punjab [(1987) 1 SCC 679 : 1987 SCC (Cri) 232 : AIR 1987 SC 826] held as under: (SCC p. 682, para 9)*

> *"9. … As the appellants were only four in number, there was no question of their forming an unlawful assembly within the meaning of Section 141 IPC. It is not the prosecution case that apart from the said seven accused persons, there were other persons who were involved in the crime. Therefore, on the acquittal of three accused persons, the remaining four accused, that is, the appellants, cannot be convicted under Section 148 or Section 149 IPC for any offence, for, the first condition to be fulfilled in designating an assembly an 'unlawful assembly' is that such assembly must be of five or more persons, as required under Section 141 IPC. In our opinion, the convictions of the appellants under Sections 148 and 149 IPC cannot be sustained."*
>
> *(emphasis added)*

18. Similarly, in Nagamalleswara Rao (K.) v. State of A.P. [(1991) 2 SCC 532 : 1991 SCC (Cri) 564 : AIR 1991 SC 1075] this Court observed: (SCC p. 537, para 8)

> *"8. However, the learned Judges overlooked that since the accused who are convicted were only four in number and the prosecution has not proved the involvement of other persons and the courts below have acquitted all the other accused of all the offences, Section 149 cannot be invoked for convicting the four appellants herein. … It is not the prosecution case that apart from the said 15 persons there were other persons who were involved in the crime. When the eleven other accused were acquitted it means that their involvement in the offence had not been proved. It would not also be permissible to assume or conclude that others named or unnamed acted conjointly with the charged accused in the case unless the charge itself specifically said so and there was evidence to conclude that some others also were involved in the commission of the offence conjointly with the charged accused in furtherance of a common object."* *(emphasis added)*

19. Similarly, this Court in Mohd. Ankoos v. Public Prosecutor [(2010) 1 SCC 94 : (2010) 1 SCC (Cri) 460 : AIR 2010 SC 566] held as under: (SCC p. 107, para 35)

> *"35. Section 148 IPC creates liability on persons armed with deadly weapons and is a distinct offence and there is no requirement in law that members of unlawful*

assembly have also to be charged under Section 148 IPC for legally recording their conviction under Section 302 read with Section 149 IPC. However, where an accused is charged under Section 148 IPC and acquitted, conviction of such accused under Section 302 read with Section 149 IPC could not be legally recorded. We find support from a four-Judge Bench decision of this Court in Mahadev Sharma v. State of Bihar [AIR 1966 SC 302 : 1966 Cri LJ 197] …."

20. *Undoubtedly, this Court has categorically held that in such a situation, a conviction cannot be made with the aid of Section 149 IPC, particularly when, upon the acquittal of some of the accused, the total number of accused stands reduced to less than 5, and it is not the case of the prosecution that there are in fact, some other accused who have not yet been put to trial. However, it is also a settled legal proposition that in such a fact situation, the High Court could most certainly have convicted the appellants, under Section 302 read with Section 34 IPC.*

21. *In Nethala Pothuraju v. State of A.P. [(1992) 1 SCC 49 : 1992 SCC (Cri) 20 : AIR 1991 SC 2214] this Court while considering a similar case, held that the non-applicability of Section 149 IPC is no bar for the purpose of convicting the accused under Section 302 read with Section 34 IPC, if the evidence discloses the commission of an offence, in furtherance of the common intention of such accused. This is because both Sections 149 and 34 IPC deal with a group of persons who become liable to be punished as sharers in the commission of an offence. Thus, in a case where the prosecution fails to prove that the number of members of an unlawful assembly are 5 or more, the court can simply convict the guilty persons with the aid of Section 34 IPC, provided that there is adequate evidence on record to show that such accused shared a common intention to commit the crime in question.*

22. *A similar view has been reiterated in Jivan Lal v. State of M.P. [(1997) 9 SCC 119 : 1997 SCC (Cri) 521] and Hamlet v. State of Kerala [(2003) 10 SCC 108 : (2006) 2 SCC (Cri) 518 : AIR 2003 SC 3682] [See also: Willie (William) Slaney v. State of M.P. [AIR 1956 SC 116 : 1956 Cri LJ 291] , Fakhruddin v. State of M.P. [AIR 1967 SC 1326 : 1967 Cri LJ 1197] , Gurpreet Singh v. State of Punjab [(2005) 12 SCC 615 : (2006) 1 SCC (Cri) 191 : AIR 2006 SC 191] , Sanichar Sahni v. State of Bihar [(2009) 7 SCC 198 : (2009) 3 SCC (Cri) 347 : AIR 2010 SC 3786] , S. Ganesan v. Rama Raghuraman [(2011) 2 SCC 83 : (2011) 1 SCC (Cri) 607] and Darbara Singh v. State of Punjab [(2012) 10 SCC 476] .*"

Similar view was also held in (2018) 12 SCC 440 (Birbal Chaudhary Vs. State of Bihar) and Palakone Abdul Rahiman Vs. State of Kerala (2019) 4 SCC 795 where in it was held that

"The non applicability of Section 149 IPC is no bar in convicting the accused persons under section 302 read with section 34 IPC provided there is evidence which discloses commission of offences in furtherance of common intention. "

JOINDER OF CHARGES

SECTION 218 – SEPARATE CHARGE FOR EVERY DISTINCT OFFENCE

For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately:

Provided that where the accused person, by an application in writing, so desires and the Magistrate is of the opinion that such person is not likely to be prejudiced thereby the Magistrate may try together all or any number of the charges framed against such person.

This Section provides, first, that there should be a separate charge for every distinct offence; and, secondly, that there should be a separate trial for every such charge, except in the four cases under Sections 219, 220, 221 and 223.The proviso authorizes the Magistrate for amalgamation of case on the application of the accused, but it does not authorize the sessions Judge to amalgamate the cases. Joint trial is an enabling provision which permits the Court to try at one trial more than one offence. Holding separate trial in cases where a single trial could have been possible under Section 219. These are only enabling sections and the Court may exercise discretion in favour of not combining the several charges.

DISTINCT OFFENCE

When two offences are committed and they have no connection with each other they are distinct offences. Even where the offences are not unconnected they can be distinct offence and separate charge shall follow. For instance in case of rioting and arson in one transaction will invite different charges for the distinct offences of arson and rioting.

Every distinct offence cannot be treated to have the same meaning as every offence. Offence will be distinct if they fall under different sections of the same penal enactment or under different enactments, or when they are committed on different occasions or against different persons even though they may fall under different sections. For instance if , if an accused at one at the same time and place and also at the same place attacks and cause injuries to several persons, he commits as many distinct offences as the person he attacks, although the same thing may have been done in the course of the same transaction.

Separate offences need not be lumped together in a single charge. The joint trial for the two charges may be legally tried under the provision of Section 219 but it is undesirable to lump together two separate offence of murder under one head of charge.

VINUBHAI RANCHHODBHAI PATEL V. RAJIVBHAI DUDABHAI PATEL AND OTHERS, (2018) 7 SCC743

In this case, the Hon'ble Court has discussed the importance, relevance and necessity of framing a charge without which, any judgment and sentence therein, if any, will be bad in the eyes of law, if failure of justice occurs thereby.

An incident occurred in a village leaving 3 persons dead and 5 persons injured. On completion of investigation a charge sheet can to be filed against 15 accused and the two accused were absconding who were later apprehended and put to a separate trial for the offences punishable under sections 147, 148, 120B, 302 and 307 read with section 149 of IPC and under Section 25(1)(A)of the Arms Act and under Section135of Bombay Police Act in Sessions Case. Out of the 15 accused 4 were convicted who preferred an appeal to the Gujarat High Court challenging conviction and sentence.

The Apex Court observed that it is a case where no clear charges have been framed. It is a case where three persons died and five were injured allegedly in an attack by all the accused. Causing death to each one of the three persons or causing injury to each one of the five persons is a distinct offence. Similarly, an offence under section 307 is a distinct offence specific to a particular victim. The offences under sections 147 and 148 are distinct offences. Section 149 does not create a separate offence but only declares the vicarious liability of all the members of an unlawful assembly in certain circumstances.

The Apex Court stated that in the case on hand where three persons died, the charge under Section 302 must have been framed on three counts against specifically named accused with respect to each of the deceased. Assuming for the sake of argument, that all the 17 persons are accused of causing the death of each one of the three deceased, distinct charges should have been framed with respect to each of the deceased. It is also necessary that the court should record a specific finding as to the guilt of the accused under Section 302 IPC qua the death of a named deceased. If different accused are prosecuted for causing the death of the three different deceased, then distinct charges should have been framed specifying which of the accused are charged for the offence of causing the death of which one of the three different deceased. Charges should also have been proved clearly indicating which of the accused is charged for the offence under Section 302 simpliciter or which of the accused are vicariously liable under Section 149 IPC for causing the death of one or more of the three deceased. Of

course, none of the accused is eventually found vicariously guilty of the offence under Section 302 IPC read with Section 149 IPC.

The responsibility of the prosecution and/or of the court [in a case like the one at hand where large numbers of people (5 or more) are collectively accused to have committed various offences and subjected to trial]—in examining whether some of the members of such group are vicariously liable for some offence committed by some of the other members of such group—requires an analysis. Such analysis has two components — (i) the amplitude and the vicarious liability created under Section 149; and (ii) the facts which are required to be proved to hold an accused vicariously liable for an offence.

Further, by definition of the offences covered under Sections 147 and 148 [Section 146 IPC defines the offence of rioting. Section 147 IPC prescribes punishment for offence of rioting. Section 148 IPC prescribes punishment for offence of rioting armed with deadly weapons.] , a person cannot be charged simultaneously with both the offences by the very nature of theses offences. A person can only be held guilty of an offence punishable either under Section 147 or Section148.

Making the aforesaid observations regarding the framing of charges for distinct offences, the Hon'ble Court expressed its displeasure on the manner in which the Trial Court had conducted the trial.

STATE OF BIHAR V. RAMAUTAR SINGH, AIR 1956 PAT 10

In this case, the accused had killed a man and subsequently had also killed his wife. It was held that the two murders were distinct offences and inclusion of both in one charge offended the provision of Section 218(1).

VIJENDRA V. STATE OF DELHI, 1997 (6) SCC 171

In the offences of kidnapping and murder and those of Section 25 of the Arms Act read with Section 5 of the Terrorist and Disruptive Activities (Prevention) Act for illegal possession of country made pistol and cartridge, there was no evidence that the arms were used for kidnapping or murder. It was held that the said offences are distinct and separate and therefore joinder of charges and joint trial is illegal because the accused persons had been prejudiced by such joint trial. So, the conviction under Section 25 of the Arms Act and Section 5 of the Terrorist and Disruptive Activities (Prevention) Act had been set aside by the Hon'ble Supreme Court.

CHANDRMA PD. CHAMAR V. STATE, 1951 (1) CAL 539

It was held in this case that where two dacoities are committed in two different houses on the same night, a single rolled up charge embracing both dacoities should not be framed. Similarly in ***Sanatan Mondal v. State, 1988 (94) Cr. LJ 238 (Cal)***, it was held that in four cases of dacoities in four different flats in the same building cannot be joined together.

The Section requires a separate charge to be framed for every distinct offence. It does not say "for every offence" or "for each offence". A distinct offence is distinguished from another by:-

(A) difference in time of their occurrence or

(B) Place or

(C) Victims of crimes being different or

(D) the Acts constituting the offence are covered by different sections.

Distinct offence must have different content and separate charge required for it and not necessarily for each or every offence.

STATE OF JHARKHAND THROUGH SP, CBI V. LALU PRASAD @ LALU PRASAD YADAV, 2017 (4) SUPREME 321

The Hon'ble Court, in this case, discussed the concept of *autrefois convict autrefois acquit* and the provisions of Article 20(2) of the Constitution read with Sections 300,212,219, 220 and 221, Code of Criminal Procedure, 1973. The contention in this case was based on double jeopardy. In this case, a general conspiracy was hatched in the period 1988- 1996 but the defalcations were from different treasuries for different financial years by exceeding the amount of each year allocated for Animal Husbandry Department for each of the district. The amount involved was also different. Fake vouchers, fake allotment letters and fake supply orders had been prepared with the help of different sets of accused persons. It was held that though there was only one general conspiracy to commit the offences, the offences themselves were distinct. ***The Hon'ble Court drew a distinction between "same kind of offence" and "same offence" and held that there must be separate trials for different offences and separate charges must be framed for distinct offences and they cannot be clubbed together for more than one year. Since, the transactions were from different treasuries, the transaction cannot be considered to be the same and, therefore, Section 221 was held to be not attracted in this case.***

(Paras 23,31)

SECTION 219 – THREE OFFENCES OF THE SAME KIND WITHIN A YEAR MAY BE CHARGED TOGETHER

Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the IPC or of any other special or local law:

Provided that an offence punishable under Section 379 shall be deemed to be an offence of the same kind as an offence under Section 380 of the IPC and the attempt to commit such an offence shall also be the offence of the same kind.

BIPIN CHANDRA V. REPUBLIC OF INDIA 1964 (1) CRI LJ 688

Section 5 of the Prevention of Corruption Act is not confined to single act of misappropriation but to many similar acts committed by the accused. All such acts can be tried together. Limitations do not apply to such trials.

SECTION 220 – TRIAL FOR MORE THAN ONE OFFENCE

If, in one series of act so connected together as to form part of the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for every such offence.

When a person charged with one or more offences of Criminal Breach of Trust of dishonest misappropriation of property as provided in Sub-Section (2) of Section 212 or Section 219(1), is accused of committing, for the purpose of facilitating or concealing the commission of that offence or those offences, one or more offences of falsification of accounts, he may be charged with and tried at one trial for, every such offence.

If the **act alleged** constitute the offence falling within two or more separate definitions of any law for the time being in force by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offence.

If several acts, of which one or more than one would by themselves or itself constitute an offence, constitute when combined a different offence, the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one or more, such acts. Section 71 of the IPC is not affected by anything contained in this provision.

Section 219 lays down that more offence than one of the same kind within 12 months, not exceeding three, can be charged together. Under Section 220, there is no restriction in the number of offences which can be charged if they are in one series of acts so connected together

as to form part of the same transaction. The distinction between these two provisions has been succinctly elucidated in T.B. Mukherji case. The ratio of this case implies that distinct offences have been committed of the same kind in separate transactions, more than three, cannot be clubbed together. However, when they are part of the same transaction, there is no limit in the number of offences that can be charged together in a case.

T.B.MUKERJI V. STATE, AIR 1954 ALL 501

It was held in this case that offences mentioned in Section 220(1) may be of same nature of different natures. If they are of same nature, they can be tried together regardless of their number. The limit of three offences which govern the joinder of charges when the offences are committed in different transaction does not govern the joinder of charges when they are governed in the same transaction. If the offences are committed in one transaction they will be governed by Section 220(1) and when in one transaction by Section 219.

K.T.M.S. MOHAMMAD V. UNION OF INDIA, AIR 1992 SC 1831

The Hon'ble Court held, in this case, that misjoinder of charges is not a mere irregularity, but the accused may be entitled to acquittal solely on this ground.

SECTION 221 – WHERE IT IS DOUBTFUL WHAT OFFENCE HAS BEEN COMMITTED

If a single act or series of act is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of the offences, and any number of charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offence.

If in such a case if the accused in charged with one offence and it appears in the evidence that he has committed a different offence for which he might have been charged under the provision of sub-section(1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

GURNAIB SINGH V. STATE OF PUNJAB, 2013 CRILJ 3212

In this case, the charge under Section 304B had been framed against the accused persons but they were convicted under section 306 of the Indian Penal Code. The Hon'ble Supreme Court held that based on the sketchy evidences in the trial, it is difficult to concur with the finding that there was demand for dowry by the accused husband and the harassment pertained to such a demand. The Hon'ble Court further observed that *it has come out in evidence that there was ill treatment by the mother-in-law and the husband. The bride was in her early twenties. She*

was turned out of the matrimonial home on certain occasions. This aspect has been established beyond doubt. There can be no dispute that in a family life, there can be differences, quarrels, misgivings and apprehensions but it is the degree which raises it to the level of mental cruelty. A daughter-in-law is to be treated as a member of the family with warmth and affection and not as a stranger with despicable and ignoble indifference. She should not be treated as a housemaid. No impression should be given that she can be thrown out of her matrimonial home at any time. In the case at hand, considering the evidence of the prosecution witnesses, we are disposed to think that it is a case where the bride was totally insensitively treated and harassed. It is not that she has accidentally consumed the poison. She had deliberately put an end to her life. The defence had tried to prove that she was suffering from depression and because of such depression; she extinguished the candle of her own life. The testimony of the doctors cited by the defence has not been accepted by the learned trial Judge as well as by the High Court. They have not been able to bring in adequate material on record that she was suffering from such depression as would force her to commit suicide. On a perusal of the evidence of the said witnesses, we find that the finding recorded on that score is absolutely impeccable, and, therefore, the fact that she was treated with cruelty and harassed was given credence.

The Hon'ble Court further held that –

> *"20. There is no dispute that no charge was framed under Section 306 IPC. Though the charge has not been framed under Section 306 yet on a question that has been put under Section 313 CrPC, it is clear as crystal that they were aware that they are facing a charge under Section 304-B IPC which related not to administration of poison but to consumption of poison by the deceased because of the demand of dowry and harassment.It is major evidence in comparison to Section 306 IPC which deals with abetment to suicide by a bride in the context of Explanation clause (a) of Section 498-A IPC.The test is whether there has been failure of justice or prejudice has been caused to the accused."*

Referring to several judgments on analyzing the concept of "failure of justice",[22] the Hon'ble Court held that in the present case, the basic ingredients of the offence under Section 306 IPC have been established by the prosecution inasmuch as the death has occurred within seven years in an abnormal circumstance and the deceased was metedout with mental cruelty and, therefore, the Hon'ble Supreme Court ordered the conviction under Section 306 instead of Section 304B, though charges had not been framed under Section 306.[23]

22 *Shamnsaheb M. Multtani v. State of Karnataka, (2001) 2 SCC 577; Gurbachan Singh v. State of Punjab, AIR 1957 SC 623.*

23 *See also, Narwinder Singh v. State of Punjab, (2011) 2 SCC 47 ; K. Prema S. Rao v. Yadla Srinivasa Rao, (2003)*

DINESH MEHTA V. STATE, 2007 CRLJ 3834 DEL

It was held in this case that an accused charged under Sections 304 B and 498A can be alternatively charged under Section 306 IPC.

In the present case the Trial Court charged the accused for commission of offences punishable under Sections 498-A/304-B, IPC wherein the victim had suffered 90% burn injuries. The question to be decided is whether the case falls under that of section 304B.

The Delhi High Court referred to the decision in ***Rajesh Mehta v. State***[24], where the issue was whether the charges were correctly framed under Section 498-A and 304-B, and if the charge under Section 306; though not framed by the trial Court, was made out. The Court held as follows:

> *"14. A bare perusal of Section 221 of the Code shows that wherever it is doubtful as to which of the several offences, the facts, if proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once. The basic principle is that the doubt should be as to the nature of the offence and not about the facts. Therefore, if on the basis of the facts alleged by the prosecution, it is doubtful as to which of the offences, the alleged facts will constitute, the framing of alternative or additional charge is permissible."*

Section 221 of the code cannot be invoked where the facts themselves are in doubt nor it can be invoked for framing charges for those offences, the ingredients of which are altogether different. In ***Jatinder Kumar v. State of Delhi***[25], and ***Sangaraboina Sreenu v. State of Andhra Pradesh***[26] it was held that since the ingredients of Sections 302 and 306 of Indian Penal Code were distinct and these two offences belonged to two different categories, alternative charges under both these sections could not be framed.

However, the ingredients of Sections 304-B and 306, IPC are not so different and distinct so as to say that the charges under both these sections cannot be framed against an accused. Under Section 304-B, IPC, the death of a woman caused by burns, injury or otherwise than in normal circumstances within seven years of her marriage becomes punishable if it is shown that soon before her death, she was being subjected to cruelty or Harassment for or in connection with any demand of dowry. On the other hand, if a woman commits suicide upon abetment of an accused, the offence under Section 306, IPC may be made out. The instigation for the purposes of abetment, as defined under Section 107, IPC, would include the cases of

24 *(2001) 93 DLT 428*
25 *1992 Cri LJ 1482*
26 *(1997) 5 SCC 348*

inciting, goading, provoking or pushing the woman into a situation, which compels her to put an end to her life by committing suicide.

In case of the death of a woman, the difference, therefore, between Sections 304-B and 306, IPC primarily remains in regard to the demand of dowry, which is an essential ingredient of Section 304-B, IPC and is not so for the purposes of an offence under Section 306, IPC. Section 304-B, IPC can be taken as an aggravated form of Section 306, IPC in regard to the death of a woman, who is harassed on account of dowry demands and dies within seven years of her marriage. If in a trial under Section 304-B, IPC, dowry related harassment or cruelty is not proved or it is shown that the woman had been married for a period of more than seven years, the offence would not fall under Section 304-B, IPC, but may fall within the ambit of Section 306, IPC, which dealt with cases in which an accused by his conduct incites, provokes or virtually pushes the woman into a desperate situation where she is compelled to put an end to her life by committing suicide. It, therefore ,can be safely said that the offences under Sections304-B and 306, IPC are neither quite distinct nor they belong to two different categories. However, offences under Sections 302 and 306 are quite distinct and belong to two different categories.

Therefore, the High Court stated that an alternative charge under section 306 is required to be framed against the accused by the trial court.

DALBIR SINGH V. STATE OF UP 2004 (3) SUPREME 506

In this case the accused was originally charged under Section 302 and 498A of the IPC, but the fact on evidence established the case to be suicidal and not homicidal. The question was whether in the absence of specific charge of Section 306, whether a Judgment under Section 306 can be returned.

The Hon'ble Court observed that *it is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required, a nice balancing of the rights of the State and the protection of society in general against protection from harassment to the individual and the risks of unjust conviction. Relying on several judgments, the Hon'ble Court held that in view of Section 464 of the CrPC, it is possible for the appellate or revisional Court to convict an accused for an offence for which no charge was framed unless the Court is of the opinion that a failure of justice would in fact occasion.* In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought

to be established against him were explained to him clearly and whether he got a fair chance to defend himself.

SECTION 222 – WHEN OFFENCE PROVED INCLUDED IN OFFENCE CHARGED

When a person is charged with an offence consisting of several particulars, a combination of some only of which constitute a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

When a person is charged with an offence and facts are proved which reduce it to minor offence, he may be convicted of the minor offence, although he is not charged with it.

When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

However, this Section shall not be deemed to authorize a conviction of any minor offence where the condition requisite for the initiation of proceedings in respect of that minor offence is not satisfied.

PAL SINGH V. STATE OF PUNJAB, 2014 CRILJ 2573 (SC)

The accused persons including the petitioner were charged under Sections 302, 148/149 IPC and Section 120B IPC. Evidence of eyewitness was that petitioners came fully armed with iron rods and both of them gave two blows each on the vital part of the body i.e. head and forehead which proved fatal for deceased. Also no question was put to the doctor as to whether injuries caused by each of the petitioners were sufficient in the ordinary course of nature to cause death. Petitioners could be convicted under Section302 even if no separate charge was framed under these Sections.

SECTION 223 – WHAT PERSONS MAY BE TRIED JOINTLY

The following persons may be charged and tried together, namely—

- Persons accused of the same offence committed in the course of same transaction;
- person accused of an offence and person accused of abetment or attempt to commit such offence
- persons accused of more than one offence of the same kind, within the meaning the meaning of Section 219 committed by them jointly within a period of twelve months;

- persons accused of different offences committed within the course of same transaction;
- persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining or assisting in the disposal or concealment of property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last-named offence;
- persons accused of offences under Section 411 IPC and 414IPC
- persons accused of counterfeiting of currency notes.

SECTION 216 – COURT MAY ALTER CHARGE

Any Court may alter or add to any charge at any time before the Judgment is pronounced.

Every such alteration or addition shall be explained to the accused.

If the addition or alteration of charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court to prejudice the accused in his defence, or the prosecutor in the conduct of the case the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge has been the original charge.

If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction, is obtained for a prosecution of the same facts as those on which the altered or added charge is founded.

RANBIR YADAV V. STATE OF BIHAR, AIR 1995 SC 1219

Merely because the charge has been added or altered it cannot be presumed that a new trial has commenced unless the Court passes a Specific order and directs a new trial.

The Court is empowered to pass an order of retrial under Section 216(4), if continuing with the trial is likely to cause prejudice to the accused in his defence or the prosecutor. Alternatively the Court has an option to summon the witnesses under Section 217.

R.RACHAIAH V. HOME SECRETARY, BANGALORE, AIR 2016 SC 2447

In this case the accused was put on trial for charge under Section 306 of the IPC and 26 witnesses were examined by the prosecution and at the fag end of the trial, the charge was amended and the accused was charged alternatively under Section 302 and convicted thereunder.

The Hon'ble Court held that it was incumbent upon the prosecution to re-call the witnesses, examine them in the context of charge under Section 302 IPC and allow the accused to cross-examine those witnesses. The trial therefore stood vitiated and there could not be any conviction under Section 302 IPC.

GOVINDAMMAL V. M.THILAKAVATHY, 2000 CRILJ 1073

Issue – Where under Section 494 IPC bigamy is alleged and the husband (first accused) and second wife(second accused) are the parties, is it proper to allow alteration of the charge against the second wife to mention Section 109 IPC and to add time and place of offence?

In this case, the Hon'ble Court answered the question in the affirmative since the accused persons were not prejudiced thereby as the witnesses could be questioned.

SECTION 217 – RECALL OF WITNESSES WHEN CHARGE ALTERED

Whenever a charge is altered or added by Court after the commencement of trial, the prosecutor and the accused shall be allowed—

- to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, **unless** the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice
- also to call any further witness whom the court may think to be material.

RANVIR YADAV V. STATE OF BIHAR, 1995 CR LJ 2265

Though the trial court has discretion in respect of giving a direction for a fresh trial after addition or alteration in charge, yet it is not essential in every case because it depends upon facts and circumstance of the said case.

SATISH SHETTY V. STATE OF KARNATKA, 2016 (4) SUPREME 412

When relevant and glaring material facts are already part of charge under other provisions, conviction under a provision in absence of any charge framed under that provision would be permissible.

MOOSA ABDUL RAHIMAN V. STATE OF KERALA, 1982 CRILJ 2087 (KER)

It is the duty of the prosecution or the accused to request for re-examination of witnesses, it is not the duty of the Court to act Suo moto.

Powers and Duties of the Court under Section 311 Cr.P.C.

ZAHIRA HABIBULLAH SHEIKH (5) V. STATE OF GUJARAT, (2006) 3 SCC 374

Section 311 of the Criminal Procedure Code is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall".

In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded.

On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. ***This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it.*** It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. ***There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.***

The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative

factor is whether it is essential to the just decision of the case. ***The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused.*** The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Evidence Act, 1872 are based on this rule. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. ***But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge***.

The object of Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. ***If a witness called by the court gives evidence against the complainant, he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a court arises not under the provisions of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the court could not be termed a witness of any particular party, the court should give the right of cross-examination to the complainant***. These aspects were highlighted in ***Jamatraj Kewalji Govani v. State of Maharashtra***[27]. (Reiterated later in ***Iddar v. Aabida, (2007) 11 SCC 211***

27 *(1967) 3 SCR 415*

MANJU DEVI V. STATE OF RAJASTHAN, 2019 SCC ONLINE SC 552

In this case an application under section 311 Cr.P.C. was made by the appellant seeking the recording of evidence of a Nigerian Doctor through video conferencing. The Doctor had conducted the post mortem of the deceased in an alleged dowry death case.

The Apex Court allowed the application. The Apex Court said that it needs hardly any emphasis that the discretionary powers like those under Section 311 Crpc are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity in so far as the evidence is concerned as also to ensure that no prejudice is caused to anyone. The principles underlying Section 311 Crpc and amplitude of the powers of the Court thereunder have been explained by this Court in several decisions.[28]

In ***Natasha Singh v. CBI (State)***[29], though the application for examination of witnesses was filed by the accused but, on the principles relating to the exercise of powers under Section 311 Crpc , this Court observed, inter alia, as under:—

> *"8. Section 311 Crpc empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under Crpc, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, the Crpc has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings.* ***The court is competent to exercise such power even suomotu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.***
>
> *15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results.* ***An application under Section 311***

28 *Mohanlal Shamji Soni v. Union of India: 1991 Supp (1) SCC 271, Zahira Habibulla H. Sheikh v. State of Gujarat: (2004) 4 SCC 158, Mina Lalita Baruwa v. State of Orissa: (2013) 16 SCC 173 and Rajaram Prasad Yadav v. State of Bihar: (2013) 14 SCC 461*

29 *(2013) 5 SCC 741*

Crpc must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. *Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 Crpc must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as "any Court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this Section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case."*

RAJARAM PRASAD YADAV V. STATE OF BIHAR, (2013) 14 SCC 461

In the present case the second respondent wanted himself to be re examined. Elaborating on the point of re calling or re examination of the person already examined, the Court linked section 138 of the Evidence Act with section 311 Cr.p.c.

The Apex Court stated that a conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression *"any"* has been used as a prefix to *"court"*, *"inquiry"*, *"trial"*, *"other proceeding"*, *"person as a witness"*, *"person in attendance though not summoned as a witness"*, and *"person already examined"*. By using the said expression *"any"* as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case.

Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the

prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

From a conspectus consideration of the several decisions, while dealing with an application under Section 311 CrPC read along with Section 138 of the Evidence Act, the following principles will have to be borne in mind by the courts:

1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?

2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

6. The wide discretionary power should be exercised judiciously and not arbitrarily.

7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

14. The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

VIJAY KUMAR V. STATE OF U.P., (2011) 8 SCC 136

The Apex Court noted that Section 311 of the Code of Criminal Procedure consists of two parts viz. (1) giving discretion to the court to examine the witness at any stage; and (2) the mandatory portion which compels a court to examine a witness if his evidence appears to be essential to the just decision of the case. The section enables and in certain circumstances, imposes on the court the duty of summoning witnesses who would have been otherwise brought before the court. This section confers a wide discretion on the court to act as the exigencies of justice require. The power of the court under Section 165 of the Evidence Act is complementary to its power under this section. These two sections between them confer jurisdiction on the court to act in aid of justice.

There is no manner of doubt that the power under Section 311 of the Code of Criminal Procedure is a vast one. This power can be exercised at any stage of the trial. Such a power should be exercised provided the evidence which may be tendered by a witness is germane to the issue involved, or if proper evidence is not adduced or relevant material is not brought on record due to any inadvertence. It hardly needs to be emphasised that power under Section 311 should be exercised for the just decision of the case. The wide discretion conferred on the court to summon a witness must be exercised judicially, as wider the power, the greater is the necessity for application of the judicial mind. Whether to exercise the power or not would largely depend upon the facts and circumstances of each case. As is provided in the section, power to summon any person as a witness can be exercised if the court forms an opinion that the examination of such a witness is essential for the just decision of the case.

Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. ***The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously***.

U.T. OF DADRA & NAGAR HAVELI V. FATEH SINH MOHAN SINH CHAUHAN, (2006) 7 SCC 529

The Apex Court while elaborating on the scope of section 311, emphasized that the principle is well settled that the exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth

in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice.

RATANLAL V. PRAHLAD JAT, (2017) 9 SCC 340

The Apex Court stated in this case the object of section 311 and also the requirement of stating the reasons for exercising the power under section 311. The Court was also of the opinion that when there is a delay in filing the application under section 311, the same should be explained in the application.

The Apex Court noted that in order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. ***The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society***. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. ***Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order.***

In ***State (NCT of Delhi) v. Shiv Kumar Yadav***[30], it was held thus:

> *"… 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, there is no ground to justify the recall of witnesses already examined."*

30 *(2016) 2 SCC 402*

Further, the Apex Court was of the view ***that the delay in filing the application is one of the important factors which has to be explained in the application.***

In ***Umar Mohammad v. State of Rajasthan***[31], this Court has held as under:

"The very fact that such an application was got filed by PW 1 nine months after his deposition is itself a pointer to the fact that he had been won over. It is absurd to contend that he, after a period of four years and that too after his examination-in-chief and cross-examination was complete, would file an application on his own will and volition. The said application was, therefore, rightly dismissed."

Coming to the facts of the present case, ***after a passage of 14 months, the Prosecution witnesses have filed the application for their re-examination on the ground that the statements made by them earlier were under pressure. They have not assigned any reasons for the delay in making application. It is obvious that they had been won over.***

MANNAN SHAIKH V. STATE OF WEST BENGAL, (2014) 13 SCC 59

In this case the Court was posed with the question whether further recall of a witness already recalled under section 311 Cr.p.c permissible.

The Apex Court stated that the aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

The words 'essential to the just decision of the case' are the key words. ***The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary.*** Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammeled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case.

31 *(2007) 14 SCC 711*

In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine.

While dealing with Section 311 of the Code in *Rajendra Prasad v. Narcotic Cell*[32] this Court explained what is ***lacuna in the prosecution*** as under: "Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

Reference must also be made to the observations of this Court in ***Zahira Habibulla H. Sheikh and anr. v. State of Gujarat and ors***[33] where this Court described the scope of Section 311 of the Code as under: "Object of the Section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth."

In the present case, ***it is true that PW 15 SI Dayal Mukherjee was once recalled but that does not matter. It does not prevent his further recall. Section 311 of the Code does not put any such limitation on the court. He can still be recalled if his evidence appears to the court to be essential to the just decision of the case. In this connection we must revisit Rajendra Prasad where this Court has clarified that the court can exercise the power of resummoning any witness even if it has exercised the said power earlier***. Relevant observations of this Court run as under:

> "*12. We cannot therefore accept the contention of the appellant as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that the prosecution discovered laches only when the defence highlighted them during final*

32 *(1999) 6 SCC 110*
33 *(2004) 4 SCC 158*

arguments. ***The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision.*** *The steps which the trial court permitted in this case for resummoning certain witnesses cannot therefore be spurned down or frowned at."*

BIRI BHAGAT V. STATE OF JHARKHAND, 2015 4 JLJR 269

The Jharkhand High Court was vexed with the question whether production of any document be ordered in exercise of the powers conferred under Section 311 of the Code.

The Jharkhand High Court referred to the decision in ***Vindhyawashini Prasad @ Vindhyawashini Prasad Verma***[34], wherein the Hon'ble Court has held that the court below has exceeded his power under section 311 of the Code by calling for certain documents from the parties and from the registration office, since under the provisions of Section 311 of the Code, documents cannot be called, produced or proved in a trial.

GOVIND YADAV V. STATE OF JHARKHAND, 2012 3 JLJR 314

The Jharkhand High Court noted that the Court below has directed for examination of such witnesses, who are not named in the charge-sheet. Their statements were not recorded by the police during investigation. This apart, sufficient opportunity was given to the prosecution for examining the witnesses even after closing the prosecution evidence, but the prosecution did not avail the opportunity and the prosecution evidence was again closed after giving sufficient opportunity to the prosecution.

In this view of the matter, the Jharkhand High Court was of the considered view that the examination of the witnesses, who were not named in the charge-sheet and whose statements had not been recorded by the police during investigation and one of whom was not produced by the prosecution even though the Court had given sufficient opportunity to the prosecution, shall certainly prejudice the defence of the petitioners, apart from allowing the prosecution to fill up the lacuna.

AMIT RAJ VARDHAN V. STATE OF JHARKHAND, 2009 3 JLJR 107

In this case the Court considered the fact whether new evidence could be admitted at any stage even after closure of the prosecution and defence.

Section 311 Cr.P.C. consists of two parts. The first part speaks about the discretionary powers enabling a Court to exercise the power at any stage to summon any witness or to examine any witness present in Court or to recall and re-examine any witness.

34 *(2002) 1 East Criminal Cases 21 (Pat)*

Whereas the second part is mandatory in nature which speaks that if the new evidence appears to be essential to the just decision of the case, the Court is bound to take any of the above steps. The object of the section is to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for the just decision of a case.

If the Court finds that the new evidence is to be admitted for the just decision of the case, then in that case, such power can be exercised at any stage even after closure of the prosecution and defence. This power can be exercised so long as the judgment has not been pronounced by the Court.

The main and foremost question to be considered by the trial court is as to whether the examination of the witnesses for whom prayer has been made by the prosecution for their examination is essential to the just decision of the case or not? The function of the Court is to render just decision. The criminal court is to administer criminal justice and not to count errors committed by the parties. If the examination of any witness is essential to the just decision of the case then the trial court must exercise its power under Section 311 Cr.P.C. and allow the prosecution to examine the witnesses.

Section 313 Cr.P.C. - Powers, Procedure and Purpose

MUKESH KUMAR V. STATE OF JHARKHAND, 2010 4 JLJR 321

The Jharkhand High Court was vexed with the question whether the order of conviction can be based only on the statement recorded under Section 313 Cr.P.C.

The Jharkhand High Court held that no doubt, it is true that Section 313 Cr. P. C. is intended to afford a person accused of a crime an opportunity to explain the circumstances appearing in evidence against him.

Sub-section (1) of the section is in two parts: the first part empowers the court to put such questions to the accused as it considers necessary at any stage of the inquiry or trial whereas the second part imposes a duty and makes it imperative on the court to question him generally on the prosecution having completed the examination of its witnesses and before the accused is called on to enter upon his defence. Therefore, it does appear that the purpose of examination of the accused under Section 313 Cr.P.C. is to give the accused an opportunity to explain the incriminating material which has surfaced on record.

After the statement under Section 313 Cr.P.C. is recorded, opportunity is given to the defence to lead evidences and then to hear the arguments and to pronounce judgment. Therefore, no

matter how weak and scanty the prosecution evidence is in regard to a certain incriminating material, it is the duty of the court to examine the accused and seek his explanation thereon. It has been well settled that the statements made by the accused will not be evidence stricto sensu for the reason that no oath is administered to the accused before his statement is recorded. That is why sub-section (3) says that the accused shall not render himself liable to punishment if he gives false answers. However, at the same time, one in order to decide the issue as has been formulated to take notice of the provision as contained in sub-section (4) which reads as under:-

> *"Section 313 (4) : The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed."*

Thus, the answers given by the accused in response to his examination under Section 313 Cr.P.C. can be taken into consideration in such inquiry or trial. This much is clear on a plain reading of the above sub-section. Therefore, the statement by the accused though cannot be taken strictly as evidence, sub-section (4) permits that it may be taken into consideration in the said inquiry or trial. This proposition of law has already been laid down in the cases of ***State of Maharashtra v. A.B. Chowdhari***[35]***, Hate Singh Bhagat Singh v. State of M.B.***[36] and also in the case of ***Narain Singh v. State of Punjab***[37], *wherein it has been held that if the accused confesses to the commission of the offence with which he is charged the Court may, relying upon that confession, proceed to convict him*. It would be better to reproduce the observation made in the case of ***Narain Singh v. State of Punjab*** by the Hon'ble Supreme Court by three Judges Bench:

> *"Under Section 342 of the Code of Criminal Procedure by the first sub-section, insofar as it is material, the Court may at any stage of the enquiry or trial and after the witnesses for the prosecution have been examined and before the accused is called upon for his defence shall put questions to the accused person for the purpose of enabling him to explain any circumstance appearing in the evidence against him. Examination under Section 342 is primarily to be directed to those matters on which evidence has been led for the prosecution to ascertain from the accused his version or explanation-if any, of the incident which forms the subject-matter of the charge and his defence. By sub-section (3), the answers given by the accused may be taken into consideration at the enquiry or the trial. If the accused person in his examination under Section 342 confesses to the commission of the offence charged against him the court may, relying upon that confession, proceed to convict*

35 *AIR 1968 S.C. 110*
36 *AIR 1953 S.C. 468*
37 *(1964)1 Cri.L.J. 730*

him, but if he does not confess and in explaining circumstance appearing in the evidence against him sets up his own version and seeks to explain his conduct pleading that he has committed no offence, the statement of the accused can only be taken into consideration in its entirety."

Further, the Jharkhand High Court noted that the present subsection (4) with which this Court is concerned is a verbatim reproduction of subsection (3). Therefore, the aforesaid observations apply with equal force. Subsequently, the Hon'ble Supreme Court in a case of ***State of Maharashtra v. Sukhdev Singh and Another***[38] putting its reliance on the case of Hate Singh Bhagat Singh and also on the case of Narain Singh held that the answers given by the accused under Section 313 Cr.P.C. examination can be used for proving his guilt as much as the evidence given by a prosecution witness.

In this case at the time of recording statement under Section 313 Cr.P.C. when the court put that question as to whether he has committed such offence, he accepted his guilt and on that basis learned trial court recorded the order of conviction and sentence, which, in the High Court's view has rightly been recorded, as plea of guilt seems to be voluntary one keeping in view that the accused on being asked expressed his intention to plead guilty and before that he had also expressed his wishes to plead guilty before the jail authority and as such that order needs no interference by this Court.

NAR SINGH V. STATE OF HARYANA, (2015) 1 SCC 496

In this case the Apex Court considered the matter whether circumstances not put to the accused for explanation could be used as evidence against him. Also, the Apex Court considered whether defective questioning under section 313 could ipso facto vitiate the trial. The Apex Court also summarized the courses available to the appellate court in case of alleged omission of compliance of section 313.

There are two kinds of examination under Section 313 CrPC. The first under Section 313(1)(a) CrPC relates to any stage of the inquiry or trial; while the second under Section 313(1)(b) CrPC takes place after the prosecution witnesses are examined and before the accused is called upon to enter upon his defence. The former is particular and optional; but the latter is general and mandatory.

The object of Section 313(1)(b) CrPC is to bring the substance of accusation to the accused to enable the accused to explain each and every circumstance appearing in the evidence against him. The provisions of this section are mandatory and cast a duty on the court to afford an opportunity to the accused to explain each and every circumstance and incriminating

38 *(1992)3 SCC 700*

evidence against him. The examination of the accused under Section 313(1)(b) CrPC is not a mere formality. Section 313 CrPC prescribes a procedural safeguard for an accused, giving him an opportunity to explain the facts and circumstances appearing against him in the evidence and this opportunity is valuable from the standpoint of the accused. The real importance of Section 313 CrPC lies in that, it imposes a duty on the court to question the accused properly and fairly so as to bring home to him the exact case he will have to meet and thereby, an opportunity is given to him to explain any such point.

Elaborating upon the importance of a statement under Section 313 CrPC, in ***Paramjeet Singh v. State of Uttarakhand*** [39], this Court has held as under:

> *"22. Section 313 CrPC is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Therefore, the court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him.* ***Circumstances which were not put to the accused in his examination under Section 313 CrPC cannot be used against him and have to be excluded from consideration.*** *(Vide Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116 and State of Maharashtra v. Sukhdev Singh (1992) 3 SCC 700.)"*

In ***Basavaraj R. Patil v. State of Karnataka***[40], this Court considered the scope of Section 313 CrPC :

> *"18. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is 'for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him'. In* ***Jai Dev v. State of Punjab***[41] *Gajendragadkar, J. speaking for a three-Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus:*
>
> > *'The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say*

39 *(2010) 10 SCC 439*
40 *(2000) 8 SCC 740*
41 *AIR 1963 SC 612*

in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.'

19. *Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion.*

20. *At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim* ***audi alteram partem****. The word 'may' in clause (a) of sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it.* ***But if the court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him.****"*

If an objection as to Section 313 CrPC statement is taken at the earliest stage, the court can make good the defect and record additional statement of the accused as that would be in the interest of all. When objections as to defective Section 313 CrPC statement is raised in the appellate court, then difficulty arises for the prosecution as well as the accused. ***When the trial court is required to act in accordance with the mandatory provisions of Section 313 CrPC, failure on the part of the trial court to comply with the mandate of the law, in our view, cannot automatically enure to the benefit of the accused. Any omission on the part of the court to question the accused on any incriminating circumstance would not ipso facto vitiate the trial, unless some material prejudice is shown to have been caused to the accused. Insofar as non-compliance with mandatory provisions of Section 313 CrPC is concerned it is an error essentially committed by the learned Sessions Judge. Since justice suffers in the hands of the court, the same has to be corrected or rectified in the appeal.***

Observing that omission to put any material circumstance to the accused does not ipso facto vitiate the trial and that the accused must show prejudice and that miscarriage of justice had been sustained by him, this Court in ***Santosh Kumar Singh v. State***,[42] has held as under:

"92. … the facts of each case have to be examined but the broad principle is that all incriminating material circumstances must be put to an accused while recording his statement under Section 313 of the Code, but if any material circumstance has

42 *(2010) 9 SCC 747*

been left out that would not ipso facto result in the exclusion of that evidence from consideration unless it could further be shown by the accused that prejudice and miscarriage of justice had been sustained by him."

In ***Paramjeet Singh v. State of Uttarakhand***[43], this Court has held as under:

"*30. Thus, it is evident from the above that the provisions of Section 313 CrPC make it obligatory for the court to question the accused on the evidence and circumstances against him so as to offer the accused an opportunity to explain the same. But, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance, instead he must show that such non-examination has actually and materially prejudiced him and has resulted in the failure of justice. In other words,* ***in the event of an inadvertent omission on the part of the court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the court."***

The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance with Section 313 CrPC has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under Section 313 CrPC, it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that the accused has suffered some disability or detriment in relation to the safeguard given to him under Section 313 CrPC. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. ***The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the Court may draw an inference of such prejudice.*** The facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused.

Further, the Apex Court noted that ***when such objection as to omission to put the question under Section 313 CrPC is raised by the accused in the appellate court and prejudice is also shown to have been caused to the accused, then what are the courses available to the appellate court?***

43 *(2010) 10 SCC 439*

The appellate court may examine the convict or call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him under Section 313 CrPC and the said answer can be taken into consideration.

The Apex Court referred to ***Shivaji Sahabrao Bobade v. State of Maharashtra***[44], and held that t***his Court has thus widened the scope of the provisions concerning the examination of the accused after closing prosecution evidence and the explanation offered by the counsel of the accused at the appeal stage was held to be a sufficient substitute for the answers given by the accused himself.***

The Apex Court then pondered on the point that if all relevant questions were not put to the accused by the trial court as mandated under Section 313 CrPC and where the accused has also shown that prejudice has been caused to him or where prejudice is implicit, whether the appellate court is having the power to remand the case for redecision from the stage of recording of statement under Section 313 CrPC.

Section 386 CrPC deals with power of the appellate court. As per sub-clause (b)(i) of Section 386 CrPC, the appellate court is having power to order retrial of the case by a court of competent jurisdiction subordinate to such appellate court. Hence, if all the relevant questions were not put to the accused by the trial court and when the accused has shown that prejudice was caused to him, the appellate court is having power to remand the case to examine the accused again under Section 313 CrPC and may direct remanding the case again for retrial of the case from that stage of recording of statement under Section 313 CrPC and the same cannot be said to be amounting to filling up lacuna in the prosecution case.

Whenever a plea of omission to put a question to the accused on vital piece of evidence is raised in the appellate court, courses available to the appellate court can be briefly summarised as under:

1. Whenever a plea of non-compliance with Section 313 CrPC is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer.

2. In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits

44 *(1973) 2 SCC 793*

3. If the appellate court is of the opinion that non-compliance with the provisions of Section 313 Cr.P.C. has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 Cr.P.C. and the trial Judge may be directed to examine the accused afresh and defence witness, if any, and dispose of the matter afresh.

4. The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused.

BALAJI GUNTHU DHULE V. STATE OF MAHARASHTRA, (2012) 11 SCC 685

The Apex Court considered the matter whether a statement made under section 313 by the accused can be the sole basis of conviction.

The Apex Court noted that the statement of the accused recorded under Section 313 of the Code cannot be put against the accused person. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution. The statement made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution.

This Court in ***Manu Sao v. State of Bihar***[45] has examined the vital features of Section 313 of the Code and the principles of law as enunciated by judgments, analysing the guiding factors for proper application and consequences that shall flow from the said provision and has observed:

> *"14. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence against the accused in any other enquiry or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other*

45 *(2010) 12 SCC 310*

evidence against him led by the prosecution. However, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution.

15. *Another important caution that courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 of the Code as it cannot be regarded as a substantive piece of evidence."*

RAJ KUMAR SINGH V. STATE OF RAJASTHAN, (2013) 5 SCC 722

The Apex Court considered the matter as to what would be the consequence if the accused chose to remain silent during his statement under section 313.

The Apex Court noted that in a criminal trial, the purpose of examining the accused person under Section 313 CrPC is to meet the requirement of the principles of natural justice i.e. *audi alteram partem*.

This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. ***In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete.*** No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. ***The circumstances which are not put to the accused in his examination under Section 313 CrPC, cannot be used against him and have to be excluded from consideration.***

In ***Mohan Singh v. Prem Singh***[46] this Court held:

"30. The statement of the accused under Section 313 CrPC is not a substantive piece of evidence. It can be used for appreciating evidence led by the prosecution to accept or reject it. It is, however, not a substitute for the evidence of the prosecution. … if the exculpatory part of his statement is found to be false and the evidence led by the prosecution is reliable, the inculpatory part of his statement can be taken aid of to lend assurance to the evidence of the prosecution. If the prosecution evidence does not inspire confidence to sustain the conviction of the accused, the inculpatory part of his statement under Section 313 CrPC cannot be made the sole basis of his conviction."

In ***Dehal Singh v. State of H.P.***[47] this Court observed:

46 *(2002) 10 SCC 236*

47 *(2010) 9 SCC 85*

"23. … Statement of an accused under Section 313 of the Code of Criminal Procedure is recorded without administering oath and, therefore, the said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act. The appellants have not chosen to examine any other witness to support this plea and in case none was available they were free to examine themselves in terms of Section 315 of the Code of Criminal Procedure which, inter alia, provides that a person accused of an offence is a competent witness of the defence and may give evidence on oath in disproof of the charges. There is reason not to treat the statement under Section 313 of the Code of Criminal Procedure as evidence as the accused cannot be cross-examined with reference to those statements. However, when an accused appears as a witness in defence to disprove the charge, his version can be tested by his cross-examination.

In ***Rafiq Ahmad v. State of U.P.*** (2011) 8 SCC 300 this Court observed as under:

"67. It is true that the statement under Section 313 CrPC cannot be the sole basis for conviction of the accused but certainly it can be a relevant consideration for the courts to examine, particularly when the prosecution has otherwise been able to establish the chain of events."

In ***Dharnidhar v. State of U.P.***[48] this Court held:

"29. The proper methodology to be adopted by the Court while recording the statement of the accused under Section 313 CrPC is to invite the attention of the accused to the circumstances and substantial evidence in relation to the offence, for which he has been charged and invite his explanation. In other words, it provides an opportunity to an accused to state before the court as to what is the truth and what is his defence, in accordance with law. It was for the accused to avail that opportunity and if he fails to do so then it is for the court to examine the case of the prosecution on its evidence with reference to the statement made by the accused under Section 313 CrPC."

In *Ramnaresh*[49] this Court had taken the view that if an accused is given the freedom to remain silent during the investigation, as well as before the court, then the accused may choose to maintain silence or even remain in complete denial, even at the time when his statement under Section 313 CrPC is being recorded. ***However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused, as may be permissible in accordance with law. While such an observation has been made, this part of the judgment must be read along with the subsequent observation of the Court stating***

48 *(2010) 7 SCC 759*
49 *(2012) 4 SCC 257*

that if he keeps silent or furnishes an explanation, in both cases, the same can be used against him for rendering a conviction, insofar as it supports the case of the prosecution.

In ***Brajendra Singh v. State of M.P.***[50] this Court held, that it is equally true that a statement under Section 313 Cr.P.C. simpliciter cannot normally be made the basis for convicting the accused. But where the statement of the accused under Section 313 CrPC is in line with the case of the prosecution, then the heavy onus of providing adequate proof on the prosecution that is placed is to some extent reduced.

In view of the above, the Apex Court stated that the law on the issue can be summarised to the effect that statement under Section 313 CrPC is recorded to meet the requirement of the principles of natural justice as it requires that an accused may be given an opportunity to furnish explanation of the incriminating material which had come against him in the trial. ***However, his statement cannot be made a basis for his conviction. His answers to the questions put to him under Section 313 CrPC cannot be used to fill up the gaps left by the prosecution witnesses in their depositions. Thus, the statement of the accused is not a substantive piece of evidence and therefore, it can be used only for appreciating the evidence led by the prosecution, though it cannot be a substitute for the evidence of the prosecution. In case the prosecution evidence is not found sufficient to sustain conviction of the accused, the inculpatory part of his statement cannot be made the sole basis of his conviction.*** The statement under Section 313 CrPC is not recorded after administering oath to the accused. Therefore, it cannot be treated as an evidence within the meaning of Section 3 of the Evidence Act, though the accused has a right if he chooses to be a witness, and once he makes that option, he can be administered oath and examined as a witness in defence as required under Section 315 CrPC. ***An adverse inference can be taken against the accused only and only if the incriminating material stood fully established and the accused is not able to furnish any explanation for the same. However, the accused has a right to remain silent as he cannot be forced to become a witness against himself.***

PRAHLAD V. STATE OF RAJASTHAN, 2018 SCC ONLINE SC 2548

In this case, the Court held: "No explanation is forthcoming from the statement of the accused under Section 313 Cr.P.C. as to when he parted the company of the victim. Also, no explanation is there as to what happened after getting the chocolates for the victim. The silence on the part of the accused, in such a matter wherein he is expected to come out with an explanation, leads to an adverse inference against the accused.

50 *(2012) 4 SCC 289*

REENA HAZARIKA V. STATE OF ASSAM, 2018 SCC ONLINE SC 2281

The Apex Court considered the matter whether complete non-consideration of the statement made under section 313 would vitiate the trial.

The Apex Court noted that Section 313, Cr.P.C. cannot be seen simply as a part of *audi alteram partem*. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2), Cr.P.C.

If the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) Cr.P.C. the Court is duty bound under Section 313(4) Cr.P.C. to consider the same. The mere use of the word 'may' cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available is an entirely different matter. ***If there has been no consideration at all of the defence taken under Section 313 Cr.P.C., in the given facts of a case, the conviction may well stand vitiated.A solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 Cr.P.C. and to either accept or reject the same for reasons specified in writing.***

In this case, unfortunately neither Trial Court nor the High Court considered it necessary to take notice of, much less discuss or observe with regard to the aforesaid defence by the appellant under Section 313 Cr.P.C. to either accept or reject it. The defence taken cannot be said to be irrelevant, illogical or fanciful in the entirety of the facts and the nature of other evidence available as discussed hereinbefore. ***The complete non- consideration thereof has clearly caused prejudice to the appellant. Unlike the prosecution, the accused is not required to establish the defence beyond all reasonable doubt. The accused has only to raise doubts on a preponderance of probability as observed in Hate Singh Bhagat Singh v. State of Madhya Bharat.***[51]

SAJJAN SHARMA V. STATE OF BIHAR, (2011) 2 SCC 206

The Hon'ble Supreme Court, in this case, discouraged the usual process in which the trial Courts used to examine the accused under Section 313, which is evident from the extracts given below from the judgment:-

51 *AIR 1953 SC 468.*

"*13. Here we may also take a look at the examination of the appellant by the court under Section 313 of the Code of Criminal Procedure. This examination too is highly unsatisfactory and sketchy. The first question by the court to the appellant (and for that matter to all the accused) was:*

> *"There is evidence against you that on 24-11-1994 at David Door Bahiar in concert with the other accused (you) killed Narain Kunwar by firing shot at him."*
>
> *The appellant replied:*
>
> *"It is wrong (to say that)."*
>
> *Whereupon the court put the second and the last question:*
>
> *"In defence you wish to say anything?"*
>
> *The appellant replied:*
>
> *"I am innocent."*

14. We are constrained to say that this is not an isolated case but it is almost a stereotype. It is our experience that in criminal trials in Bihar no proper attention is paid to the framing of charges and the examination of the accused under Section 313 of the Code of Criminal Procedure, the two very important stages in a criminal trial. The framing of the charge and the examination of the accused are mostly done in the most unmindful and mechanical manner. We wish that the Patna High Court should take note of the neglectful way in which some of the courts in the State appear to be conducting trials of serious offences and take appropriate corrective steps."

KRIT SAO V. STATE OF JHARKHAND, 2015 2 JLJR 379

The object of Section 313(1)(b) Cr.P.C., is to bring the substance of accusation to the accused to enable him to explain each and every circumstance appearing in the evidence against him. The provision, thus, is mandatory and casts a duty on the Court to afford an opportunity to the accused to explain incriminating evidence against him. It cannot be said to be a mere formality as Section 313 Cr.P.C. prescribes a procedural safeguard to an accused and this opportunity is very valuable from the stand point of the accused. Therefore, it imposes a duty on the Court to question the accused properly and fairly so as to bring home to him the exact case, he will have to meet and thereby an opportunity to him to explain any such point.

In the case ***Paramjeet Singh alias Pamma versus State of Uttarakhand***[52], the Hon'ble Supreme Court in held as under: -

> *"Section 313 CrPC is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Therefore, the court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Circumstances which were not put to the accused in his examination under Section 313 CrPC cannot be used against him and have to be excluded from consideration." (vide* ***Sharad Birdichand Sarda v. State of Maharashtra***[53]*, and* ***State of Maharashtra v. Sukhdev Singh***[54]*)*

Whether the omission to put the question under Section 313 Cr.P.C. has caused prejudice to the accused vitiating the conviction or not, would be an important aspect for discussion.

In ***State of Punjab v. Hari Singh & Others***[55] question regarding conscious possession of narcotics was not put to accused when he was examined under Section 313 Cr.P.C. Finding that question relating to possession of contraband being not put to the accused, the Hon'ble Supreme Court held that the effect of such omission had affected the prosecution case vitally, as such the acquittal was confirmed by the Hon'ble Supreme Court.

In ***Kuldip Singh & Others v. State of Delhi***[56], the Hon'ble Supreme Court held that when an important incriminating circumstance was not put to the accused during examination under Section 313 Cr.P.C., prosecution cannot place reliance on such piece of evidence

The Jharkhand High Court then referred to the decision in ***Nar Singh v. State of Haryana***[57] in which while taking into account the objection as to omission to put the question under Section 313 Cr.P.C. before the Appellate Court and the prejudice also shown to have been caused to the accused, the Hon'ble Supreme Court with regard to the courses available to the Appellate Court, summarized them in para 30 of the judgment as referred here in above.

In *Nar Singh case*, on the question of remitting the matter back to the Trial Court on the ground of non-compliance of mandatory provisions of Section 313 Cr.P.C., many aspects

52 *(2010) 10 SCC 439*
53 *(1984) 4 SCC 116*
54 *(1992) 3 SCC 700*
55 *(2009) 4 SCC 200*
56 *(2003) 12 SCC 528*
57 *2015 (1) JLJR 36 (SC)*

were considered including the custody of the appellant and the Hon'ble Supreme Court, ultimately, observed that it was a case to be remitted to the Trial Court for proceeding afresh from the stage of Section 313 Cr.P.C. so that the accused is given a fair trial. It is observed that the victim of the offence or the accused should not suffer for lapses or omission of the Court as omission to put material evidence to the accused in the course of examination under Section 313 Cr.P.C., prosecution is not guilty of not adducing or suppressing such evidence, it is only the failure on the part of learned Trial Court. In the aforesaid case, the appellant was in custody for about 8 years. Considering the right of the accused to speedy trial being a valuable one, the right of victim's family and the society at large, the appellant was not held entitled for acquittal on the ground of non-compliance of mandatory provisions of Section 313 Cr.P.C., instead while setting aside his conviction and sentence, the matter was remitted back to the Trial Court for proceeding with it afresh from the stage of recording statement of accused under Section 313 Cr.P.C. with a direction to the Trial Judge to marshal the evidence on record and put specific and separate question to the accused with regard to incriminating evidence and the circumstance.

UDIT RAM V. STATE OF JHARKHAND, 2006 2 JLJR 133

The Jharkhand High Court was of the opinion that when the circumstances and the evidence appearing against the appellant were not put to him while examining him under Section 313, Cr PC, the same cannot be used against him to convict the appellant under Sections 302/34/201/120B, IPC.

The examination of accused under this Section is not a mere formality. The attention of the accused must specifically be invited to inculpatory pieces of evidence or circumstances led on record with a view to providing him an opportunity to give an explanation if he chooses to do so. Section 313, Cr PC imposes a heavy duty on the Court to take great care to ensure that the incriminating circumstances are put to the accused and his explanation is solicited, The purpose of the examination of the accused under this Section is to give an accused an opportunity to explain the incriminating material which has been surfaced on record. It does not matter how weak or scanty the prosecution evidence is on the record to ascertain the incriminating material. It is the duty of the Court to examine the accused and seek his explanation thereunder.

DEEPAK TIRU V. STATE OF JHARKHAND, 2009 3 JLJR 38

From the perusal of the provision as contained in Section 313 of the Code of Criminal Procedure, it appears that the purpose of putting question during examination under Section 313 of the Code of Criminal Procedure is to afford the accused personally, an opportunity of

explaining any incriminating circumstances so appearing in evidence against him. However, the accused may or may not avail the opportunity for offering his explanation. It be further noticed that Section 313 does not envisage the examination of the counsel in place of accused where warrant triable cases are concerned but that mandate, in view of the proviso to Section 313(1) is never there so far summons cases are concerned.

Section 319 Cr.P.C., When, Why and How ?

HARDEEP SINGH V. STATE OF PUNJAB, (2014) 3 SCC 92

Questions (i) and (iii)

What is the stage at which power under Section 319 CrPC can be exercised?

AND

Whether the word "evidence" used in Section 319(1) CrPC has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

In ***Dharam Pal v. State of Haryana***[58], the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of the investigation. Such cognizance can be taken under Section 193 CrPC and the Sessions Judge need not wait till "evidence" under Section 319 CrPC becomes available for summoning an additional accused.

Section 319 CrPC, significantly, uses two expressions that have to be taken note of i.e. (1) inquiry (2) trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 CrPC, and under Section 398 CrPC are species of the inquiry contemplated by Section 319 CrPC. Materials coming before the court in course of such inquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 CrPC, and also to add an accused whose name has been shown in Column 2 of the charge-sheet.

In view of the above position the word "evidence" in Section 319 CrPC has to be broadly understood and not literally i.e. as evidence brought during a trial.

58 *(2014) 3 SCC 306.*

Question (ii)Whether the word "evidence" used in Section 319(1) CrPC could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

Considering the fact that under Section 319 CrPC a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) CrPC the proceeding against such person is to commence from the stage of taking of cognizance, the court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question (iv)What is the nature of the satisfaction required to invoke the power under Section 319 CrPC to arraign an accused? Whether the power under Section 319(1) CrPC can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

Though under Section 319(4)(b) CrPC the accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 CrPC would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question (v) Does the power under Section 319 CrPC extend to persons not named in the FIR or named in the FIR but not charge-sheeted or who have been discharged?

A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 CrPC provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, insofar as an accused who has been discharged is concerned the requirement of Sections 300 and 398 CrPC has to be complied with before he can be summoned afresh.

RAJESH V. STATE OF HARYANA, 2019 SCC ONLINE SC 638

In this case the Apex Court considered the matter in which if the stage of filing protest petition urging upon the trial court to summon other persons who were named in the FIR but not

implicated in the charge sheet has gone, whether those persons could be summoned to face trial.

Considering the law laid down by this Court in the case of ***Hardeep Singh***[59], it emerges that (i) the Court can exercise the power under Section 319 of the CrPC even on the basis of the statement made in the examination-in-chief of the witness concerned and the Court need not wait till the cross-examination of such a witness and the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination; and (ii) a person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 of the CrPC, provided from the evidence (may be on the basis of the evidence collected in the form of statement made in the examination-in-chief of the witness concerned), it appears that such person can be tried along with the accused already facing trial.

Even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial Court to summon other persons as well who were named in the FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 of the CrPC and even those persons named in the FIR but not implicated in the charge-sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.

JOGENDRA YADAV V. STATE OF BIHAR, (2015) 9 SCC 244

The Apex Court considered the question whether remedy of discharge is available to person arraigned as an additional accused under section 319.

On a perusal of Section 319 CrPC, it is apparent that a person who is not an accused may be added as an accused only when it appears from the evidence that he has committed any offence for which he could be tried together with the accused. The Section says that in such an eventuality, the Court *"may proceed against such person"* for the offence which he appears to have committed. In other words, a person who is not an accused becomes liable to be added where he appears to have committed an offence. Thereupon, the effect is that the Court may proceed against such a person.

Section 227 CrPC on the other hand, provides that an accused may be discharged if the Judge construes that there is no sufficient ground for the proceedings against him. In other words, if the Judge is of the view that there are no sufficient grounds for the proceedings against the accused, he may be discharged, whereupon the proceedings against him are dropped.

59 *(2014) 3 SCC 92*

It is apparent that both these provisions, in essence, have the opposite effect. The power under Section 319 CrPC results in the summoning and consequent commencement of the proceedings against a person who was hitherto not an accused and the power under Section 227 CrPC, results in termination of proceedings against the person who is an accused.

An accused since inception is not necessarily heard before he is added as an accused. However, **a person who is added as an accused under Section 319 CrPC, is necessarily heard before being so added.** Often he gets a further hearing if he challenges the summoning order before the High Court and further. ***It seems incongruous and indeed anomalous if the two sections are construed to mean that a person who is added as an accused by the court after considering the evidence against him can avail remedy of discharge on the ground that there is no sufficient material against him.*** Moreover, it is settled that the extraordinary power under Section 319 CrPC, can be exercised only if very strong and cogent evidence occurs against a person from the evidence led before the Court.

It is now settled vide the Constitution Bench decision in ***Hardeep Singh v. State of Punjab***[60], that the standard of proof employed for summoning a person as an accused under Section 319 CrPC, is higher than the standard of proof employed for framing a charge against an accused. The Court observed for the purpose of Section 319 CrPC, that:

> *"94. … What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to the conviction of the persons sought to be added as the accused in the case."*

As regards the degree of satisfaction necessary for framing a charge this Court observed in para 100: {*Hardeep Singh case* (2014) 3 SCC 92 }

> *"100. However, there is a series of cases wherein this Court while dealing with the provisions of Sections 227, 228, 239, 240, 241, 242 and 245 CrPC, has consistently held that the court at the stage of framing of the charge has to apply its mind to the question whether or not there is any ground for presuming the commission of an offence by the accused. The court has to see as to whether the material brought on record reasonably connect the accused with the offence. Nothing more is required to be enquired into. While dealing with the aforesaid provisions, the test of prima facie case is to be applied. The court has to find out whether the materials offered by the prosecution to be adduced as evidence are sufficient for the court to proceed against the accused further."*

The Court concluded in para 106 as follows: {*Hardeep Singh case*, (2014) 3 SCC 92 }

60 *(2014) 3 SCC 92*

> *"106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction."*

Thus, it does not stand to reason that a person who is summoned as an accused to stand trial and added as such to the proceedings on the basis of a stricter standard of proof can be allowed to be discharged from the proceedings on the basis of a lesser standard of proof such as a prima facie connection with the offence necessary for charging the accused.

This view is further fortified by the fact that a person is added as an accused under Section 319 CrPC, on the basis of evidence; whereas an accused is discharged under Section 227 CrPC, on a sifting of material collected i.e. *"the record of the case and the documents submitted herewith"* in order to find out whether or not there is sufficient ground for proceeding against the accused. In fact it may be noted that the mandate of Section 228 CrPC, is that the Judge only need be of

> *"opinion that there is ground for presuming that the accused has committed an offence…".*

before framing a charge. In fact this Court has held in ***Ajay Kumar Parmar v. State of Rajasthan***[61], that appreciation of evidence at the stage of Section 227 CrPC, is not permissible . It is, therefore, clear that an order for addition of an accused made after considering the evidence cannot be undone by coming to the conclusion that there is no sufficient ground for proceeding against the accused without appreciation of evidence.

The Apex Court noted that the fact that the interpretation placed on the scheme of Sections 319 and 227 makes Section 227 unavailable to an accused who has been added under Section 319 CrPC. For the reasons given above, that this must necessarily be so since a view to the contrary would render the exercise undertaken by a court under Section 319 CrPC, for summoning an accused, on the basis of a higher standard of proof totally infructuous and futile if the same court were to subsequently discharge the same accused by exercise of the power under Section 227 CrPC, on the basis of a mere prima facie view. The exercise of the power under Section 319 CrPC, must be placed on a higher pedestal. Needless to say the accused summoned under Section 319 CrPC, are entitled to invoke remedy under law against an illegal or improper exercise of the power under Section 319, but cannot have the

61 *(2012) 12 SCC 406*

effect of the order undone by seeking a discharge under Section 227 CrPC. If allowed to, such an action of discharge would not be in accordance with the purpose of Criminal Procedure Code in enacting Section 319 which empowers the Court to summon a person for being tried along with the other accused where it appears from the evidence that he has committed an offence.

BRIJENDRA SINGH V. STATE OF RAJASTHAN, (2017) 7 SCC 706

In this case the Apex Court considered the question as to what would be the meaning of "evidence" for the purpose of section 319.

The powers of the Court to proceed under Section 319 CrPC even against those persons who are not arraigned as accused, cannot be disputed. This provision is meant to achieve the objective that the real culprit should not get away unpunished. A Constitution Bench of this Court in ***Hardeep Singh v. State of Punjab***[62], explained the aforesaid purpose behind this provision in the following manner:

> *"8. The constitutional mandate under Articles 20 and 21 of the Constitution of India provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to the society at large to ensure that the guilty does not get away from the clutches of law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature under CrPC indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law. It is these ideals as enshrined under the Constitution and our laws that have led to several decisions, whereby innovating methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished.*
>
> *12. Section 319 CrPC springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 CrPC.*
>
> *13. It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an*

62 *(2014) 3 SCC 92*

accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 CrPC?

19. *The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."*

It also goes without saying that Section 319 CrPC, which is an enabling provision empowering the Court to take appropriate steps for proceeding against any person, not being an accused, can be exercised at any time after the charge-sheet is filed and before the pronouncement of the judgment, except during the stage of Sections 207/208 CrPC, the committal, etc. which is only a pre-trial stage intended to put the process into motion.

…power under Section 319 CrPC can be exercised by the trial court at any stage during the trial i.e. before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some *"evidence"* against such a person on the basis of which evidence it can be gathered that he appears to be guilty of the offence. The "evidence" herein means the material that is brought before the court during trial. ***Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 CrPC.*** No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the court under Section 319 CrPC and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrant. ***The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom charge-sheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised.*** It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

When translated, the aforesaid principles with their application to the facts of this case, an impression is gathered that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants. The appellants were named in the FIR. Investigation

was carried out by the police. On the basis of material collected during investigation, which has been referred to above, the IO found that these appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 km. The complainant and others who supported the version in the FIR regarding alleged presence of the appellants at the place of incident had also made statements under Section 161 CrPC to the same effect. Notwithstanding the same, the police investigation revealed that the statements of these persons regarding the presence of the appellants at the place of occurrence was doubtful and did not inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that the appellants' plea of alibi was correct.

SUNIL KUMAR GUPTA V. STATE OF U.P., (2019) 4 SCC 556

The Apex Court in this case was categorical in stating that a person can be added as an accused for "any offence" provided he can be "tried together" with the other accused.

Section 319(1) CrPC empowers the court to proceed against any person not shown as an accused if it appears from the evidence that such person has committed any offence for which such person could be tried together along with the accused. It is fairly well settled that before the court exercises its jurisdiction in terms of Section 319 CrPC, it must arrive at satisfaction that the evidence adduced by the prosecution, if unrebutted, would lead to conviction of the persons sought to be added as the accused in the case.

Under Section 319 CrPC, a person can be added as an accused invoking the provisions not only for the same offence for which the accused is tried but for "any offence"; but that offence shall be such that in respect of which all the accused could be tried together.

PERIYASAMI AND OTHERS V. S. NALLASAMY (2019) 4 SCC 342

The additional accused cannot be summoned under Section 319 of the Code in casual and cavalier manner in the absence of strong and cogent evidence. **Under Section 319 of the Code additional accused can be summoned only if there is more than prima facie case as is required at the time of framing of charge but which is less than the satisfaction required at the time of conclusion of the trial convicting the accused.**

DHRUVA PRASAD OJHA V. STATE OF JHARKHAND THROUGH THE C.B.I., 2018 0 SUPREME (JHK) 869

In this case the following issues arose for determination:

i. Whether the exercise of power under section 319 of the Cr.PC was proper in the eye of law and on facts?

ii. Whether there was material evidence recorded during trial or at the stage of inquiry to invoke powers under section 319 of the Cr.PC?

iii. Whether the exercise of such power by the learned CBI court satisfy the test i.e. one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that evidence if goes unrebutted, will lead to conviction of the petitioners?

iv. Whether the power has been exercised at a proper stage as is permissible in law? Whether the learned court had become functus officio after pronouncement of the judgment?

v. Whether petitioners had a right to be heard before being arraigned as an accused under section 319 of the Cr.PC?

vi. Whether in the absence of sanction for prosecution, cognizance could have been taken against the petitioners under the relevant provisions of Indian Penal Code and Prevention of Corruption Act?

vii. Whether the court's direction to file sanction order upon the CBI was proper in the eye of law?

The Jharkhand High Court observed while answering questions i, ii, iii, iv, that CBI has not filed any counter affidavit in this case. It is apparent from perusal of the impugned order that no other material evidence has been even referred to by the CBI court while taking cognizance against the petitioner 'D'. During course of submission also, no other evidence adduced during trial which was against the petitioner has been brought to the notice of this Court even by the CBI to form such an opinion. The test that has to be applied in such a case is one which is more than a prima facie as exercised at the time of framing of charge but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. The impugned order reveals that no such material evidence, as required in the eye of law, was referred to or before the CBI court. It also completely failed to record the satisfaction required as per the test prescribed under law for taking cognizance under section 319 of the Cr.PC against the petitioner 'D'. It is an extraordinary power conferred upon the Trial Court to be exercised with discretion in a judicious manner and not in a casual or cavalier manner.

As held by the Apex Court in *Hardeep Singh Case*, power under section 319(1) Cr.PC can be exercised at any time after the charge sheet is filed and before pronouncement of the judgment.

The word 'course' allows the court to invoke this power against any person from initial stage of enquiry up to the stage of conclusion of the trial. However, in the facts of the instant case, CBI Court had, after pronouncement of the judgment on 23.12.2017, proceeded to exercise the powers under section 319 of the Cr.PC to arraign these petitioners as an accused. As such, the Jharkhand high Court observed that the CBI court committed a serious error of jurisdiction while passing such order.

Trial Court on the basis of same document which were found during investigation and on which, CBI did not consider it proper to implicate the petitioner of charges of criminal conspiracy together with other accused persons, has proceeded to form the opinion that a prima facie case under the provisions of IPC and PC Act has been made out against the then Deputy Commissioner, petitioner 'S' herein. In these background facts, it is worthwhile to mention that the learned CBI court has failed to refer to any other 'evidence' adduced during enquiry or trial which could form the basis to take cognizance and arraign this petitioner as an accused to face trial in exercise of power under section 319 of Cr.PC.

For the exercise of powers under section 319 of the Cr.PC the test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr PC.

Coming to questions v, vi, vii, the High Court observed that petitioners could not get an opportunity to show that there was no such material evidence to arraign them as an accused and that such 'evidence' if goes unrebutted, could lead to their conviction. Accused persons arraigned as an accused do not have remedy to seek discharge under section 227 of the Cr.PC, as held by the Apex Court in the case of *Jogendra Yadav*. Elaborate arguments made before this Court and the materials being relied upon in support during the hearing, in itself, is an indicator that an opportunity to show-cause was required to be given before any such prima facie opinion was formed by the Trial Court. Unfortunately, learned court seems to have been completely oblivious of the principles of law well settled by the pronouncement of the Apex Court while proceeding to exercise extraordinary power conferred on it under section 319 of the Cr.PC. ***Arraignment as an accused, in itself, entails serious adverse consequences both in terms of facing a long drawn trial to vindicate his innocence and a serious slur on the reputation of such person arraigned as an accused.***

The order impugned is bad in law and in violation of principles of natural justice on that score as well. The court also did not consider it proper to wait for the sanction for prosecution against these two petitioners from the competent authority before cognizance was taken. ***The***

protection under section 197 of the Cr.PC is available both to a serving officer as well as a retired office.

MD. ISHAQUE MIAN V. STATE OF JHARKHAND, 2003 2 JLJR 530

Informant/prosecution filed a petition under Section 319 of the Code praying therein for issuance of summons against opposite party Nos. 2 to 5 for facing their trial on the ground that the witnesses examined during trial also named these persons for being involved in the crime.

In the instant case nine witnesses have already been examined and admittedly they had not said anything against opposite party nos. 2 to 5 before the Investigating Officer. It is also clear from their evidence that they are not the eye witness about assaulting or throwing the dead body into the well. Moreover the witnesses examined are relations who are interested witnesses on this point. The trial Court also considered and discussed the evidence of those witnesses in detail. It may be noted that the informant had also submitted a written report before the Police at the police station in which he had not said anything that they had seen opposite party Nos. 2 to 5 while they were throwing the dead body into the well. There was no reason as to why the informant has not stated those facts in the written report submitted before the police, which was recorded at the very initial stage giving details about the incident.

It is true that sub-section (1) of Section 319 of the Code contemplates existence of some evidence appearing in counsel of trial wherefrom the Court can prima facie conclude that the person not arraigned before he is also involved in the commission of crime for which he can be tried with other persons already on the record, but this provision ought to be exercised sparingly as this is really-an extraordinary power which ought to be "invoked only if compelling reasons exist for taking those persons also in the trial.

Clearly, the proceedings against the persons summoned under sub-section (1) of 319 of the Code are required to be commenced afresh and the witnesses reheard. The entire proceedings have to recommence from the beginning of the trial. All the witnesses have to be examined afresh. Opportunity has to be granted for cross-examination and, in this way, there has to be a denovo trial, when one of the accused Mohammad Sultan Mian has already been in jail custody since long. In such situation, the prosecution cannot be allowed to take advantage at its will. There must be cogent and reliable evidence for invoking the provision of Section 319 of the code so that no one may fall in the prey of harassment unnecessarily.

The case at hand clearly shows that several witnesses have already been examined and opposite party Nos. 2 to 5 have never been in picture either in the first information report

or the evidence collected under Section 161 of the Code. Moreover the evidence collected during trial is also not of such type, which can be used for invoking the provision of Section 319 of the Code.

SHYAMDEO MODI V. STATE OF JHARKHAND, 2006 2 AIR(JHAR)(R) 49

From a bare perusal of this provisions of Section 319 of Cr. P. C., it appears that this power can be exercised by the Trial Court at the stage of examination of the witnesses during trial and if the evidence adduced by the prosecution is pointed out against any person who is not being tried, then the Trial court may proceed against such person for the offence which he appears to have committed. This power is no doubt discretionary and has to be exercised judicially. In the decision cited by the petitioner of the Apex court, in the case of ***Michael Machado and another v. Central Bureau of Investigation***[63] and it has been held that the basic requirements for invoking Section 319 Cr. P. C. is that the Court must have reasonable satisfaction from the evidence already collected regarding two aspects. ***First that some other person who is not arraigned as an accused in that case has committed the offence. Second, that for such offence, that other person could well be tried along with the already arraigned accused. It is not enough that the Court entertained some doubts from the evidence about the involvement of another person in the offence.***

In the said decision, it has also been held that what is conferred on the Court is only a discretion as could be discerned from the words "the court may proceed against such person". The discretionary power so conferred should be exercised only to achieve criminal justice.

The Hon'ble Supreme Court, in the case of ***Dr. S. S. Khanna v. Chief Secretary, Patna***[64] has held as follows

> *"that a plain reading of Section 319 (1) which occurs in Chapter XXIV dealing with general provisions as to inquiries and trials, clearly shows that it applies to all the courts including a Sessions Court and such a Sessions Court will have the power to add any person, not being the accused before it, but against whom there appears during trial sufficient evidence indicating his involvement in the offence, as an accused and direct him to be tried along with the other accused,. . . . . In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizanceagainst them and try them along with other accused. But, we would hasten to add that this is really an extraordinary power*

63 *(2000) 3 SCC 262*

64 *AIR 1983 SC 595*

which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken. More than this we would not like to say anything further at this stage. We leave the entire matter to the discretion of the court concerned so that it may act according to law. We would however, make it plain that the mere fact that the proceedings have been quashed against respondents 2 to 5 will not prevent the court from exercising its discretion if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it."

The Hon'ble Supreme Court, in the case of Michael Machado has not held that such power under section 319 Cr. P. C. cannot and should not be exercised at the fag end of the trial rather the Hon'ble Supreme Court in the case of Dr. S. S. Khanna v. Chief Secretary, Patnahas held that "if the prosecution at any stage produced evidence which satisfies the court that the other accused" or those who have not been arrayed as accused against whom proceeding have been quashed have also committed offence, the Court may take cognizance against them and try them along with other accused. But, of course, this power has to be exercised sparingly and only for the compelling reasons."

Circumstantial Evidence

SHARAD BIRDHICHAND SARDA V. STATE OF MAHARASHTRA, (1984) 4 SCC 116

The following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in ***Shivaji Sahabrao Bobade v. State of Maharashtra***[65] where the observations were made:

"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."

65 *(1973) 2 SCC 793*

(2) 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,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) 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.

These five golden principles, constitute the panchsheel of the proof of a case based on circumstantial evidence.

G. PARSHWANATH V. STATE OF KARNATAKA, (2010) 8 SCC 593

In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone,

it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. 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, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court.

The argument that in absence of motive on the part of the appellant to kill the deceased benefit of reasonable doubt should be given, cannot be accepted. First of all every suspicion is not a doubt. Only reasonable doubt gives benefit to the accused and not the doubt of a vacillating Judge. Very often a motive is alleged to indicate the high degree of probability that the offence was committed by the person who was prompted by the motive. In a case where the motive alleged against accused is fully established, it provides foundational material to connect the chain of circumstances. It affords a key on a pointer to scan the evidence in the case in that perspective and as a satisfactory circumstance of corroboration. However, in a case based on circumstantial evidence where proved circumstances complete the chain of evidence, it cannot be said that in absence of motive, the other proved circumstances are of no consequence. The absence of motive, however, puts the court on its guard to scrutinise the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof. ***There is no absolute legal proposition of law that in the absence of any motive an accused cannot be convicted under Section 302 IPC.*** Effect of absence of motive would depend on the facts of each case.

SARBIR SINGH V. STATE OF PUNJAB, 1993 SUPP (3) SCC 41

It is said that ***men lie but circumstances do not.*** Under the circumstances prevailing in the society today, it is not true in many cases. Sometimes the circumstances which are sought to be proved against the accused for purpose of establishing the charge are planted by the elements hostile to the accused who find out witnesses to fill up the gaps in the chain of circumstances.

In countries having sophisticated modes of investigation, every trace left behind by the culprit can be followed and pursued immediately. Unfortunately it is not available in many parts of this country. That is why courts have insisted

(i) the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established;

(ii) all the facts so established should be consistent only with the hypothesis of the guilty of the accused and should be such as to exclude every hypothesis but the one sought to be proved;

(iii) the circumstances should be of a conclusive nature; and

(iv) the chain of evidence should not have any reasonable ground for a conclusion consistent with the innocence of the accused.

It has been impressed that suspicion and conjecture should not take the place of legal proof. It is true that the chain of events proved by the prosecution must show that within all human probability the offence has been committed by the accused, but the court is expected to consider the total cumulative effect of all the proved facts along with the motive suggested by the prosecution which induced the accused to follow a particular path. ***The existence of a motive is often an enlightening factor in a process of presumptive reasoning in cases depending on circumstantial evidence.***

PADALA VEERA REDDY V. STATE OF A.P., 1989 SUPP (2) SCC 706

In this case the court relied upon various decisions to hold that no one can be convicted on the basis of mere suspicion, however strong it may be.

This Court in P*alvinder Kaur v. State of Punjab* [AIR 1952 SC 354 : 1953 SCR 94 : 1953 Cri LJ 154] has pointed out that in cases depending on circumstantial evidence courts should safeguard themselves against the danger of basing their conclusions on suspicions howsoever strong.

In *Chandrakant Ganpat Sovitkar v. State of Maharashtra* [(1975) 3 SCC 16 : 1974 SCC (Cri) 712] it has been observed: (SCC p. 28, para 16)

> *"It is well settled that no one can be convicted on the basis of mere suspicion, however strong it may be. It also cannot be disputed that when we take into account the conduct of an accused, his conduct must be looked at in its entirety."*

In *Sharad Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116 : 1984 SCC (Cri) 487] this Court has reiterated the above dictum and pointed out that the suspicion, however great it may be, cannot take the place of legal proof and that "fouler the crime higher the proof".

GAMBHIR V. STATE OF MAHARASHTRA, (1982) 2 SCC 351

The law regarding circumstantial evidence is well settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests:

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

JOSEPH V. STATE OF KERALA, (2000) 5 SCC 197

During the time of questioning under Section 313 CrPC, the appellant instead of making at least an attempt to explain or clarify the incriminating circumstances inculpating him, and connecting him with the crime by his adamant attitude of total denial of everything when those circumstances were brought to his notice by the Court not only lost the opportunity but stood self-condemned. Such incriminating links of facts could, if at all, have been only explained by the appellant, and by nobody else, they being personally and exclusively within his knowledge.

Of late, courts have, from the falsity of the defence plea and false answers given to court, when questioned, found the missing links to be supplied by such answers for completing the chain of incriminating circumstances necessary to connect the person concerned with the crime committed.[66] That missing link to connect the accused-appellant, is found in this case provided by the blunt and outright denial of every one and all the incriminating circumstances pointed out which, with sufficient and reasonable certainty on the facts proved, connect the accused with the death and the cause for the death of the deceased.

66 *See State of Maharashtra v. Suresh, (2000) 1 SCC 471.*

REDDY SAMPATH KUMAR V. STATE OF A.P., (2005) 7 SCC 603

It is a well-settled principle of law that in order to sustain conviction, the circumstantial evidence must be complete and incapable of explanation of any other hypothesis except that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

PONNUSAMY V. STATE OF T.N., (2008) 5 SCC 587

This Court in ***State of Maharashtra v. Suresh***[67] opined:

> "*26. We too countenance three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself.* ***This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by himself****. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act.*"

The factual background of the present case is to be considered in the light of the relationship between the parties. If his wife was found missing, ordinarily, the husband would search for her. ***If she has died in an unnatural situation when she was in his company, he is expected to offer an explanation therefor. Lack of such explanation on the part of the appellant itself would be a circumstantial evidence against him.***

LAST SEEN THEORY

RAVI V. STATE OF KARNATAKA, (2018) 16 SCC 102

"Last seen together" is certainly a strong piece of circumstantial evidence against an accused. However, as it has been held in numerous pronouncements of this Court, ***the time-lag between the occurrence of the death and when the accused was last seen in the company of the deceased has to be reasonably close to permit an inference of guilt to be drawn. When the***

67 *(2000) 1 SCC 471*

time-lag is considerably large, as in the present case, it would be safer for the court to look for corroboration. In the present case, no corroboration is forthcoming. ***In the absence of any other circumstances which could connect the appellant-accused with the crime alleged except as indicated above and in the absence of any corroboration of the circumstance of "last seen together", a reasonable doubt can be entertained with regard to the involvement of the appellant-accused in the crime alleged against them.*** The burden under Section 106 of the Evidence Act, 1872 would not shift in the aforesaid fact situation, a position which has been dealt with by this Court in ***Malleshappa v. State of Karnataka***[68], wherein the earlier view of this Court in ***Mohibur Rahman v. State of Assam***[69], has been extracted. The said view in *Mohibur Rahman* may be profitably extracted below:

"The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. ***There may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide.***

BODHRAJ V. STATE OF J&K, (2002) 8 SCC 45

The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. ***It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists.*** In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases

KIRITI PAL V. STATE OF W.B., (2015) 11 SCC 178

The theory of "*last seen alive*" comes into play when the time gap between the way the accused and the deceased were last seen together and the deceased was found dead was so small, the possibility of any other person committing the murder becomes impossible.

68 *(2007) 13 SCC 399*
69 *(2002) 6 SCC 715*

Thus, on the principle that the person who is last found in the company of another is dead or missing, the person with whom he was last found alive has to explain the circumstances in which he parted company.

In ***State of Rajasthan v. Kashi Ram***[70], this Court has held as under:

"The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. ***It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain.*** The principle has been succinctly stated in *Naina Mohamed, In re,*[71]."

ASHOK V. STATE OF MAHARASHTRA, (2015) 4 SCC 393

The "last seen together" theory has been elucidated by this Court in ***Trimukh Maroti Kirkan v. State of Maharashtra***[72], in the following words:

> *"22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Thus, the doctrine of last seen together shifts the burden of proof onto the accused, requiring him to explain how the*

70 *(2006) 12 SCC 254*
71 *1959 SCC OnLine Mad 173*
72 *(2006) 10 SCC 681*

incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him"

In *Ram Gulam Chaudhary v. State of Bihar,* (2001) 8 SCC 311 the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor was his body found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they had murdered the boy.

In *Nika Ram v. State of H.P.* [(1972) 2 SCC 80 : 1972 SCC (Cri) 635] , it was observed that the fact that the accused alone was with his wife in the house when she was murdered with a "khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

The latest judgment on the point is *Kanhaiya Lal v. State of Rajasthan*[73]. In this case this Court has held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing the connectivity between the accused and the crime. ***Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.***

From the study of above stated judgments and many others delivered by this Court over a period of years, the rule can be summarised as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of the accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of the Evidence Act. ***Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused, etc. non-explanation of death of the deceased, may lead to a presumption of guilt.***

THEORIES OF PUNISHMENT

The object of punishment is to create consequences for crime. Punishment must be adjusted to the nature of the crime. Earlier, the torture to the body of the offender was a part of punishment which required a public spectacle.[74] Later on, this kind of punishment saw a shift towards controlling the mind of the offender by disciplining them in prison system.

73 *(2014) 4 SCC 715*

74 *Michel Foucault, DISCIPLINE AND PUNISH*

Punishment in general may be divided into two camps: Consequentialist and Retributivist. In the first camp are those who believe that punishment can only be justified as far as it serves the goal of reducing the wrongdoing. We may reduce wrongdoing by restraining the wrongdoer (incapacitation), making him an example for others (deterrence), or even by improving either his values or his circumstances to make him less likely to want to offend again (rehabilitation). The second camp however, believes that punishment serves as an end (and a good) in itself, by "answering" wrongdoing and giving a voice to society's norms and morality.[75]

DETERRENT THEORY:

This kind of punishment presupposes infliction of severe penalties on offenders with a view to deter them from committing crimes. The deterrent theory seeks to create some kind of fear in the mind of others by providing adequate penalty and exemplary punishment to offenders which keeps them away from being involved in criminal activity.

PREVENTIVE THEORY:

Preventive theory of punishment is based on the proposition that crime should not be avenged but prevented from taking place. It presupposes that need for punishment of crime arises simply out of social necessities. It is the certainty of law and not its severity, which has a real effect on offenders. The institution of prison is an outcome of preventive view regarding crime and criminals. It basically seeks to prevent the recurrence of crime by incapacitating the offenders.

REFORMATIVE THEORY:

This theory seeks to bring about a change in the attitude of the offender so as to rehabilitate him as a law abiding member of society. It condemns all kinds of corporeal punishment. The agencies such as parole and probation are recommended as measures to reclaim offenders to society as reformed persons. However, this theory is not successful for those who are habitual lawbreakers.

RETRIBUTIVE THEORY:

While deterrent theory considered punishment as a means of attaining social security, the retributive theory treated it as an end in itself. It was essentially based on retributive justice which suggests that evil should be returned for evil without any regard to consequences. The theory underlined the idea of vengeance or revenge. Thus the pain to be inflicted on the

75 *Kenworthey Bilz & John M. Darley, What's Wrong with Harmless Theories of Punishment, 79 Chi.-KentL. Rev. 1215 (2004). Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol79/iss3/32*

offender by way of punishment was to outweigh the pleasure derived by him from the crime. In other words, retributive theory suggested that punishment is an expression of society's disapprobation for offender's criminal act.[76]

Sentencing of a convict basically embarks the culmination of the judicial process which begins with the detection, enforcement of the law, prosecution and adjudication. Thus the importance of Sentencing lies in the fact that it becomes the face of Justice and a future deterrent for the prospective offender of law. There is no doubt in the fact that Criminal Courts have championed in the art of fact finding and law applying but when it comes to the process of Sentencing, there lies the lacuna. The success in former is mainly due to unemotional and objective approach while failure in later owes to emotional and subjective reaction towards the circumstances surrounding the convict. This situation is further aggravated due to the lack of well-defined sentencing policy. The modern attitude towards Sentencing is that, it is an individualised treatment process and a sure response to every events of crime. The question, what Sentence is, cannot be distinguished from who is the offender and what are his offending act. The modern Criminologists are inclined to analyse not only the bio-socio-politico-cultural phenomenon but also psycho-pathological and most recently the genetic phenomenon of the person.

Crime is a deviation from social norm and reason for this deviation lies in bio-psycho-genetic and eco-socio-cultural phenomenon. Therefore the main object of sentencing should be reformative rather than punitive so as to facilitate the return of offender to normal life and serving the ultimate goal of prevention of crime. Justice Krishna Iyer, observed that: "The retributive theory has had its day and is no longer valid. Deterrence and reformation are the primary social goals which make depreciation of life and liberty reasonable as penal panacea."

Practice and Procedure in India

In India neither the legislature nor the judiciary has issued structured sentencing guidelines. Several governmental committees have pointed to the need to adopt such guidelines in order to minimize uncertainty in awarding sentences. The higher courts, recognizing the absence of such guidelines, have provided judicial guidance in the form of principles and factors that courts must take into account while exercising discretion in sentencing. Currently India does not have structured sentencing guidelines that have been issued either by the legislature or the judiciary. In March 2003, the Committee on Reforms of Criminal Justice System (the Malimath Committee), a body established by the Ministry of Home Affairs, issued a report

76 *Criminology and Penology with Victimology, Prof. N. V. Paranjape, Central Law Publications.*

that emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences, stating,

"The Indian Penal Code prescribe offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum is prescribed. The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries guidance regarding sentencing option[s] is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimize uncertainty to the matter of awarding sentence. There are several factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body." The Committee advised further that, in order to bring "predictability in the matter of sentencing," a statutory committee should be established "to lay guidelines on sentencing guidelines under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative." In 2008, the Committee on Draft National Policy on Criminal Justice (the Madhava Menon Committee), reasserted the need for statutory sentencing guidelines.

In 2008, the Supreme Court of India, in *State of Punjab v. Prem Sagar & Ors.*, also noted the absence of judiciary-driven guidelines in India's criminal justice system, stating, "In our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts, except for making observations with regard to the purport and object for which punishment is imposed upon an offender, had not issued any guidelines." The Court stated that the superior courts have come across a large number of cases that "show anomalies as regards the policy of sentencing," adding, "whereas the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where same sentence is imposed, the principles applied are found to be different. Similar discrepancies have been noticed in regard to imposition of fine[s]." In 2013 the Supreme Court, in the case of *Soman v. State of Kerala*, also observed the absence of structured guidelines: Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges. In India no uniform sentencing policy exists and sentence awarded to an offender reflect the individual philosophy of the judges.

This is evident from the following statements given by the three prominent judges of India which shows the present condition of sentencing policy of India.

"Every saint has a past, every sinner has a future." Krishna Iyer J

"Theory of reformation through punishment is grounded on the sublime philosophy that every man is born good, but circumstances transform him into a criminal." K T Thomas J

"Reformative theory is certainly important but too much stress to my mind cannot be laid down on it that basic tenets of punishment altogether vanish". D P Wadhwa J

The Sentencing Procedure under Criminal Procedure Code, 1973

The Code provides for wide discretionary powers to the judge once the conviction is determined. The Code talks about sentencing chiefly in S.235, S.248, S.325, S.360 and S.361.

S.235 is a part of Chapter 18 dealing with a proceeding in the Court of Session. It directs the judge to pass a judgement of acquittal or conviction and in case conviction to follow clause 2 of the section. Clause 2 of the section gives the procedure to be followed in cases of sentencing a person convicted of a crime. The section provides a quasi trial to ensure that the convict is given a chance to speak for himself and give opinion on the sentence to be imposed on him.

The reasons given by the convict may not be pertaining to the crime or be legally sound. It is just for the judge to get an idea of the social and personal details of the convict and to see if none of these will affect the sentence. Facts such as the convict being a breadwinner might help in mitigating his punishment or the conditions in which he might work. This section plainly provides that every person must be given a chance to talk about the kind of punishment to be imposed.

The section just does not stop at allowing the convict to speak but also allows the defence counsel to bring to the notice of the court all possible factors which might mitigate the sentence and if these factors are contested then the prosecution and defence counsels must prove their argument. This ordeal must not be looked on as a formality but as a serious effort in doing justice to the persons involved. A sentence not in compliance with S.235 (2) might be struck down as violative of natural justice.

However this procedure is not required in cases where the sentencing is done according to S.360. S.248 which comes under Chapter 19 of the Code dealing with warrants case. The provisions contained in this section are very similar to the provisions under S.235.

PROCEDURE WHERE THE SENTENCE TO BE IMPOSED EXCEEDS THE SENTENCING POWER OF THE MAGISTRATE

The judge at any point cannot exceed his powers as provided under the code in the name of discretion. In cases where the magistrate feels that the crime proved to have been committed is of greater intensity and must be punished severely and if it is outside the scope of his jurisdiction to award the punishment then he may forward the case to the Chief Judicial Magistrate with the records of the case along with his opinion as provided under section 325 Cr.P.C.

It will be interesting at this stage to note that the first schedule of the Cr.P.C. which catalogues the offences, their punishment, nature of those offences and the court by which they are triable, makes several offences punishable upto imprisonment for life, triable by the court of Magistrate. As far as the offences under sections 134, 193, 195A, 211, 213, 214, 216, 216A, 219, 220, 221, 225, 231, 239, 243, 244, 245, 247, 249, 250, 263, 256, 257, 258, 259, 260, 281, 291, 292, 312, 317, 325, 330, 335, 354B to 354D, 363, 365, 369, 381, 386, 387, 404, 407, 408, 420, 429, 430, 431, 432, 435, 440, 451, 452, 454, 455, 466, 472, 473, 476, 477A, 493, 494, 495, 496, 497, 505 and 506 of IPC is concerned, there is no difficulty as such and the trial Magistrate when is of the opinion after hearing the evidence for the prosecution and the accused that the accused ought to receive a punishment more severe than that which such Magistrate is empowered to inflict, he may record the opinion and submit its proceedings and forward the accused to the Chief Judicial Magistrate to whom he is subordinate under the provisions of section 325(1) Cr.P.C.. The Chief Judicial Magistrate and Additional Chief Judicial Magistrate has power under section 29 of Cr.P.C. to impose punishment with an imprisonment upto 7 years.

In cases where the maximum prescribed punishment exceeds 7 years, a question may be raised that for offences punishable for more than 7 years upto imprisonment for life in which the CJM can exercise power of adjudication, what should be the proper course for a Magistrate? Whether in such cases under section 325 the concerned Magistrate has to commit such case to the court of sessions or it has to be simply transferred to the CJM?

This question has been answered in a number of judgments of various High Courts and the law is settled that where after commencement of enquiry or trial the Magistrate finds that the case should be committed to the court of sessions the Magistrate will commit the case to the court of sessions after recording his opinion based on the material on record of the case under Section 323 Cr.P.C.

But on the other hand in cases where a Magistrate is of opinion after hearing the evidence for the prosecution and the accused, that the accused is guilty and the accused ought to receive a punishment more severe than that which such Magistrate is empowered to inflict, he will submit his proceedings and accused be forwarded to the CJM to whom he is subordinate. He has got to follow the procedure under section 325 of the code and there is no other alternative left for him in such a case. Which follows as a necessary consequence that after following the procedure under section 325, if he comes to the opinion contemplated by sub section (1) thereof, he has to submit the proceedings to the CJM or the CMM as the case may be. Section 323 and section 325 operates in different fields. Whereas section 323 of the code uses the expression after commencement of enquiry ot trial, where as section 325 of the Code comes into picture when a Magistrate after hearing the evidence for the prosecution and the accused is of the opinion that the case deserves a more severe sentence than what the Magistrate is empowered to inflict.

Now after receiving the record of the case under section 325(1) the CJM can adopt any of the following course:

Firstly, if the case involves offences punishable upto 7 years the Chief Judicial Magistrate may proceed under section 325 (3) by examining the parties recall and examine any witness who has already given evidence in the case and may call for and take any futher evidence and shall pass such judgment, sentence or order in the case as he thinks fit.

Secondly, where the case involves offences punishable with imprisonment exceeding 7 years upto 10 years (Sections 333, 363A-(i), 382, 386, 388(i), 389, 392- Robbery, 455, 493 and 495 of IPC) and the CJM or ACJM is also invested with the power of Assistant Sessions Judge, he can commit the case to the court of sessions so that after the due entry in the sessions register the case may be formally transferred to the court of Assistant Sessions Judge for proceeding as per Chapter XVIII of the Cr.P.C.

Thirdly, in cases of offences punishable for a term imprisonment of more than 10 years but are made triable by the court of Magistrates e.g. Section 222, 225, 255, 263A, 388, 389, 392, 394, 409, 454, 457, 458, 467, 472, 474, 475, 477, the procedure to be adopted for commitment is provided in such cases under section 325 where the Magistrate is of the opinion that sentence to be imposed is to be more than 10 years. Even in these cases if the court of CJM is inclined to award a sentence which is within its sentencing power, there is no mandatory requirement to commit such cases mechanically.

Section 325(3) provides that the Chief Judicial Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who

has already given evidence in the case and may call for and take any further evidence and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law. The order here is one disposing of the case and includes power of committing it for trial but he has no power to return the case.

It is thus amply clear from the above discussion that the Cr.P.C. has taken care of such offences which as per first schedule of the Cr.P.C. are triable by the court of Magistrate but the prescribed punishment exceeds 7 years of imprisonment.

The main part of judicial discretion comes in S.360 which provides for release of the convict on probation. The aim of the section is to try and reform those criminals in cases where there is no serious threat to the society. This is conveyed by limiting the scope of the section only to cases where the following conditions exist:

- A woman convicted of offence the punishment of which is not death or life imprisonment
- A person below 21 years of age convicted of offence theof which is not death or life imprisonment
- A male above 21 years convicted of an offence the punishment of which is fine or imprisonment of not above 7 years.

The Code through S.361 makes the application of S.360 mandatory wherever possible and in cases where there is exception to state clear reasons. Wherever the punishment given is below the minimum pre scribed under the relevant laws the judge must give the special reason for doing so. The omission to record the special reason is an irregularity and can set aside the sentence passed on the ground of failure of justice. These provisions are available only to trials before the Court of Sessions and the trials of warrants case.

The Probation of Offenders Act, 1958 is very similar to S.360 of the CrPC. It is more elaborate in the sense that it explicitly provides for conditions accompanying release order, a supervision order, payment of compensation to the affected party, powers and predicaments of the probation officer and other particulars that might fall in the ambit of the field. S.360 would cease to have any force in the States or parts where the Probation of Offenders Act is brought into force.

SENTENCING: ITS CONTENTS

Sentencing follows the stage of conviction and the pronouncement of this penalty imposed on the convict is the ultimate goal of any justice delivery system. This stage reflects the amount of

condemnation the society has for a particular crime. The underlying rationale of any criminal justice delivery system can be determined by looking at the kind of punishment given for various crimes. However in a system like ours, with so many actors involved apart from the accused and victim, it is not possible to expect all of them to react in the same manner to a particular act of crime. For instance the victim might express stronger emotions than a judge who is a total stranger to both the opposing parties. In the same manner the accused might be convinced that his action was in fact correct giving more importance to the surrounding factors. It is in order to reach a consensus on a given incident that judges and other legal players are appointed. The decision to be reached here is not restricted to whether there was a wrong done or not but also and more importantly what has to be done in case of a wrong being committed. The options are many. In case of a victim centric system the most opted solution would be restoration of the victim to the same position as he/she was in before the wrong had been caused. This is mostly used in torts cases and generally in economic crimes. This cannot be applied across the board in cases of physical, emotional and psychological harm where restoration is rarely possible. In such cases there are two options – retribution and rehabilitation. In the former the system focuses at condemnation of the crime as more important rationale for penalising than any other. Rehabilitation is more accused friendly and believes in reclamation of the person back to the mainstream of the society. Another most favoured justification for punishment is deterrence the basic premise of which is prevention of reoccurrence of the same scene.

The problem with the existing system as provided for in the Criminal Procedure Code is the variation in the result obtained from the same or similar set of facts. The judges are allowed to reach the decision after hearing the parties. However the factors which should be considered while determining the decision and those which should be avoided is not specified anywhere. This is where the judge is expected to use his/her personal discretionary capacity to fix the punishment. This discretion eventually gets abused in a large number of cases due to irrelevant consideration and application of personal prejudices. This is the primary reason for advocating a sentencing policy or guidelines.

Disparity In Sentencing

The discretion provided for under the existing procedure is guided by vague terms such as *'circumstances of the crime'* and *'mental state and age'*. Agreeably these can be determined but at what point will they have an effect on the sentence is the question left unanswered by the legislature. For instance, every crime has accompanying circumstances but which ones qualify as mitigating and which once act as aggravating circumstances is something which is left for the judge to decide. Therefore if one judge decides a particular circumstance as mitigating

this would not prevent another judge from ignoring that aspect as irrelevant. The Supreme Court in Suresh Chandra Bahri v. State of Bihar (AIR1994SC2420) held that this sentencing variation is bound to occur because of the varying degrees of seriousness in the offence and/or varying characteristics of the offender himself. Moreover, since no two offences or offenders can be identical the charge or label of variation as disparity in sentencing necessarily involves a value based judgment. i.e., disparity to one person may be a simply justified variation to another. It is only when such a variation takes the form of different sentences for similar offenders committing similar offences that it can be said to desperate sentencing. This lack of consistency has encouraged a few judges to misuse the discretion on the basis of their personal prejudices and biases.

Apart from the personal biases and prejudice the idea of what constitutes justice and what is the purpose of punishment varies from person to person. For instance, in the case of *Gentela Vijayavardhan Rao v. State of Andhra Pradesh* AIR 1996 SC 2791, the appellant had with the motive to rob burnt a bus full of passengers, resulting in the death of 23 passengers. The sentence provided by the judges of the lower court was death penalty for convict A and 10 years of rigorous imprisonment for convict B. This was challenged by the convict. The apex court quoted from the judgment *Dhananjoy Chatterjee v. State of West Bengal* ((1994)2SCC220) to support its view to uphold the judgment:

> *"Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime."*

This judgement reflects the principles of deterrence and retribution. But this cannot be categorised as wrong or as right for this is a product of the belief of the judges constituting the bench. Similarly in the case of *Gurdev Singh v. State of Punjab* (AIR2003SC4187) the court confirmed the death penalty imposed on the appellant keeping in mind the aggravating circumstances. Though on the face of it this might be nothing but a brutal revenge for the crime done by the convicts, on a deeper study one can realize from the judgment that the act was absolutely unforgivable for the judges. This cannot be stated to be the inability of the judges to feel sympathy. This is just a reflection of their values.

On the other hand, *Mohd Chaman v. State* (2001CriLJ725) the courts have shockingly reduced the sentence of death penalty to rigorous imprisonment of life due to the belief that the accused is not a danger to the society and hence his life need not be taken. The accused in this case had gruesomely raped and murdered a one and a half year old child. The lower courts having seen the situation as the *rarest of the rare* cases imposed death penalty. This was

reversed by the apex Court as it was not convinced that the act was sufficiently deserving of capital punishment.

The question to be addressed here, having the inability to adjudge the situations objectively, how do we decide which is the most preferred judgment. Had the same issue be addressed in a vice versa manner, the former convict would have been in the prison and the latter would have died.

How helpful would a guideline be to this scenario? A guideline if laid down would principally have a *primary rationale* for punishing (whatever this rationale may be - retribution is the underlying purpose or rehabilitation and reclamation is the ultimate goal). This primary rationale would help the judges determine what exactly needs to be achieved of the punishment.

Taking off from here, the mitigating and aggravating circumstances can also be easily determined once the *primary rationale* is clear. Illustrating this point, in the case of *Raju v. State* AIR 1994 SC 222 the Courts reduced the punishment below the minimum prescribed in the statute for reasons which in the opinion of the author are very frivolous. The judge took into account the alleged "immoral character and loose moral of the victim" and reduced the sentence for the accused to the term served. Had there been a clear indication of a victim-centric penal system, a judgment which benefits the accused for the faults of the victim will not be delivered. In *State of Karnataka v. S. Nagaraju* JT2002((Suppl1)SC7) the judge convicted the accused more as a deterrent measure to prevent other potential offenders than to penalise that particular convict.

It is not alleged that in the above scenarios and many other similar ones the judges are irrational or unjust. The only point placed for the observation is variations in the idea of justice and this drastically affects the societal demand of what the judiciary must do in a particular state of affairs.

There have been judges like Krishna Iyer who have taken rehabilitation and reclamation to a different level of understanding. In the famous case of *Mohammad Giasuddin v. State of Andhra Pradesh* (AIR1977SC1926) he explained punishment as follows:

> *"Progressive criminologists across the world will agree that the Gandhian diagnosis of offender as patients and his conception of prisons as hospitals - mental and moral - is the key to the pathology of delinquency and the therapeutic role of 'punishment'."*

Strongly agreeing with the above proposition it is unfair to allow some convicts reap the benefit of the sympathy of the judge and to let others bear the brunt of the wrath of the others.

As far as India is concerned, the Indian Penal Code provides us with a broad classification and gradation of punishments. This has been further carved by various judicial decisions on sentencing. However these rulings of the court suffer from the following disadvantages:

a) Facts specific: Though these guidelines are given as *Obiter Dicta*, the application of such guidelines is misleading in the subsequent judgments. Currently the well established Guideline followed by the courts is with respect to death penalty as explained above. The application of this test in the case of *A. Devendran v. State of Tamil Nadu* (AIR1998SC2821) explains this point. This was a case of triple murder. However the Court held that the trial court was not justified in awarding death sentence as the accused had no pre-meditated plan to kill any person and as the main object was to commit robbery. This case should be compared with *Gentela Vijayavardhan Rao v. State of Andhra Pradesh* discussed above. The motive in both is to rob the victim. However in one case it has been used as a aggravating factor and the other it is used as a mitigating factor. This shows how the same test has been contradictorily applied.

b) Not followed by lower courts: Another side of the coin is that the lower courts do not follow these guidelines as they are not binding on them. The precedents are usually ignored or differentiated from the existing fact scenario so as to give the judge his space to rule on the case.

c) More of a legislative job: More importantly, it is the job of the legislature to make rules and of the judiciary to interpret and enforce it. It would not be fulfilling or correct to expect and allow the judges to frame the rules by themselves.

d) A final reason as to why the judiciary should not frame the rules is that it once again boils down to the whims and fancies of the judge framing it. This would only be a mere extension of the belief of one judge over all others.

One of the propositions proposed by Andrew von Hirsch and Nils Jareborg is that they divided the process into stages of determining proportionality while determining a sentence. The four steps are

- What interests are violated or threatened by the standard case of the crime – physical integrity, material support and amenity, freedom from humiliation, privacy and autonomy

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

- Culpability of the offender
- Remoteness of the actual harm as seen by a reasonable man

Factors which determine culpability vary depending on which of the following schemes one intends to follow.

1. Determinism – Where factors outside oneself determines the actions eg. self defence and duress. However most people have sufficient freedom to determine their actions so this will not hold good at all times

2. Social and Familial background – low family income, large family, parental criminality, low intelligence and poor parental behaviour.

3. The employment, education and economic policy have a major impact on individuals. They result in consequences such as deprivation and marginalization leading to development of criminals in the society.

The chief criticism of this procedure is that once again it involves a wide discretion of the judge when it comes to determining the culpability. This once again leads to certainty as against the discretion.

SENTENCING POLICIES: AN INTERNATIONAL PERSPECTIVE

AUSTRALIA

Australia has set out sentencing law frameworks in separate legislation. The statutes typically contain the purposes and aims of sentencing; aggravating and mitigating factors that should be considered in sentencing ; and the types of sentences that may be imposed.

The sentencing statutes provide general rather than prescriptive guidance, and Australian judges maintain broad sentencing discretion.11 With the courts emphasizing individualized justice and generally favoring an approach known as “instinctive synthesis”—an “exercise in which all relevant considerations are simultaneously unified, balanced, and weighed by the sentencing judge”—concerns have been raised about sentencing inconsistencies. Australia has not adopted the approach of appointed commissions developing standardized numerical sentencing guidelines for judges, It is generally seen by Australian courts as being overly restrictive on the exercise of judicial discretion and against the concept of individualized justice.

The three mechanisms aimed at achieving consistency in sentencing that have been implemented in some Australian jurisdictions: guideline judgments, mandatory minimum sentences in legislation (including examples for specific offenses), and sentencing councils.

They are independent entities with functions related to monitoring and researching sentencing matters and providing information that could assist judges and/or policymakers as well as helping to educate the public.

In addition to the councils, in some states judicial branch or related entities may publish information on sentencing with the aim of improving consistency and public confidence in the justice system.

The general functions of the Council include

- Providing statistical information on sentencing and information on current sentencing practices to members of the judiciary and "other interested persons;"
- Conducting research and disseminating information on sentencing matters;
- Gauging public opinion on sentencing matters;
- Consulting with government departments and other bodies, as well as the general public, on sentencing matters;

ENGLAND

The English justice system considers that sentences imposed on offenders should reflect the crime committed and be proportionate to the seriousness of the offense. It has a Sentencing Council that is responsible for producing, issuing, and reviewing guidance to the courts on what factors should be considered when sentencing offenders and the range of sentences that should be awarded, among other things.

The Sentencing Council is an independent non departmental body of the Ministry of Justice. It was established in 2009 by the Coroners and Justice Act and is responsible for issuing guidelines for sentencing that must be followed by the courts unless it is contrary to the interests of justice to do so. Its role includes:

- developing sentencing guidelines and monitoring their use;
- assessing the impact of guidelines on sentencing practice. . . . and

- promoting awareness amongst the public regarding the realities of sentencing and publishing information regarding sentencing practice in Magistrates' and the Crown Court.

When conducting the above functions, the Sentencing Council must take into account the impact of sentences on victims of crime, monitor how the guidelines are applied in practice, and help increase public confidence in the sentencing and criminal justice system

When drafting sentencing guidelines, the Council takes into account

(a) the sentences imposed by courts in England and Wales for offences;

(b) the need to promote consistency in sentencing;

(c) the impact of sentencing decisions on victims of offences;

(d) the need to promote public confidence in the criminal justice system;

(e) the cost of different sentences and their relative effectiveness in preventing reoffending;

UNITED STATES

In the United States, sentencing law varies by jurisdiction. Since the US Constitution is the supreme law of land, all sentences in the US must conform the requirements of the Constitution, which sets the basic mandates while leaving the bulk of policy making upto the States. Despite the continued growth of federal criminal law, the vast majority of criminal sentencing takes place in state and local courts. Except for death penalty cases (which are exceptionally rare), juries generally have little involvement in sentencing, which is typically left to the discretion of the presiding judge. Sentences are typically pronounced by the judge in a separate hearing, after the jury (or other finder of fact) has issued findings of fact and a guilty verdict, and in some cases after the probation department has carried out a pre-sentence investigation. The structure and jurisdiction of courts within a state are typically governed by state law, as are sentences and sentencing guidelines and regimes. There is enormous substantive and procedural difference between the criminal laws of the fifty states and the various federal territories and enclaves.

The U.S. Sentencing Guidelines prescribe a reduction of sentence time for most defendants who accept responsibility and plead guilty; further discounts are available to some defendants through fact bargaining, substantial assistance, and so on. These Guidelines are the product of the United States Sentencing Commission, which was created by the Sentencing Reform

Act of 1984, which is an independent agency of the judicial branch of the federal government of the United States.

The Guidelines determine sentences based primarily on two factors:

1. the conduct associated with the offense (the offense conduct, which produces the offense level)

2. the defendant's criminal history (the criminal history category)

The Sentencing Table in the Guidelines Manual shows the relationship between these two factors; for each pairing of offense level and criminal history category, the Table specifies a sentencing range, in months, within which the court may sentence a defendant.

Suggestions on the Formulation of a Sentencing Policy in India

Closer liaison between Judiciary and Penal Authority: Judge lacks sufficient information and knowledge of penal system, which carries out its sentence and effects of different types of punishments on different types of offenders. Therefore it is necessary that some system of closer liaison between judiciary and penal authorities should be developed to meet with this criticism.

Sentencing Board Comprising of Exports: Individual personality of judge or magistrate plays too large a part in assessment of punishment. In such state of affairs of dissimilarities there are bound to create distrust in public and bickering and frustration in mind of offender.

Therefore the judge should decide only guilty part of the offence and sentencing part should be dealt with by a Sentencing Board comprising of experts. This is in fact has been suggested in Mrichhakatika namely that the decision of the guilt or the innocence is the function of the judge and the determination is for King or the State.

Determination of Sentence by a Board of Experts The sentence should be determined after making thorough checks of offender and his antecedents as this will place offender in better hands from the rehabilitation angle. This scheme however would require trained experts for constituting the Board and would need effective techniques of supervising the Board.

Indeterminate Sentencing: Cases should be reviewed from time to time and released ordered on basis of progress achieved by the offender. It is based on the theory that one who has been guilty of serious infraction of criminal law should be imprisoned for such time as is necessary

to cure him of his antisocial tendencies and should then be conditionally released on parole, with adequate supervision for such time as is necessary to restore him to normal life of law abiding citizen. Since it is impossible to forecast what term of imprisonment and supervision may be necessary to accomplish this result, sentence is not to be for a definite term but for such time as may be necessary to rehabilitate the offender and to restore his place on society.

Therefore when a Court finds that an accused deserves imprisonment it should call for presentencing report thorough Probation Authorities and on that basis fix maximum period of sentence deemed necessary.

JUDICIAL PRONOUNCEMENTS

The Court, in ***Jameel vs. State of U.P.*** (2010) 12 SCC 532, held that in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing in mind and proceed to impose a sentence commensurate with the gravity of the offence.

Recently, in ***Sumer Singh vs. Surajbhan Singh and others 2014 (6) SCALE 187***, noticing inadequate sentence of seven days of imprisonment for an offence punishable under Section 326 IPC, where the convict had chopped off the left hand of the victim from the wrist, the Court was constrained to observe: -

> *"It is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the Court's accountability to remind itself about its role and the reverence for rule of law. It must evince the rationalized judicial discretion and not an individual perception or a moral propensity. But, if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined. Law cannot tolerate it; society does not withstand it; and sanctity of conscience abhors*

it. The old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. True it is, it has its own room, but, in all circumstances, it cannot be allowed to occupy the whole accommodation. The victim, in this case, still cries for justice. We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption."

In ***Gopal Singh v. State of Uttarakhand*** (2013) 7 SCC 545, the Court opined that just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect - propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasise, these are certain illustrative aspects put forth in a condensed manner. There can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalised judicial discretion.

Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which have been indicated hereinbefore and also have been stated in a number of pronouncements by the Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment.

In ***Bachan singh vs State of Punjab*** (AIR 1980 SC 898) The Hon'ble Apex court while interpreting S. 354(3) and 235(2) Cr.P.C. elaborated two aspects, firstly that the extreme penalty can be inflicted only in gravest cases of extreme culpability and secondly, in making the choice of sentence due regard must be paid to the circumstances of the offender also.

The Hon'ble Apex Court in ***Rajendra Pralhadrao Wasnik Vs. State of Maharashtra***, (AIR 2012 SC 1377), held that "Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the Court, while exercising its jurisdiction. It is difficult to state, it as an absolute rule.

Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the Court may consider in its endeavour to do complete justice between the parties".

The Hon'ble Apex court in ***State of Madhya Pradesh vs Mehtab***, (Cri. Appeal no. 290/2015, dated 13.02.2015) has observed that, *"we find force in the submission, it is the duty of the court to award just sentence to a convict against whom charge is proved. While mitigating and aggravating circumstance may be given due weight, mechanical reduction of sentence to the period already undergone cannot be appreciated. Sentence has to be fair not only to the accused but also the victim and the society."*

In ***Shailesh Jasvantbhai and Another v. State of Gujarat and Others***, [(2006)2 SCC 359] The Hon'ble Apex Court held that " *In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be.* The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration."

In ***Alister Anthony Pareira Vs. State of Maharashtra*** (AIR 2012 SC 3802) The Hon'ble Apex Court held that "*Sentencing policy is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing and accused on proof of crime. The courts have evolved certain principles:*

> *Twin objectives of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime*

doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

In Brajendrasingh Vs. State of Madhya Pradesh (AIR 2012 SC 1552), The hon'ble Hon'ble Apex Court held that *"The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in the case of Bachan Singh and thereafter, in the case of Machhi Singh. The aforesaid judgments, primarily dissect these principles into two different compartments one being the 'aggravating circumstances' while the other being the 'mitigating circumstance'. The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court."*

In ***State of M.P. v Bablu Natt*** [(2009)2 S.C.C. 272] , The Hon'ble Apex Court held that "Keeping in view the nature of the offence and the helpless condition in which the prosecutrix a young girl of 13/14 years was placed, the High Court was clearly in error in reducing the sentence imposed upon the respondent and that too without assigning any reasons, much less special and adequate reasons. The High Court appears to have overlooked the mandate of the Legislature as reflected in Section 376(1) IPC.

In recent years, we have noticed that crime against women is on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the Legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 years old girl shakes our judicial conscience. The offence was inhumane. There are no extenuating or mitigating circumstances available on the record which may justify imposition of sentence less than the minimum prescribed by the Legislature under Section 376(1) of the Act."

In ***Shyam Narain v. The State of NCT of Delhi***,(AIR 2013 SC 2209), the Hon'ble Apex Court while dealing with the imposition of sentence on a rape convict observed that *"the fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes."* This observation sounds that the Hon'ble Supreme Court has been moving towards crime control model of criminal justice and retributive theory of punishment, at least in the cases of the crimes committed against women.

In ***Shankar Kisanrao Khade v. State of Maharashtra,*** [2013 Cri.LJ 2595(SC)], the Hon'ble Apex Court held that, an attempt was made to do away with the preparation of balance sheet of aggravating and mitigating circumstances for arriving at a decision on death sentence by substituting the said exercise with "Crime test", "Criminal test", and "PR test." While restating the "rarest of rare case" rule, Hon'ble Justice K.S.P. Radahakrishnan opined that to award death sentence the crime test has to be fully satisfied i.e. 100% and the criminal test shall be 0% and later it shall pass through "PR test." One doubts whether there can be any such cases where there will be 100% and 0% of crime test and criminal test respectively.

In ***Mohd. Arif @ Ashfaq Vs. The Registrar, Supreme Court of India***, (2014 Cri.L.J. 4598), The Hon'ble Apex Court observed that Crime and punishment are two sides of the same coin. Punishment must fit to the crime. The notion of 'Just deserts' or a sentence proportionate to the offender's culpability was the principle which, by passage of time, became applicable to criminal jurisprudence. It is not out of place to mention that in all of recorded history, there has never been a time when crime and punishment have not been the subject of debate and difference of opinion. There are no statutory guidelines to regulate punishment. Therefore, in practice, there is much variance in the matter of sentencing.

In ***State of Madhya Pradesh Vs. Surendra Singh***, (AIR 2015 SC 3980, based on the theory of proportionality, it is laid down by Hon'ble Apex Court that, "Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment.

Meager sentence imposed solely on account of lapse of time without considering the degree of the offence will be counterproductive in the long run and against the interest of the society. One of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which commensurate with gravity, nature of crime and the manner in which the offence is committed. One should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with gravity of crime.

The punishment should not be so lenient that it shocks the conscience of the society. It is, therefore, solemn duty of the court to strike a proper balance while awarding the sentence as awarding lesser sentence encourages any criminal and, as a result of the same, the society suffers. Imposition of sentence must commensurate with gravity of offence".

In ***Sangeet & Anr. v. State of Haryana*** [(2013) 2 SCC 452] the Hon'ble Apex Court held that "In the sentencing process, both the crime and the criminal are equally important. We have unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge centric sentencing rather than principled sentencing."

Sentences which Courts may pass.

- A High Court may pass any sentence authorised by law.-Sec. 28.(1)Cr.P.C
- A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law ; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.-Sec.28.(2)Cr.P.C
- An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years.-Sec.28.(3)Cr.P.C
- The Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.-Sec.29.(1)Cr.P.C
- The Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding ten thousand rupees, or of both.-Sec.29.(2)Cr.P.C
- The Court of a Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding one thousand rupees, or of both.-Sec.29.(3)Cr.P.C

- The punishments to which offenders are liable under the provisions of this Code are- (Section 53 IPC)

  First- Death;

  Secondly- Imprisonment for life;

  [***]

  Fourthly- imprisonment, which is of two descriptions, namely:-

  (1) Rigorous, that is, with hard labour;

  (2) Simple,

  Fifthly- Forfeiture of property;

  Sixthly- Fine.

- When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently. Sec.31.(1)Cr.P.C

- In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:

- Provided that-

  (a) in no case shall such person be sentenced to imprisonment for longer period than fourteen years;

  (b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence. Sec.31.(2)Cr.P.C

- Sec 31.(3)Cr.P.C - For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence.

- The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law:

  Provided that the term-

  (a) is not in excess of the powers of the Magistrate under section 29;

  (b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine. Sec 30(1) Cr.P.C

- The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 29. Sec 30(2)Cr.P.C

- **IPC Section 64. Sentence of imprisonment for non-payment of fine** - In every case, of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable [with imprisonment or fine, or] with fine only, in which the offender is sentenced to a fine,] it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

- **IPC Section 65 – Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable** - The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one- fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

- **IPC Section 66. Description of imprisonment for non-payment of fine**

  The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.

- **IPC Section 67. Imprisonment for non-payment of fine, when offence punishable with fine only**

If the offence be punishable with fine only, [the imprisonment which the Court imposes in default of payment of the fine shall be simple, and] the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed tile following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

- **IPC Section 68. Imprisonment to terminate on payment of fine**

  The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

- **IPC Section 69. Termination of imprisonment on payment of proportional part of fine**

  If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

SECTION 31- SENTENCE IN CASES OF SEVERAL OFFENCES AT ONE TRIAL

SECTION 31, CRPC

When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of Section 71 of the IPC, sentence him for such offences, to the several punishments prescribed for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishment when consisting of imprisonment to commence one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishment shall run concurrently.

Where anything is an offence falling within two or more separate definition of any law for the time being in force for which offences are defined or punished, or where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any such offences.

It is also pertinent to mention Section 26 of the General Clauses Act, where it has been provided that where an act or omission constitute an offence under two or more enactments, then the offender will be liable to be prosecuted and punished under either or any of those enactment, **but shall not be liable to be punished twice for the same offence.**

MD AKHTAR HUSSAIN V. ASSISTANT COLLECTOR OF CUSTOMS, AIR 1988 SC 2143

The basic rule of thumb over the years has been the so called single transaction rule for concurrent sentence. If a given transaction constitutes two offences under two enactments generally, **it is wrong to have consecutive sentences.** But this rule hasno application if the transaction relating to the offence is not the same or the fact constituting the two offences are quite different. **Section 71 IPC-Limits of punishment of offence made up of several offence**-Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences , unless it be so expressly provided.

BHASKARAN V. STATE, 1978 CRILJ 738

The Kerala High Court, in this case, held that though sentence passed in separate trial cannot be ordered to run concurrently under Section 31, the same may be ordered under Section 427. But in such cases the direction that the sentences are to run concurrently cannot be passed after the subsequent Judgment is delivered.

O.M. CHERIAN V. STATE OF KERALA, (2015) 2 SCC 501

Section 31 CrPC relates to the quantum of punishment which may be legally passed when there is (a) one trial, and (b) the accused is convicted of "two or more offences". Section 31 CrPC says that subject to the provisions of Section 71 IPC, the court may pass separate sentences for two or more offences of which the accused is found guilty, but the aggregate punishment must not exceed the limit fixed in provisos (a) and (b) of sub- section (2) of Section 31 CrPC. In Section 31(1) CrPC, since the word "may" is used, in our considered view, when a person is convicted for two or more offences at one trial, the court may exercise its discretion in directing that the sentence for each offence may either run consecutively or concurrently subject to the provisions of Section71 IPC. But the aggregate must not exceed the limit fixed in provisos (a) and (b) of sub-section (2) of Section 31 CrPC, that is; (i) it should not exceed 14years; and (ii) it cannot exceed twice the maximum imprisonment awardable by the sentencing court for a single offence.

The words in Section 31 CrPC "… sentence him for such offences, to the several punishments prescribed therefor which such court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct" indicate that in case the court directs sentences to run one after the other, the court has to specify the order in which the sentences are to run. If the court directs running of sentences concurrently, order of running of sentences is not required to be mentioned. Discretion to order running of sentences concurrently or consecutively is judicial discretion of the court which is to be exercised as per the established law of sentencing. The court before exercising its discretion under Section 31 CrPC is required to consider the totality of the facts and circumstances of those offences against the accused while deciding whether sentences are to run consecutively or concurrently.

Section 31(1) CrPC enjoins a further direction by the court to specify the order in which one particular sentence shall commence after the expiration of the other. Difficulties arise when the courts impose sentence of imprisonment for life and also sentences of imprisonment for fixed term. In such cases, if the court does not direct that the sentences shall run concurrently, then the sentences will run consecutively by operation of Section 31(1) CrPC. There is no question of the convict first undergoing the sentence of imprisonment for life and thereafter undergoing the rest of the sentences of imprisonment for fixed term and any such direction would be unworkable. Since sentence of imprisonment for life means jail till the end of normal life of the convict, the sentence of imprisonment of fixed term has to necessarily run concurrently with life imprisonment. In such case, it will be in order if the Sessions Judges exercise their discretion in issuing direction for concurrent running of sentences. Likewise if two life sentences are imposed on the convict, necessarily, the court has to direct those sentences to run concurrently.

The opening words "in the case of consecutive sentences" in sub-section (2) of Section 31 CrPC make it clear that this sub-section refers to a case in which "consecutive sentences" are ordered. The provision says that if an aggregate punishment for several offences is found to be in excess of punishment which the court is competent to inflict on a conviction of single offence, it shall not be necessary for the court to send the offender for trial before a higher court. Proviso (a) is added to sub-section(2) of Section 31 CrPC to limit the aggregate of sentences—that in no case, the aggregate of consecutive sentences passed against an accused shall exceed fourteen years. "Fourteen years' rule" contained in clause (a) of the proviso to Section 31(2) CrPC may not be applicable in relation to sentence of imprisonment for life, since imprisonment for life means the convict will remain in jail till the end of his normal life.

When the prosecution is based on single transaction where it constitutes two or more offences, sentences are to run concurrently. Imposing separate sentences, when the acts constituting different offences form part of the single transaction is not justified.

As pointed out earlier, Section 31 CrPC deals with quantum of punishment which may be legally passed when there is (a) one trial; and (b) the accused is convicted of two or more offences. The ambit of Section 31 is wide, covering not only a single transaction constituting two or more offences but also offences arising out of two or more transactions. In the two judgments in *Mohd. Akhtar Hussain [Mohd. Akhtar Hussain v. Collector of Customs,* (1988) 4 SCC 183 : 1988 SCC (Cri) 921] and *Manoj* [(2014) 2 SCC 153 : (2014) 1 SCC (Cri) 763] , the issue that fell for consideration was the imposition of sentence for two or more offences arising out of the single transaction. It is in that context, in those cases, this Court held that the sentences shall run concurrently.

Under Section 31 CrPC it is left to the full discretion of the court to order the sentences to run concurrently in case of conviction for two or more offences. It is difficult to lay down any straitjacket approach in the matter of exercise of such discretion by the courts. By and large, trial courts and appellate courts have invoked and exercised their discretion to issue directions for concurrent running of sentences, favouring the benefit to be given to the accused. Whether a direction for concurrent running of sentences ought to be issued in a given case would depend upon the nature of the offence or offences committed and the facts and circumstances of the case. The discretion has to be exercised along the judicial lines and not mechanically.

In the case of Gagan Kumar Vs. State of Punjab reported in 2019 (5) SCC 154 the Hon'ble Apex Court held that in case of punishment for offences under single transaction it is mandatory for the court to specify as to whether sentences awarded to accused would run concurrently or consecutively when accused is convicted for more than one offence in a trial.

Accordingly, we answer the reference by holding that Section 31 CrPC leaves full discretion with the court to order sentences for two or more offences at one trial to run concurrently, having regard to the nature of offences and attendant aggravating or mitigating circumstances. We do not find any reason to hold that normal rule is to order the sentence to be consecutive and exception is to make the sentences concurrent. Of course, if the court does not order the sentence to be concurrent, one sentence may run after the other, in such order as the court may direct. We also do not find any conflict in the earlier judgment in Mohd. Akhtar Hussain v. Collector of Customs, (1988) 4 SCC 183, and Section 31 CrPC.

SCOPE OF SECTION 71 OF THE INDIAN PENAL CODE

Though separate sentences may be awarded for conviction at one trial for different offences, yet this provision is subject to the limitation imposed by section 71 of the IPC. Section 71 has two components which limits the power of the court to impose more severe punishment on the offender. Firstly, where anything, which is an offence, is made up of parts, any of which parts is itself an offence, the offender shall not be punished with punishment of more than one of such his offences. Secondly, where anything is an offence falling within two or more separate definition for any law enforce and where several acts of which or more than one by itself constitute an offence, constitute, when combined a different offence, the offender shall not be punished with a more severe punishment than the Court which tried him could award for any one of such offence.

Section 71 of the IPC and Section 26 of the General Clauses Act talk of punishment and not of conviction. From Section 31 it is manifest that punishment means sentence only. Consequently conviction for two offences for the same act is possible, though punishment for both may barred under Section 71 IPC and Section 26 of the General Clauses Act. Under the first half of Section 71 punishment for two offences which are part of the main offence is barred. In part two of Section 71 sentence for each conviction is not barred, what is barred is the punishment awarded for the offence should not exceed the maximum punishment that may be awarded for any of the offence.

EXERCISE OF DISCRETION UNDER SECTION 427

The sentencing court has the discretion to direct concurrency. When the two offences are akin or intimately connected, that factor would be a special occasion for ordering the two sentences to run concurrently. Where accused are convicted for offences under 395, 399, 400, 402 and 412 IPC, committed at different time and places, ends of justice would be met if sentences are ordered to be run concurrently.

MUTHURAMALINGAM AND ORS. V. STATE, (2016) 8 SCC 313

The Constitution Bench of the Hon'ble Supreme Court, in this case, was answering the question as to whether consecutive life sentences can be awarded to a convict on being found guilty of a series of murders for which he has been tried in a single trial.

The Hon'ble Court held that in cases where the accused has been sentenced for different terms apart from being awarded imprisonment for life, the court can **legitimately direct that the prisoner shall first undergo the term sentence before the commencement of life**

sentence. The Hon'ble Court further held that while multiple sentences of life imprisonment can be awarded for multiple murders or other offences punishable with imprisonment for life, **the life sentence so awarded cannot be directed to run consecutively.** It could however be superimposed in such a manner so that remission or commutation granted by the competent authority inonecasedoesnotipsofactoresultin remission in sentence awarded to the prisoner in other case. It was observed that **Section 427 (2) Cr.P.C., mandating that if a prisoner already undergoing life sentence is sentenced to another imprisonment for life for a subsequent offence committed by him, the two sentences so awarded shall run concurrently and not consecutively;** is an exception to the general rule u/s 427 (1) that sentence awarded upon conviction for different offence shall run consecutively.

R. MOHAN V. A.K. VIJAY KUMAR, (2012) 8 SCC 721

A conjoint reading of 421 and 431 Cr. P.C. read with section 64 IPC makes it very clear that so far as mode of recovery is concerned there is no reason why the court cannot impose a sentence in default of payment of compensation as it can be done in default of payment of fine.

SENTENCING IN DEATH PENALTY CASES

SANTOSH KUMAR SATISHBHUSHAN BARIYAR V. STATE OF MAHARASHTRA, (2009) 6 SCC 498

This was a case of abduction and murder of one person whose body parts were cut into pieces after his murder. The Supreme Court held that the accused persons were not criminals. They were friends. The deceased was said to have been selected because his father was rich. The motive, if any, was to collect some money. They were not professional killers. They have no criminal history. All were unemployed and were searching for jobs. Further, if age of the accused was a relevant factor for the High Court for not imposing death penalty on Accused 2 and 3, the same standard should have been applied to the case of the appellant also who was only two years older and still a young man in age. Accused 2 and 3 were as much a part of the crime as the appellant. Though it is true, that it was he who allegedly proposed the idea of kidnapping, but at the same time it must not be forgotten that the said plan was only executed when all the persons involved gave their consent thereto. Therefore, the Supreme Court instead of confirming the death sentence of the appellant awarded him rigorous life imprisonment.

The Apex Court discussed the sentencing at length starting from its discussion in ***Bachan Singh v. State of Punjab***.[77]

ON INDIVIDUALISED SENTENCING

For an effective compliance of sentencing procedure under Section 354(3) and Section 235(2) CrPC, sufficient discretion is a precondition. Strict channelling of discretion would also go against the founding principles of sentencing as it will prevent the sentencing court to identify and weigh various factors relating to the crime and the criminal such as culpability, impact on the society, gravity of offence, motive behind the crime, etc. *Bachan Singh* also holds the same view.

It was held in *Bachan Singh*:

> *"173. Thirdly, a standardisation of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single offence category ceases to be judicial. It tends to sacrifice justice at the altar of blind uniformity. Indeed, there is a real danger of such mechanical standardisation degenerating into a bed of procrustean cruelty.*
>
> *174. Fourthly, standardisation or sentencing discretion is a policy matter which belongs to the sphere of legislation. When Parliament as a matter of sound legislative policy, did not deliberately restrict, control or standardise the sentencing discretion any further than that is encompassed by the broad contours delineated in Section 354(3), the court would not by overleaping its bounds rush to do what Parliament, in its wisdom, warily did not do."*

The analytical tangle relating to sentencing procedure deserves some attention here. Sentencing procedure deserves an articulate and judicial administration. In this regard, all courts are equally responsible. Sentencing process should be so complied with, that enough information is generated to objectively inform the selection of penalty. The selection of penalty must not require a judge to reflect on his/her personal perception of crime.

In ***Swamy Shraddananda (2) v. State of Karnataka***[78], the Court notes that the awarding of sentence of death "depends a good deal on the personal predilection of the Judges constituting the Bench". This is a serious admission on the part of this Court. Insofar as this aspect is considered, there is inconsistency in how Bachan Singh has been implemented, as *Bachan Singh* mandated principled sentencing and not judge-centric sentencing. There are two sides

77 *(1980) 2 SCC 684*
78 *(2008) 13 SCC 767*

of the debate. It is accepted that the rarest of the rare case is to be determined in the facts and circumstance of a given case and there is no hard- and-fast rule for that purpose. There are no strict guidelines. But a sentencing procedure is suggested. This procedure is in the nature of safeguards and has an overarching embrace of the *rarest of rare* dictum. Therefore, it is to be read with Articles 21 and 14.

PRE-SENTENCE HEARING AND "SPECIAL REASONS"

Under Sections 235(2) and 354(3) of the Criminal Procedure Code, there is a mandate as to a full-fledged bifurcated hearing and recording of "special reasons" if the court inclines to award death penalty. In the specific backdrop of sentencing in capital punishment, and that the matter attracts constitutional prescription in full force, it is incumbent on the sentencing court to oversee comprehensive compliance with both the provisions. A scrupulous compliance with both provisions is necessary such that an informed selection of sentence could be based on the information collected and collated at this stage.[79]

NATURE OF INFORMATION TO BE COLLATED AT PRE-SENTENCE HEARING

At this stage, *Bachan Singh* informs the content of the sentencing hearing. The court must play a proactive role to record all relevant information at this stage. Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This information would include aspects relating to the nature, motive and impact of crime, culpability of convict, etc. Quality of evidence adduced is also a relevant factor. For instance, extent of reliance on circumstantial evidence or child witness plays an important role in the sentencing analysis. But *what is sorely lacking, in most capital sentencing cases, is information relating to characteristics andsocio-economic background of the offender.* This issue was also raised in the 48th Report of the Law Commission.

Circumstances which may not have been pertinent in conviction can also play an important rolein the selection of sentence. Objective analysis of the probability that the accused can be reformedand rehabilitated can be one such illustration

In fine, *Bachan Singh* mandated identification of aggravating and mitigating circumstance relating to crime and the convict to be collected in the sentencing hearing.

79 *See Santa Singh v. State of Punjab [AIR 1956 SC 256] , Malkiat Singh v. State of Punjab [(1991) 4 SCC341: 1991 SCC (Cri) 976] , Allauddin Mian v. State of Bihar [(1989) 3 SCC 5 : 1989 SCC (Cri) 490 : AIR 1989 SC 1456] , Muniappan v. State of T.N. [(1981) 3 SCC 11 : 1981 SCC (Cri) 617] , Jumman Khan v. State of U.P. [(1991) 1 SCC 752 : 1991 SCC (Cri) 283] and Anshad v. State of Karnataka [(1994) 4 SCC 381 : 1994 SCC (Cri) 1204] on this.*

ALTERNATIVE OPTION IS FORECLOSED

Another aspect of the *rarest of rare* doctrine which needs serious consideration is interpretation of latter part of the dictum— "[t]hat ought not to be done save in the *rarest of rare* cases when the *alternative option is unquestionably foreclosed*". *Bachan Singh* suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose.

Death punishment, qualitatively stands on a very different footing from other types of punishments. It is unique in its total irrevocability. Incarceration, life or otherwise, potentially serves more than one sentencing aims. Deterrence, incapacitation, rehabilitation and retribution—all ends are capable to be furthered in different degrees, by calibrating this punishment in light of the overarching penal policy. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore puts an end to anything to do with the life. This is the big difference between the two punishments. Before imposing death penalty, therefore, it is imperative to consider the same.

The *rarest of rare* dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason in the facts and circumstances of the case? As discussed above, *life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the secondexception to the rarest of rare doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigour when the court focuses on the circumstances relating to the criminal, alongwith other circumstances.*

ROLE AND RESPONSIBILITY OF COURTS

Bachan Singh while enunciating the rarest of rare doctrine, did not deal with the role and responsibility of sentencing court and the appellate court separately. For that matter, this Court did not specify any review standards for the High Court and the Supreme Court. *In that event, all courts, be it the trial court, the High Court or this Court, are duty-bound to ensure that the ratio laid down therein is scrupulously followed. Same standard of rigour and fairness are to be followed by the courts.* If anything, inverse pyramid of responsibility is applicable in death penalty cases.

SENTENCING JUSTIFICATIONS IN HEINOUS CRIMES

It has been observed, generally and more specifically in the context of death punishment, that sentencing is the biggest casualty in crimes of brutal and heinous nature. Our capital sentencing jurisprudence is thin in the sense that there is very little objective discussion on aggravating and mitigating circumstances. In most such cases, courts have only been considering the brutality of crime index. There may be other factors which may not have been recorded.

It must also be pointed out, in this context, *that there is no consensus in the Court on the use of "social necessity" as a sole justification in death punishment matters. The test which emanates from Bachan Singh in clear terms is that the courts must engage in an analysis of aggravating and mitigating circumstances with an open mind, relating both to crime and the criminal, irrespective of the gravity or nature of crime under consideration.*[80]

A dispassionate analysis, on the aforementioned counts, is a must. *The courts while adjudging on life and death must ensure that rigour and fairness are given primacy over sentiments and emotions*

Whether primacy should be accorded to aggravating circumstances or mitigating circumstances is not the question. Court is duty-bound by virtue of *Bachan Singh* to equally consider both and then to arrive at a conclusion as to respective weights to be accorded. The Court is bound by the spirit of Article 14 and Article 21 which forces it to adopt a principled approach to sentencing. This overarching policy flowing from *Bachan Singh* applies to heinous crimes as much as it applies to relatively less brutal murders.

PUBLIC OPINION IN CAPITAL SENTENCING

It is also to be pointed out that public opinion is difficult to fit in the *rarest of rare* matrix. People's perception of crime is neither an objective circumstance relating to crime nor to the criminal. Perception of public is extraneous to conviction as also sentencing, at least in capital sentencing according to the mandate of *Bachan Singh*.

The constitutional role of the judiciary also mandates taking a perspective on individual rights at a higher pedestal than majoritarian aspirations. To that extent the court plays a

80 *On this point see Mukesh v. State (NCT of Delhi), (2017)6 SCC 1. In this case the mitigating factors which have been highlighted before the court on the basis of the affidavits filed by the appellants pertain to the strata to which they belong, the aged parents, marital status and the young children and the suffering they would go through and the calamities they would face in case of affirmation of sentence, their conduct while they are in custody and the reformative path they have chosen and their transformation and the possibility of reformation. That apart, emphasis has been laid on their young age and rehabilitation. Despite there being a number of mitigating circumstances, the manner in which the crime was committed outweighed them and the death sentences awarded to the appellant were upheld.*

counter-majoritarian role. And this part of debate is not only relevant in the annals of judicial review, but also to criminal jurisprudence.

Public opinion may also run counter to the rule of law and constitutionalism. *Bhagalpur Blinding case*[81] or the recent spate of attacks on right to trial of the accused in *Bombay Bomb Blast case* are recent examples.

MAHEBOOBKHAN AZAMKHAN PATHAN V. STATE OF MAHARASHTRA, (2013) 14 SCC 214

The present case was of theft and robbery resulting in the deceased's death. The Supreme Court commuted the death sentence into that of life imprisonment holding that with the possibility of rehabilitation, reformation and consequent deterrence by life-long prison terms, the present case cannot be brought within the ambit of offence resulting in social menace.

The Apex Court on sentencing, stated that despite the changes in the criminologist thought and movement and the extent of clemency in penal laws, it has not been possible to put to rest the conflicting views on the sentencing policy. The sentencing policy, as a significant and inseparable facet of criminal jurisprudence, continues to remain a great subject of social and judicial discussion and it is neither possible nor prudent to state a "straitjacket" formula which would be applicable to the cases where capital punishment has been prescribed. *The court, therefore, has to consider the factors to the sentencing calculus such as the gravity of the offence, the provocative and aggravating circumstances at the time of the commission of the crime, the possibility of the convict being reformed or rehabilitated, the adequacy of the sentence of life imprisonment and other attendant circumstances.*

SANGEET V. STATE OF HARYANA, (2013) 2 SCC 452

The brief facts of the case are that all the members of one family except one were murdered by the appellant and several other persons. The Supreme Court commuted the death sentence to life imprisonment of the appellant.

The Apex Court noted that *Bachan Singh* made two very significant departures from *Jagmohan Singh*[82]. The departures were: (i) in the award of punishment by deleting any reference to the aggravating and mitigating circumstances of a crime, and (ii) in introducing the circumstances of the criminal.

81 *Khatri (II) v. State of Bihar, (1981) 1 SCC627*

82 *(1973) 1 SCC 20*

Bachan Singh effectively opened up Phase II of a sentencing policy by shifting the focus from the crime to the crime and the criminal. This is where *Bachan Singh* marks a watershed in sentencing.

However, the Apex Court made a notable remark that aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of the mantra of aggravating and mitigating circumstances needs are view.

In the sentencing process, both the crime and the criminal are equally important..

ACCUSED 'X' V. STATE OF MAHARASHTRA (REVIEW PETITION (CRIMINAL) NO. 301 OF 2008)

Decided on –15.04.2019 by three judge Bench comprising of Justice N.V. Ramana, Justice Mohan M. Shantanagoudar, Justice Indira Banerjee

The Apex Court heard the matter only on the aspects of sentencing pertaining to two issues. The first related to the implications of non-compliance of Section 235(2) of CrPC during the sentencing process before the Trial Court. The second issue concerned the mental illness of 'accused x', which was raised for the first time in this Review Petition, after the judgment of this Court in the earlier round.

Section 235(2) of CrPC implies that once the judgment of conviction is pronounced, the Court will hear the accused on the question of sentence and at that stage, it is open to the accused to produce such material on record as is available to show the mitigating circumstances in his favor. In other words, the accused at this stage argues for imposition of lesser sentence based on such mitigating circumstances as brought to the notice of the Court by him.

Section 235(2) of CrPC mandates Pre-Sentence Hearing for the accused and imbibes a cardinal principle that the sentence should be based on 'reliable, comprehensive information relevant to what the Court seeks to do'. In the case at hand, the accused argues that his right to fair trial stands extinguished as he was not provided a separate hearing for sentencing. This issue can be resolved directly by relying on the interpretation of Section 235(2) of CrPC and this Court's jurisprudence built around Pre- Sentence Hearing.

This requirement has also been affirmed by the five-Judge Bench of this Court in Bachan Singh v. State of Punjab ,wherein it was also held that at the stage of Pre-Sentence Hearing, the accused can bring on record material or evidence, which may not be strictly relevant to

or connected with the particular crime under inquiry, but nevertheless, may have a bearing on the choice of sentence.

The Apex Court referred to the decision in ***Santa Singh v. The State of Punjab***[83], which was decided by a Division Bench of this Court. This case revolved on the fact that an accused in a double murder case was sentenced to death without providing an opportunity of 'hearing' under Section 235(2) of CrPC, which was the only ground of appeal before the Supreme Court. This Court, by two concurrent opinions, remanded the matter back to the trial court for fresh consideration on sentencing after giving an opportunity of 'hearing' to the accused. Justice Bhagwati interpreted section 235(2)[84].

The question of providing sufficient time for Pre-Sentence Hearing was dealt with by the Court in ***Allauddin Mian v. State of Bihar***[85]. In this case, the Court observed that the trial court had not provided sufficient time to the accused for hearing on sentencing. Relevant factors, such as, the antecedents of the accused, their socio-economic conditions, and the impact of their crime on the community had not come on record, and in the absence of such information deciding on punishment was difficult. The Supreme Court therefore re commended that,*"as a general rule the trial courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender"*. The aforesaid proposition was also reiterated in ***Malkiat Singh v. State of Punjab***[86].

In ***State of Maharashtra v. Sukhdev Singh***[87], the Supreme Court clarified that while Section 309 of the CrPC prescribed no power for adjournment of sentencing hearings, these should be provided where the accused sought to produce materials in capital cases.

In the case of B***.A. Umesh v. Registrar General, High Court of Karnataka***[88], ***it was held that a review petition cannot be allowed merely because no separate date was given for hearing on the sentence. This Court held that Section 235(2) of CrPC does not mandate separate***

83 *(1976) 4 SCC 190*

84 *"The hearing on the question of sentence, would be rendered devoid of all meaning and contentand it would become an idle formality, if it were confined merely to hearing oral submissions without any opportunity being given to the parties and particularly to the accused, to produce material in regard to various factors bearing on the question of sentence, and if necessary, to lead evidence for the purpose of placing such material before the court.We are therefore of the view that the hearing contemplated by section 235(2) is not confined merely to hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the accused to place before the court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same. Of course, care would have to be taken by the court to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings."*

85 *(1989) 3 SCC 5*

86 *(1991) 4 SCC 341*

87 *(1992) 3 SCC 700*

88 *(2017) 4 SCC 124*

date for the hearing of the sentence, rather, it is dependent on the facts and circumstances of the case, for instance, if parties insist to be heard on separate dates.

In the final order of ***Mukesh v. State (NCT of Delhi)***[89], this Court held that in the event the procedural requirements under Section 235(2) of the CrPC are not met, ***the appellate court can either remit the case back to the trial court or adjourn the matter before the appellate forum for hearing on sentence after giving an opportunity to adduce evidence. On the other hand, the court also noted that any deficiency in non-compliance of Section 235(2) of CrPC can be cured by providing the opportunity at the appellate stage itself so as to curtail the delay in the proceedings. In that case, this Court had allowed the accused to file an affidavit listing the mitigating circumstance, noticing that no pre-hearing on sentence was ever carried out.***

The Apex Court considered two recent three-Judge Bench decisions of this Court on this aspect. Firstly, in ***Chhannu Lal Verma v. State of Chhattisgarh***[90], this Court observed that not having a separate hearing at the stage of trial was a procedural impropriety. Noting that a bifurcated hearing for conviction and sentencing was a necessary condition laid down in ***Santosh Kumar Satish hushan Bariyar***[91], the Court held that by conducting the hearing for sentencing on the same day, the Trial Court failed to provide necessary time to the appellant therein to furnish evidence relevant to sentencing and mitigation. The Apex Court stated that this cannot be taken to mean that this Court intended to ***lay down, as a proposition of law, that hearing the accused for sentencing on the same day as for conviction would vitiate the trial. On the contrary, in the said case, it was found on facts that the same was a procedural impropriety because the accused was not given sufficient time to furnish evidence relevant to sentencing and mitigation.***

Secondly, in ***Rajendra Prahladrao Wasnik v. State of Maharashtra***[92], this Court made a general observation that in cases where the death penalty may be awarded, the Trial Court should give an opportunity to the accused after conviction which is adequate for the production of relevant material on the question of the propriety of the death sentence. ***This is evidently at best directory in nature and cannot be taken to mean thata pre-sentence hearing on a separate date ismandatory.***

It must be noted that the effect of *Malkiat Singh Case* (supra) has already been considered by this Court in ***Vasanta Sampat Dupare v. State of Maharashtra***[93], *wherein it was already*

89 *(2017) 6 SCC 1*
90 *Criminal Appeal Nos. 1482-1483 of 2018*
91 *(2009) 6 SCC 498*
92 *Review Petition (Crl.) Nos. 306-307 of 2013*
93 *(2017) 6 SCC 631*

noted that the mere non-conduct of the pre-sentence hearing on a separate date would not per se vitiate the trial if the accused has been afforded sufficient time to place relevant material on record.

The Apex Court noted that in case the minimum sentence is proposed to be imposed upon the accused, the question of providing an opportunity under Section 235(2) would not arise.[94]

The object of Section 235(2) of the Cr.P.C is to provide an opportunity for accused to adduce mitigating circumstances. This does not mean, however, that the Trial Court can fulfil the requirements of Section 235(2) of the Cr.P.C. only by adjourning the matter for one or two days to hear the parties on sentence. If the accused is ready to submit his arguments on this aspect on the very day of pronouncement of the judgment of conviction, it is open for the Trial Court to hear the parties on sentence on the same day after passing the judgment of conviction. In a given case, based on facts and circumstances, the Trial Court may choose to hear the parties on the next day or after two days as well.

The Apex court concluded that as long as the spirit and purpose of Section 235(2) is met, inasmuch as the accused is afforded a real and effective opportunity to plead his case with respect to sentencing, ***whether simply by way of oral submissions or by also bringing pertinent material on record, there is no bar on the pre-sentencing hearing taking place on the same day as the pre-conviction hearing. Depending on the facts and circumstances, a separate date may be required for hearing on sentence,but it is equally permissible to argue on the question of sentence on the same day if the parties wish to do so.***

From the aforesaid discussion, following dicta emerge-

i. That the term 'hearing' occurring under Section 235(2) requires the accused and prosecution at their option, to be given a meaningful opportunity.

ii. Meaningful hearing under Section 235(2) of CrPC, in the usual course, is not conditional upon time or number of days granted for the same. It is to be measured qualitatively and not quantitatively.

iii. The trial court need to comply with the mandate of Section 235(2) of CrPC with best efforts.

iv. Non-compliance can be rectified at the appellate stage as well, by providing meaningful opportunity.

94 *See Tarlok Singh v. State of Punjab, (1977) 3 SCC 218; Ramdeo Chauhan v. State of Assam, (2001) 5 SCC 714*

v. If such an opportunity is not provided by the trial court, the appellate court needs to balance various considerations and either afford an opportunity before itself or remand back to trial court, in appropriate case, for fresh consideration.

vi. However, the accused need to satisfy the appellate courts, *interalia* by pleading on the grounds as to existence of mitigating circumstances, for its further consideration.

vii. Being aware of certain harsh realities such as long protracted delays or jail appeals through legal aid etc., wherein the appellate court, in appropriate cases, may take recourse of independent enquiries on relevant facts ordered by the court itself.

viii. If no such grounds are brought by the accused before the appellate courts, then it is not obligated to take recourse under Section 235(2) of CrPC.

Then the Court heard the matter on the second issue ***concerning post-conviction mental illness as a mitigating factor for converting a death sentence to life imprisonment.***

It was brought to the notice of the court that the appellant has been a death row convict for almost 17 years, mandating the Court to resolve the issue of sentencing. Before the Court considered the appropriate punishment for the accused a reference was made to the background principles concerning sentencing policy considering that the present Petitioner is pleading a mitigating factor which has arisen post-conviction i.e his mental illness.

The Court then went on to observe some of the general aspects of sentencing.[95]

95 *"Sentencing is appropriate allocation of criminal sanctions, which is mostly given by the judicial branch.This process occurring at the end of a trial still has a large impact on the efficacy of a Criminal Justice System. It is established that sentencing is a socio-legal process, wherein a judge finds an appropriate punishment for the accused considering factual circumstances and equities. In light of the fact that the legislature provided for discretion to the judges to give punishment, it becomes important to exercise the same in a principled manner. We need to appreciate that a strict fixed punishment approach in sentencing cannot be acceptable, as the judge needs to have sufficient discretion as well.Before analyzing this case, we need to address the issue of the impact of reasoning in the sentencing process. The reasoning of the trial court acts as a link between the general level of sentence for the offence committed and to the facts and circumstances. The trial court is obligated to give reasons for the imposition of sentence, as firstly, it is a fundamental principle of natural justice that the adjudicators must provide reasons for reaching the decision and secondly, the reasons assume more importance as the liberty of the accused is subject to the aforesaid reasoning. Further, the appellate court is better enabled to assess the correctness of the quantum of punishment challenged, if the trial court has justified the same with reasons. The aforesaid principle is fortified not only by the statute under Section 235(2) of CrPC but also by judicial interpretation. Any increase or decrease in the quantum of punishment than the usual levels need to be reasoned by the trial court. However, any reasoning dependent on moral and personal opinion/notion of a Judge about an offence needs to be avoided at all costs. Sentencing in India, is a midway between judicial intuition and strict application of rule of law. As much as we value the rule of law, the process of sentencing needs to preserve principled discretion for a judge. In India, sentencing is mostly led by 'guideline judgments' in the death penalty context, while many other countries like United Kingdom and United States of America, provide a basic framework in sentencing guidelines. Although at the outset, it is clarified that this Court may not laydown a 'definitive sentencing policy', which is rather a legislative function, however, the Courts in India have addressed this problem in a principled manner having regards to judicial standards and principles. These judicially set-principles not only serve as instructive guidelines, but also preserve the required discretion of the trial judges while sentencing. Such an effort has already been initiated by the Supreme Court, in Sunil Dutt Sharma Case, (2014) 4 SCC 375, when the sentencing guidelines evolved in the context of death penalty were applied to a lesser sentence as well. However, achieving sentencing uniformity may not only require judicial efforts,but even the legislature may be required to step in.*
Moreover, our attention is also drawn to the Malimath Committee Report on Reforms in the Criminal Justice System, which recommended creation of a statutory body for prescribing sentencing guidelines. Before concluding the aforementioned observations highlighting the dangers of sentencing discretion, we are reminded of the words of Justice Krishna Iyer, who held that "Guided missiles with lethal potential, in unguided hands, even judicial, is a grave risk where the peril is mortal though tempered by the appellate process." [refer Rajendra Prasad v. State of Uttar Pradesh (1979) 3 SCC646]"

Considering that a large part of the exercise of sentencing discretion is principled, a Judge in India needs to keep in mind broad purposes of punishment, which are deterrence, incapacitation, rehabilitation, retribution and reparation (wherever applicable), unless particularly specified by the legislature as to the choice. The purposes identified above, marks a shift in law from crime-oriented sentencing to a holistic approach wherein the crime, criminal and victim have to be taken into consideration collectively.

The Apex Court noted that mitigating factors are associated with the criminal and aggravating factors are relatable to commission of the crime. These mitigating factors include considerations such as the accused's age, socio-economic condition etc. We note that the ground claimed by 'accused x' is arising after a long-time gap after crime and conviction. Therefore, the justification to include the same as a mitigating factor does not tie in with the equities of the case, rather the normative justification is founded in the Constitution as well as the jurisprudence of the 'rarest of the rare' doctrine. It is now settled that the death penalty can only be imposed in the rarest of the rare case which requires a consideration of the totality of circumstances. ***In this light, the Court has to assess the inclusion of post-conviction mental illness as a determining factor to*** disqualify as a 'rarest of the rare' case.

The Apex Court then referred to the normative basis for recognition of post – conviction mental illness as a mitigating factor in death penalty case which was also identified in the case of ***Shatrughan Chauhan case***[96]. Article 20 (1) of the Indian Constitution imbibes the idea communication/knowledge for the accused about the crime and its punishment. It is this communicative element, which is ingrained in the sentence (death penalty), that gives meaning to the punishments in a criminal proceeding. The notion of death penalty and the sufferance it brings along, causes incapacitation and is idealized to invoke a sense of deterrence. ***If the accused is not able to understand the impact and purpose of his execution because of his disability, then the raison d'être for the execution itself collapses.***

The Court then laid down the test for recognizing an accused eligible for such mitigating factor. The Apex Court said that it must be recognized that insanity recognized under IPC and the mental illness to be considered in the resent case arise at a different stage and time.[97]

96 *The above materials, particularly, the directions of the United Nations international conventions, of which India is a party, clearly show that insanity/mental illness/schizophrenia is a crucial supervening circumstance, which should be considered by this Court in deciding whether in the facts and circumstances of the case death sentence could be commuted to life imprisonment. To put it clear,"insanity" is a relevant supervening factor for consideration by this Court.*

97 *Under IPC, Section 84 recognizes the plea of legal insanity as a defence against criminal prosecution. This defence is restricted in its application and is made relatable to the moment when the crime is committed. Therefore, Section 84 of IPC relates to the mens rea at the time of commission of the crime, whereas the plea of post-conviction mental illness is based on appreciation of punishment and right to dignity. The different normative standards underpinning the above consequently mean different threshold standards as well.On the other hand, considering the fact that the case is at the fag end of the process and the mitigating factors so discussed above were not emergent at the time of commission of the crime, therefore this ground needs to be utilized only in extreme cases of mental illness considering the element of marginal retribution which survives. In any case, considering that India has taken an obligation at an international forum to not punish mental patients with cruel and unusual punishments, it would be necessary for this Court to provide for a test wherein only extreme cases of convicts being mentally ill are not executed. Moreover, this Court cautions against utilization of this dicta as a ruse*

The Apex Court then noted that there appear to be no set disorders/disabilities for evaluating the 'severe mental illness', ***however a 'test of severity' can be a guiding factor for recognizing those mental illness which qualify for an exemption. Therefore, the test envisaged herein predicates that the offender needs to have a severe mental illness or disability, which simply means that a medical professional would objectively consider the illness to be most serious so that he cannot understand or comprehend the nature and purpose behind the imposition of such punishment.*** These disorders generally include schizophrenia, other serious psychotic disorders, and dissociative disorders-with schizophrenia.

The Apex Court then issued the following directions which need to be followed in the future cases:

a. That the post-conviction severe mental illness will be a mitigating factor that the appellate Court, in appropriate cases, needs to consider while sentencing an accused to death penalty.

b. Theassessmentofsuchdisabilityshouldbeconductedbyamulti-disciplinary team of qualified professionals (experienced medical practitioners, criminologists etc), including professional with expertise in accused's particular mental illness.

c. The burden is on the accused to prove by a preponderance of clear evidence that he is suffering with severe mental illness. The accused has to demonstrate active, residual or prodromal symptoms, that the severe mental disability was manifesting.

d. The State may offer evidence to rebut such claim.

e. Court in appropriate cases could setup a panel to submit an expert report.

f. 'Test of severity' envisaged herein predicates that the offender needs to have a severe mental illness or disability, which simply means that objectively the illness needs to be most serious that the accused cannot understand or comprehend the nature and purpose behind the imposition of such punishment.

The aspiration of the Mental Health Act, 2017 was to provide mental health care facility for those who are in need including prisoners. The State Governments are obliged under Section 103 of the Act to set up a mental health establishment in the medical wing of at least one prison in each State and Union Territory, and prisoners with mental illness may ordinarily be referred to and cared for in the said mental health establishment.

to escape the gallows by pleading such defense even if such aliment is not of grave severity.

Therefore, the Apex Court directed the State Government to consider the case of 'accused x' under the appropriate provisions of the Mental Healthcare Act, 2017 and if found entitled, provide for his rights under that enactment.

M.A. ANTONY V. STATE OF KERALA, 2018 SCC ONLINE SC 2800

(Consideration of socio economic factors in awarding death sentence)

In this case, the Appellant was charged with the murder of six members of one family. The Apex Court commuted his death sentence to life imprisonment after considering the socio economic background of the accused.

The Apex Court stated that there is no doubt that the socio-economic factors relating to a convict should be taken into consideration for the purposes of deciding whether to award life sentence or death sentence. One of the reasons for this is the perception (perhaps misplaced) that it is only convicts belonging to the poor and disadvantaged sections of society that are awarded capital sentence while others are not.

Although *Bachan Singh v. State of Punjab* does not allude to socio-economic factors for being taken into consideration as one of the mitigating factors in favour of a convict, the development of the law in the country, particularly through the Supreme Court, has introduced this as one of the factors to be taken into consideration.

Following the view laid down by the Constitution Bench of this Court, we endorse and accept that socio-economic factors must be taken into consideration while awarding a sentence particularly the ground realities relating to access to justice and remedies to justice that are not easily available to the poor and the needy.

The earliest decision to which our attention was drawn is ***State of U.P v. M.K Anthony***[98] in which this Court cautioned against being overwhelmed by the gravity or brutality of the offence. As held in *Bachan Singh*, it is not only the crime that is of importance in the sentencing process but it is also the criminal. With this in view, this Court considered the plight of the have-not and commuted the death sentence into one of imprisonment for life.

In ***Surendra Pal Shivbalakpal v. State of Gujarat***[99] this Court considered the socio-economic condition of the appellant therein, namely that he was a migrant labourer and was living in impecunious circumstances and therefore it could not be said that he would be a menace to society in future. The sentence of death was converted into one of imprisonment for life.

98 *(1985) 1 SCC 505*

99 *(2005) 3 SCC 127*

Similarly, in ***Sushil Kumar v. State of Punjab***[100] the poverty of the convict was taken into consideration as a factor for sentencing.

In ***Mulla v. State of Uttar Pradesh***[101] this Court specifically noted in paragraph 80 of the Report that one of the factors that appears to have been left out in judicial decision- making on the issue of sentencing is the socioeconomic factor which is a mitigating fact or although it may not dilute the guilt of the convict.

In ***Kamleshwar Paswan v. Union Territory of Chandigarh***[102] this Court noted the fact that the convict was a rickshaw puller and a migrant with psychological and economic pressures. The socio-economic condition of the convict was therefore taken into consideration for the purposes of sentencing him.

There is, therefore, enough case law to suggest that socio-economic factors concerning a convict must be taken into consideration while taking a decision on whether to award a sentence of death or to award a sentence of imprisonment for life.

RAJESH KUMAR V. STATE, (2011) 13 SCC 706

In this case the appellant was convicted for murdering two children aged about eight months and 4 year old in brutal and diabolical manner on the refusal of the victim's father from lending him anymore money. The Supreme Court commuted the death sentence to life imprisonment on the ground that the State has failed to show that the appellant is a continuing threat to the society or that he is beyond reform and rehabilitation.

The Apex Court discussed the importance of section 235(2) at great length.

In ***Santa Singh v. State of Punjab***[103] this Court held that this new provision is in consonance with the modern trends in penology and sentencing procedures. Noticing the fact that Section 235(2) is a new provision introduced by the legislature in the 1973 Code, this Court went on to explain that this is an important stage in the process of administration of criminal justice and is as important as the adjudication of guilt and this stage should not be confined to a subsidiary position as if it were a matter of not much consequence.

Bhagwati, J. giving the judgment in *Santa Singh* pointed out and which was later on accepted in ***Bachan Singh v. State of Punjab***[104] that proper exercise of sentencing discretion calls for consideration of various factors like the nature of offence, the circumstances— both

100 *(2009) 10 SCC 434*
101 *(2010) 3 SCC 508*
102 *(2011) 11 SCC 564*
103 *(1976) 4 SCC 190*
104 *(1980) 2 SCC 684*

extenuating or aggravating, the prior criminal record, if any, of the offender, the age of the offender, his background, his education, his personal life, his social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of his rehabilitation in the life of community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others. After referring to all the aforesaid facts, the learned Judge opined as under:

> *"3. … These are factors which have to be taken into account by the court in deciding upon the appropriate sentence, and, therefore, the legislature felt that, for this purpose, a separate stage should be provided after conviction when the court can hear the accused in regard to these factors bearing on sentence and then pass proper sentence on the accused. Hence the new provision in Section 235(2)."*

After analysing the aforesaid aspects, the learned Judge in *Santa Singh case* posed the question: What is the meaning and content of expression "hear the accused"? By referring to various aspects and also the opinion expressed by the Law Commission in its Forty-eighth Report, Bhagwati, J. opined that the hearing contemplated under ***Section 235 (2) is not confined merely to oral submissions but it is also intended to give an opportunity to the prosecution and the accused to place before the court facts and material relating to various factors bearing on the question of sentence. However ,therewas a note of caution that in the name of such hearing, the court proceedings should not be unduly protracted.***

This Court held in *Santa Singh* that non-compliance with such hearing is not a mere irregularity curable under Section 465 of the 1973 Code.

In M***uniappan v. State of T.N.***[105] Chandrachud, C.J. delivering the judgment again had to consider the importance of Section 235(2) and Section354(3) CrPC in our sentencing procedure. The learned Chief Justice held that the obligation to hear the accused on the question of sentence under Section 235(2) of the 1973 Code is not discharged by putting a formal question to the accused as to what he has to say on the question of sentence. The learned Chief Justice made it clear that the Judge must make a genuine effort to elicit from the accused all items of information which will eventually bear on the question of sentence. All such items of information that would furnish a clue to the genesis of the crime and the motivation of the criminal are relevant and the learned Chief Justice emphasised that in such an exercise,"it is the bounden duty of the Judge to cast aside the formalities of the court scene and approach the question of sentence from a broad, sociological point of view".

105 *(1981) 3 SCC 11*

The learned Chief Justice further said that in the sentencing procedure it is not only the accused but the entire society is at stake and therefore the questions the Judge puts and the answers the accused gives may be beyond the narrow constraints of the Evidence Act.

To the same effect is the judgment of Ahmadi, J. in ***Allauddin Mian v. State of Bihar***[106]. Explaining the purpose of Section 235(2), this Court in *Allauddin Mian* held that Section 235(2) satisfies a dual purpose; first of all it satisfies rules of natural justice by according to the accused an opportunity of being heard on the question of sentence. Under such sentencing procedure the accused is given an opportunity to place before the court all relevant materials having a bearing on the question of sentence. The Court opined that it is a salutary principle and must be strictly observed and is not a matter of mere formality. This Court further held that in such hearing exercise the accused should be given a real and effective opportunity to place his antecedents, social and economic background, etc. before the court, for the court to take a fair decision on sentence as otherwise the sentence would be vulnerable.

Therefore, it is clear from the purpose of Section 235(2) as explained in the aforesaid cases, that the object of hearing under Section 235(2) being intrinsically and inherently connected with the sentencing procedure, the provision of Section 354(3) which calls for recording of special reason for awarding death sentence must be read conjointly with Section 235(2) of the 1973 Code. This Court is of the opinion that special reasons can only be validly recorded if an effective opportunity of hearing as contemplated under Section 235(2) CrPC is genuinely extended and is allowed to be exercised by the accused who stands convicted and is awaiting the sentence. These two provisions do not stand in isolation but must be construed as supplementing each other as ensuring the constitutional guarantee of a just, fair and reasonable procedure in the exercise of sentencing discretion by the court.

DALBIR SINGH V. STATE OF PUNJAB, (1979) 3 SCC 745

Counting the casualties is not the main criterion for sentencing to death; nor recklessness in the act of murder. The sole focus on the crime and the total farewell to the criminal and his social-personal circumstances mutilate sentencing justice.

EXECUTION OF DEATH WARRANT

SHABNAM V. UNION OF INDIA, (2015) 6 SCC 702

In the present case the death sentence of both the convicts was confirmed by the Supreme Court after which death warrants were issued by the Sessions judge against the convicts. It

106 *(1989) 3 SCC 5*

was held to be impermissible as various judicial and administrative remedies were open to the convicts and were yet to be exercised by them.

The Apex Court stated that the procedure prescribed by the High Court of Allahabad in ***PUDR v. Union Of India***[107] is in consonance with Article21 of the Constitution. While executing the death sentence, it is mandatory to follow the said procedure and it is also necessary for the authorities to keep in mind the guidelines contained in the judgment of this Court in ***Shatrughan Chauhan case***[108]. The procedure prescribed in the case of *PUDR case* is as follows:

> *"We are affirmatively of the view that in a civilised society, the execution of the sentence of death cannot be carried out in such an arbitrary manner, keeping the prisoner in the dark and without allowing him recourse and information. Essential safeguards must be observed. Firstly, the principles of natural justice must be read into the provisions of Sections 413 and 414 CrPC and sufficient notice ought to be given to the convict before the issuance of a warrant of death by the Sessions Court that would enable the convict to consult his advocates and to be represented in the proceedings. Secondly, the warrant must specify the exact date and time for execution and not a range of dates which places a prisoner in a state of uncertainty. Thirdly, a reasonable period of time must elapse between the date of the order on the execution warrant and the date fixed or appointed in the warrant for the execution so that the convict will have a reasonable opportunity to pursue legal recourse against the warrant and to have a final meeting with the members of his family before the date fixed for execution. Fourthly, a copy of the execution warrant must be immediately supplied to the convict. Fifthly, in those cases, where a convict is not in a position to offer a legal assistance, legal aid must be provided. These are essential procedural safeguards which must be observed if the right to life under Article 21 is not to be denuded of its meaning and content."*

SENTENCING IN DOWRY DEATH CASES

RAJBIR ALIAS RAJU AND ANOTHER V. STATE OF HARYANA, (2010) 15 SCC 116

The appellant had been convicted under Section 304-B IPC and sentenced to imprisonment for life by the trial Court apart from offences under other sections. The High Court had, however, reduced the sentence to ten years rigorous imprisonment in so far as Rajbir was concerned and to two years rigorous imprisonment in the case of his mother Appellant No.2

107 *2015 SCC OnLine All 143*
108 *(2014) 3 SCC 1*

in that case. The Hon'ble Court on a prima facie basis felt that the reduction in the sentence was not justified. Relying upon an earlier decision rendered in *Satya Narayan Tiwari* (infra), the Hon'ble Court issued notice to Rajbir to show cause why his sentence be not enhanced to life imprisonment as awarded by the trial Court.

The Hon'ble Supreme Court reiterated the principle laid down and the views expressed in the case of ***Satya Narayan Tiwari @ Jolly & Another v. State of U.P.***[109] and in ***Sukhdev Singh & Another v. State of Punjab***[110], and observed that matters of crimes against women are to be seriously viewed and harsh punishments shall be given in such cases.

In these cases, the Hon'ble Court was also of the view that the life sentences imposed by the Trial Courts or the High Courts should be converted to death sentences and for the same, notices had been issued therein.

The Hon'ble Court, in the case of *Rajbir* (supra), had also issued a direction to all the trial Courts in India that in cases involving the Charge of Section 304B, the charge of Section 302 should also be o*rdinarily* be added so that death sentences can be imposed in such heinous and barbaric crimes against women.

JASVINDER SAINI AND OTHERS V. STATE (GOVT. OF NCT OF DELHI), (2013) 7 SCC 256

In this case, the Hon'ble Supreme Court clarified the true meaning and scope of the direction issued in *Rajbir alias Raju and Another v. State of Haryana*, because the Trialo Courts all over India felt duty bound to add the charge of Section 303 in cases involving the charge of Section 304B. The Hon'ble Court held that the true purport of the direction issued in Rajbir (supra) was not to direct the addition of a charge under Section 302 IPC to every case in which the accused are charged with Section 304-B. The Hon'ble Court held–

> *"The direction was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this Court meant to say was that in a case where a charge alleging dowry death is framed, a charge under Section 302 can also be framed if the evidence otherwise permits. No other meaning could be deduced from the order of this Court. It is common ground that a charge under Section 304B IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304B IPC depends upon the fact situation and the evidence in the case. If there is evidence*

109 *(2010) 13 SCC 689*
110 *(2010) 13 SCC 656.*

whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial Court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the Court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial Court in that view of the matter acted mechanically for it framed an additional charge under Section 302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir's case(supra)."

The Hon'ble Court also held that the Trial Court is free and empowered to frame charge under Section 302 in cases involving Section 304B, if *primafacie*, it found the same to be tenable. The trial court is only prevented from mechanically framing charge under Section 302 in cases involving charge under Section 304B. In cases, where the Court *prima facie* is satisfied that charge under Section 302 should be framed, it is duty bound to do so.

SUNIL DUTT SHARMA V. STATE (GOVT. OF NCT OF DELHI), (2014) 4 SCC 375

This was a case of dowry death in which the apex court dealt with the discussion that whether the principles of sentencing evolved by this Court over the years though largely in the context of the death penalty will be applicable to all lesser sentences so long as the sentencing Judge is vested with the discretion to award a lesser or a higher sentence resembling the swing of the pendulum from the *minimum* to the maximum.

The Apex Court stated that, in fact, we are reminded of the age-old infallible logic that what is good to one situation would hold to be equally good to another like situation.

Besides, Para163 of *Bachan Singh v. State of Punjab*, reproduced earlier[111] bears testimony to the above fact.

Would the above principles apply to sentencing of an accused found guilty of the offence under Section 304-B in as much as the said offence is held to be proved against the accused on the basis of a legal presumption? This is the next question that has to be dealt with.

111 *The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302 of the Penal Code, the court should not confine its consideration 'principally' or merely to the circumstances connected with the particular crime but also give due consideration to the circumstances of the criminal*

In a situation where commission of an offence is held to be proved by means of a legal presumption the circumstances surrounding the crime to determine the presence of aggravating circumstances (Crime Test) may not be readily forthcoming unlike a case where there is evidence of overt criminal acts establishing the direct involvement of the accused with the crime to enable the court to come to specific conclusions with regard to the barbarous or deprave d nature of the crime committed. The necessity to combat the menace of demand for dowry or to prevent atrocities on women and like social evils as well as the necessity to maintain the purity of social conscience cannot be determinative of the quantum of sentence inasmuch as the said parameters would be common to all offences under Section 304-B of the Penal Code. The above, therefore, cannot be elevated to the status of acceptable jurisprudential principles to act as a rational basis for awarding varying degrees of punishment on a case-to-case basis. The search for principles to satisfy the Crime Test in an offence under Section 304-B of the Penal Code must, therefore, lie elsewhere. Perhaps, the time spent between marriage and the death of the woman; the attitude and conduct of the accused towards the victim before her death; the extent to which th demand for dowry was persisted with and the manner and circumstances of commission of the cruelty would be a surer basis for determination of the Crime Test. Coupled with the above, the fact whether the accused was also charged with the offence under Section 302 of the Penal Code and the basis of his acquittal of the said charge would be another very relevant circumstance. As against this the extenuating/mitigating circumstances which would determine the "criminal test" must be allowed to have a full play. The aforesaid two sets of circumstances being mutually irreconcilable cannot be arranged in the form of a balance sheet as observed in ***Sangeet v. State of Haryana***[112], but it is the cumulative effect of the two sets of different circumstances that has to be kept in mind while rendering the sentencing decision. This, according to us, would be the correct approach while dealing with the question of sentences of the offence under Section304-B of the Penal Code is concerned.

SENTENCING IN RAPE CASES

SONA RAM HEMBRAM V. STATE OF JHARKHAND, 2015 SCC ONLINE JHAR 923

In this case the appellant was charged with section 376 of the Indian Penal Code forthe rape of girl aged 13 years of age.

The Jharkhand High Court stated that adverting to the quantum of sentence, in our considered view, long incarceration of the accused in the jail (more than 7 years) would not be a ground

112 *(2013) 2 SCC 452*

to consider his case with any sympathetic tilt as the act committed by him is a **"beastly act".** The victim was of the age of his daughter only. The Court will be failing in its duty, if appropriate punishment is not awarded for a crime which has been committed not only against the victim, but also against the society to which the victim belongs. Imposing of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. Any liberal attitude of imposing sentence or taking too sympathetic a view, merely on account of lapse of time, will be result wise counterproductive in the long run and against the societal interest which needs to be cared for and strengthened by the required string of deterrence inbuilt in the sentencing system.

After delicately balancing the case of the accused vis-à-vis the sentence already imposed upon him the Court did not find any scope for reducing the same . He does not deserve the least sympathy of the Court, the Court held. Accordingly, the sentence of 10 years already slapped upon him was confirmed.

The Hon'ble Supreme court has held in a case of Sc & ST POA act that no punishment less than the minimum statutory punishment to be given. State of M.P. Vs. Vikram Das (2019)4 SCC 125

RAPE AND MURDER

RAJENDRA PRALHADRAO WASNIK V. STATE OF MAHARASTRA, 2018 SCC ONLINE SC 2799

In the present case the appellant is convicted for the rape and murder of a girl aged 3 years. It was concluded that the Courts did not take into consideration the probability of reformation, rehabilitation and social re-integration of the appellant into society. Indeed, no material or evidence was placed before the courts to arrive at any conclusion in this regard one way or the other and for whatever it is worth on the facts of this case. Therefore, the Apex Court commuted the death sentence into imprisonment for the remainder of his natural life.

The Apex Court stated that the law laid down by various decisions of this Court clearly and unequivocally mandates that the probability (not possibility or improbability or impossibility) that a convict can be reformed and rehabilitated in society must be seriously and earnestly considered by the courts before awarding the death sentence. This is one of the mandates of the "special reasons" requirement of Section 354(3) of the Cr.P.C. and ought not to be taken lightly since it involves snuffing out the life of a person. To effectuate this mandate, it is the obligation on the prosecution to prove to the court, through evidence, that the probability is that the convict cannot be reformed or rehabilitated. This can be achieved by bringing on

record, *inter alia*, material about his conduct in jail, his conduct outside jail if he has been on bail for some time, medical evidence about his mental make-up, contact with his family and so on. Similarly, the convict can produce evidence on these issues as well.

If an inquiry of this nature is to be conducted, as is mandated by the decisions of this Court, it is quite obvious that the period between the date of conviction and the date of awarding sentence would be quite prolonged to enable the parties to gather and lead evidence which could assist the Trial Court in taking an informed decision on the sentence. But, there is no hurry in this regard, since in any case the convict will be in custody for a fairly long time serving out at least a life sentence.

Consideration of the reformation, rehabilitation and re-integration of the convict into society cannot be over-emphasised. Until *Bachan Singh*, the emphasis given by the courts was primarily on the nature of the crime, its brutality and severity. *Bachan Singh* placed the sentencing process into perspective and introduced the necessity of considering the reformation or rehabilitation of the convict. Despite the view expressed by the Constitution Bench, there have been several instances, some of which have been pointed out in *Bariyar* and in *Sangeet v. State of Haryana* where there is a tendency to give primacy to the crime and consider the criminal in a somewhat secondary manner. As observed in *Sangeet* "In the sentencing process, both the crime and the criminal are equally important." Therefore, we should not forget that the criminal, however ruthless he might be, is nevertheless a human being and is entitled to a life of dignity notwithstanding his crime. Therefore, it is for the prosecution and the courts to determine whether such a person, notwithstanding his crime, can be reformed and rehabilitated. To obtain and analyse this information is certainly not an easy task but must nevertheless be undertaken. The process of rehabilitation is also not a simple one since it involves social re-integration of the convict into society. Of course, notwithstanding any information made available and its analysis by experts coupled with the evidence on record, there could be instances where the social re-integration of the convict may not be possible. If that should happen, the option of a long duration of imprisonment is permissible.

DHANANJOY CHATTERJEE V. STATE OF W.B., (1994) 2 SCC 220

In this case, the Hon'ble Court was dealing with the rape and murder of a young girl of about 18 years. The Court took note of the fact that the accused was a married man of 27 years of age, the principles stated in *Bachan Singh case* and further took note of the fact that there was a rise of violent crimes against women in recent years, and thereafter on consideration of aggravating factors and mitigating circumstances opined that :

"*15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.*"

After so stating, the Court took note of the fact that the deceased was a school-going girl and it was the sacred duty of the appellant, being a security guard, to ensure the safety of the inhabitants of the flats in the apartment but to gratify his lust he had raped and murdered the girl in retaliation which made the crime more heinous. Appreciating the manner in which the barbaric crime was committed on a helpless and defenceless school-going girl of 18 years the Court came to hold that the case fell in the category of rarest of the rare cases and accordingly affirmed the capital punishment imposed by the High Court.

VASANTA SAMPAT DUPARE V. STATE OF MAHARASHTRA, (2015) 1 SCC 253

In this case a man of 47 years raped and murdered a minor girl aged 4 years.

The Apex Court noted that the appellant was aged about forty-seven years at the time of commission of the crime. As is noticeable, there has been no remorse on the part of the appellant. There are cases when this Court has commuted the death sentence to life finding that the accused has expressed remorse or the crime was not premeditated. But the obtaining factual matrix when unfolded stage by stage would show the premeditation, the proclivity and the rapacious desire. The Court found that he was a history-sheeter and had a number of cases pending against him. That alone may not be sufficient. The appalling cruelty shown by him to the minor girl child is extremely shocking and it gets accentuated, when his age is taken into consideration. It was not committed under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed or rehabilitated. As the circumstances would graphically depict, he would remain a menace to society, for a defenceless child has become his prey. Therefore the Court held that there were no mitigating circumstances.

Further, the Court stated that this case deserves to fall in the category of the rarest of rare cases. It is inconceivable from the perspective of the society that a married man aged about two scores and seven makes a four-year minor innocent girl child the prey of his lust and

deliberately causes her death. A helpless and defence less child gets raped and murdered because of the acquaintance of the appellant with the people of the society. This is not only betrayal of an individual trust but destruction and devastation of social trust. It is perversity in its enormity. It irrefragably invites the extreme abhorrence and indignation of the collective. It is ananathema to the social balance. The Court affirmed the death sentence.

MOHAN ANNA CHAVAN V. STATE OF MAHARASHTRA, (2008) 7 SCC 561

In this case two minor girls who were below the age of 10 years were raped and murdered by the appellant. On previous occasion also, the appellant was convicted for the rape of minor for which he had served the sentence. The Apex Court held that the case falls into the category of rarest of rare and therefore affirmed the death sentence awarded to him.

MOHD. MANNAN V. STATE OF BIHAR, (2011) 5 SCC 317

In this case, a minor girl of seven years was raped and murdered by the Appellant. The Apex Court found the case to be one of rarest of rare category where in the appellant is a matured man aged about 43 years. He held a position of trust and misused the same in a calculated and pre-planned manner. He sent the girl aged about 7 years to buy betel and few minutes thereafter in order to execute his diabolical and grotesque desire proceeded towards the shop where she was sent. The girl was aged about 7 years of thin built and 4 ft of height and such a child was incapable of arousing lust in normal situation. The appellant had won the trust of the child and she did not understand the desire of the appellant which would be evident from the fact that while she was being taken away by the appellant no protest was made and the innocent child was made prey of the appellant's lust.

The victim of crime is an innocent child who did not provide even an excuse, much less a provocation for murder. Such cruelty towards a young child is appalling. The appellant had stooped so low as to unleash his monstrous self on the innocent, helpless and defence less child. This act no doubt had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the authority conferred with the power to adjudicate is to inflict the death sentence which is natural and logical. Further, the Court held that the Appellant was beyond reformation and affirmed the death sentence.

PROBATION OF OFFENDERS ACT

BIRJU V. STATE OF M.P., (2014) 3 SCC 421

The Apex Court first examined whether "substantial history of serious assaults and criminal conviction" is an aggravating circumstance when the court is dealing with the offences relating to the heinous crimes like murder, rape, armed dacoity, etc. Prior record of the conviction, the Court held, will be a relevant factor, but that conviction should have attained finality so as to treat it as aggravating circumstance for awarding death sentence.

In the instant case, the High Court took the view that there was no probability that the accused would not commit criminal acts of violence and would constitute a continuing threat to the society and there would be no probability that the accused could be reformed or rehabilitated. In ***Shankar Kisanrao Khade v. State of Maharashtra***[113], while dealing with the Criminal Test (mitigating circumstances), this Court noticed one of the circumstances to be considered by the trial court, while applying the test, is with regard to the chances of the accused not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

The Court stated that in several cases, the trial court while applying the Criminal Test, without any material on hand, either will hold that there would be no possibility of the accused indulging in commission of crime or that he would indulge in such offences in future and, therefore, it would not be possible to reform or rehabilitate him. Courts used to apply reformative theory in certain minor offences and while convicting persons, the courts sometimes release the accused on probation in terms of Section 360 CrPC and Sections 3 and 4 of the Probation of Offenders Act, 1958. Sections 13 and 14 of the Act provide for appointment of Probation Officers and the nature of duties to be performed. Courts also, while exercising power under Section 4, call for a report from the Probation Officer.

The Apex Court stated that while awarding sentence, in appropriate cases, while hearing the accused under Section 235(2) CrPC, courts can also call for a report from the Probation Officer, while applying the Criminal Test Guideline as laid down in *Shankar Kisanrao Khade Case*. Courts can then examine whether the accused is likely to indulge in commission of any crime or there is any probability of the accused being reformed and rehabilitated.

113 *(2013) 5 SCC 546*

COMPENSATION

SECTION 357 – ORDER TO PAY COMPENSATION

When a Court imposes a sentence of fine, the Court may , when passing the Judgment order the whole or any part of the fine recovered to be applied—

- in defraying the expense properly incurred in the prosecution;
- in the payment to any person of compensation for any loss or injury caused by the offence, when the compensation in the opinion of the Court is recoverable by such person in a Civil Court;
- when any person is convicted of any offence for having caused the death of another person or of having a betted the commission of such an offence, in paying compensation to the person who are, under the Fatal Accidents Act, 1855 , entitled to recover damages from the person sentence for the loss resulting to them for such death;
- when any person is convicted of any offence which includes theft, etc in compensating any bona fide purchaser of such property is restored to the possession of the person entitled thereto.

If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for appeal has elapsed, or if an appeal be presented, before the decision of the appeal.

When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing Judgment order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

The other provisions related to compensation and rehabilitation of victims are as follows:-

Section 357 A – Victim Compensation Scheme-

Section 357 B – Compensation to be in addition to fine under Section 326 A or Section 376 D of IPC

Section 357 C – Treatment of victims

KUMARAN V. STATE OF KERALA, (2017) 7 SCC 471

The Hon'ble Court, after referring to the provisions under Sections 357, 421, 431 read with Sections 64 and 70 of the Indian Penal Code, held that recovery of compensation, whether or not fine is imposed, despite the accused serving imprisonment for default there of, without any need of recording special reasons therefor is permissible. The Hon'ble Court further held that as long as compensation is directed to be paid, by legal fiction even though default sentence has been served, compensation would be recoverable in manner provided under Section 421 Cr.P.C.

K.A. ABBAS H.S.A. V. SABU JOSEPH AND ANOTHER, (2010) 6 SCC 230

The Hon'ble Court held that sentence of imprisonment can be granted for the default in payment of compensation awarded under section 357 (3) of the Cr.P.C.

R.MOHAN V. A.K. VIJAY KUMAR, 2012 (3) JLJR 272 (SC)

If fine is not a part of order of sentence, the court may order the accused to pay compensation to the person who has suffered any loss or injury because of the act of the accused for which he is sentenced. However, if only order of compensation is passed, it will be totally ineffective. An order under Section 357 (3) must have the potentiality to secure its observance and deterrence can only infused into the order by providing for a default of sentence.

HARI SINGH V. SUKHBIR SINGH (1988) 4 SCC 551

The power of Court to award compensation, under Section 357(3) is not ancillary to other sentences but is in addition to it.

SECTION 357-A: VICTIM COMPENSATION SCHEME

(1) The State Government in coordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependants who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) The District Legal Services Authority or the State Legal Services Authority, as the case may be, shall decide the quantum of compensation to be awarded under the aforementioned scheme.

(3) If the trial court, at the conclusion of the trial, is satisfied, that the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the cases

end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependants may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months. The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

SECTION 357-B: COMPENSATION TO BE SUPPLEMENTARY

The provision provides for the compensation awarded under Section 357-A to be in addition to any compensation that may be provided by way of Section 326- A or Section376-D.

SECTION 357-C: TREATMENT OF VICTIMS

The provision provides that all hospitals will render immediate medical aid to the victims of acid attacks [Section326-A,PenalCode,1860.]or rape[Sections 376, 376-A, 376-B, 376-C, 376-D, 376-E, Penal Code, 1860.].

TEKAN V. STATE OF MADHYA PRADESH,(2016) 4 SCC 461

On perusal of the Victim Compensation Schemes of different States and the Union Territories, the Apex Court noted that it is clear that no uniform practice is being followed in providing compensation to the rape victim for the offence and for her rehabilitation. This practice of giving different amount ranging from Rs 20,000 to Rs 10,00,000 as compensation for the offence of rape under Section 357-A needs to be introspected by all the States and the Union Territories. They should consider and formulate a uniform scheme specially for the rape victims in the light of the scheme framed in the State of Goa which has decided to give compensation up to Rs 10,00,000.

While going through different schemes for relief and rehabilitation of victims of rape, The Apex Court also come across one Scheme made by the National Commission for Women (NCW) on the direction of this Court in ***Delhi Domestic Working Women's Forum v. Union***

of India[114], whereby this Court, inter alia, had directed the National Commission for Women to evolve a "scheme" so as to wipe out the tears of unfortunate ***victims of rape. This Scheme has been revised by NCW on 15-4-2010.*** The application under this Scheme will be in addition to any application that may be made under Sections 357 and 357-A of the Code of Criminal Procedure as provided in Para 22 of the Scheme. Under this Scheme, maximum of Rs 3,00,000 (Rupees three lakhs) can be given to the victim of rape for relief and rehabilitation in special cases like the present case where the offence is against a handicapped woman who requires specialised treatment and care.

Coming to the present case in hand, victim being physically disadvantaged, she was already in a socially disadvantaged position which was exploited maliciously by the accused for his own ill intentions to commit fraud upon her and rape her in the garb of promised marriage which has put the victim in a doubly disadvantaged situation and after the waiting of many years it has worsened. It would not be possible for the victim to approach the National Commission for Women and follow up for relief and rehabilitation. Accordingly, the victim, who has already suffered a lot since the day of the crime till now, needs a special rehabilitation scheme.

The victim, being in a vulnerable position and who is not being taken care of by anyone and having no family to support her either emotionally or economically, we are not ordering the respondent State to give her any lump sum amount as compensation for rehabilitation as she is not in a position to keep and manage the lump sum amount. From the records, it is evident that no one is taking care of her and she is living alone in her village. Accordingly, in the special facts of this case, the Apex Court directed the respondent State to pay Rs 8000 per month till her lifetime, treating the same to be an interest fetched on a fixed deposit of Rs 10,00,000. By this, the State will not be required to pay any lump sum amount to the victim and this will also be in the interest of the victim.

MOJIB ANSARI V. STATE OF JHARKHAND, CRIMINAL APPEAL NO.1089 OF 2004

(2015 SCC OnLine Jhar 3614 : (2015) 4 AIR Jhar R 121 : 2015 Cri LJ 4702)

In this case, the victim was a 19 years old girl who was an IIT aspirant, was gang raped and subsequently suffered death due to mental trauma and shock. The Jharkhand High Court affirmed the sentence imposed by the trial court and ruled that the victim of crime or his kith or kin have legitimate expectation that the State will punish the guilty and compensate the victim. The Hon'ble Court invoking section 357 A of the Cr.P.C. directed the State Government to pay compensation to the mother of the deceased to the tune of Rs. 5 lakhs. The High Court

114 *(1995) 1 SCC 14*

also referred to several cases in which to do justice to the victims, the Hon'ble Supreme Court has directed payment of monetary compensation as well as rehabilitative settlement where state or other authorities failed in their duty to protect the life and liberty of victims. Reference in this regard may be made to the judgment in ***Chairman, Railway Board v. Chandrima Das***[115] and Suomoto writ petition (Cr) No. 24 of 2014[116], wherein in a case of gang rape it was held that no compensation can be adequate nor can be of any respite for the victim but as the state has failed in protecting such serious violation of the victim's right, the State is duty bound to provide compensation, which may help in the victim's rehabilitation. The humiliation or the reputation that is snuffed out cannot be recompensed but then monetary will at least provide solace. In the contemporary era where state dons the welfarist mantle, it becomes imperative for it to provide adequate recompense to the victim as it has failed in its mandate to provide security of persons and property

INHUMAN CONDITIONS IN 1382 PRISONS, IN RE, (2017) 10 SCC 658

Over the last several years, there have been discussions on the rights of victims and one of the rights of a victim of crime is to obtain compensation. Schemes for victim compensation have been framed by almost every State and that is a wholesome development. But it is important for the Central Government and the State Governments to realise *that persons who suffer an unnatural death in a prison are also victims—sometimes of a crime and sometimes of negligence and apathy or both. There is no reason at all to exclude their next of kin from receiving compensation only because the victim ofan unnatural death is a criminal.* Human rights are not dependent on the status of a person but are universal in nature. Once the issue is looked at from this perspective, it will be appreciated that merely because a person is accused of a crime or is the perpetrator of a crime and in prison custody, that person could nevertheless be a victim of an unnatural death. Hence ,the need to compensate the next of kin.

DINUBHAI BOGHABHAI SOLANKI V. STATE OF GUJARAT, (2018) 11 SCC 129

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. The result is that private parties are now

115 *(2000) 2 SCC 465*
116 *(2014)4 SCC 786*

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."

VIKAS YADAV V. STATE OF U.P., (2016) 9 SCC 541

Out of the fine amounts of Rs 50,00,000 of each of Vikas Yadav and Vishal Yadav when deposited with the trial court, Rs 20,00,000 was to be given to the mother of the victim of honour killing from the deposit of the fine of the each of the defendants. The Apex Court stated that the concept of victim compensation cannot be marginalised. Adequate compensation is required to be granted.

SURESH V. STATE OF HARYANA, (2015) 2 SCC 227

The object and purpose of the provision 357A is to enable the Court to direct the State to pay compensation to the victim where the compensation under Section 357 was not adequate or where the case ended in acquittal or discharge and the victim was required to be rehabilitated. The provision was incorporated on the recommendation of 154th Report of the Law Commission. It recognises compensation as one of the methods of protection of victims. The provision has received the attention of this Court in several decisions.[117]

In ***Abdul Rashid v. State of Odisha***[118] it was observed;

"whether the Court has legal duty to award compensation irrespective of conviction or acquittal. When the State fails to identify the accused or fails to collect and present acceptable evidence to punish the guilty, the duty to give compensation remains. Victim of a crime or his kith and kin have legitimate expectation that the State will punish the guilty and compensate the victim. There are systemic or other failures responsible for crime remaining unpunished which need to be addressed by improvement in quality and integrity of those who deal with investigation and prosecution, apart from improvement of infrastructure but punishment of guilty is not the only step in providing justice to the victim. Victim expects a mechanism for rehabilitative measures, including monetary compensation. Such compensation has been directed to be paid in public law remedy with reference to Article 21. In numerous cases,[119] to do justice to the victims, the Hon'ble Supreme Court has directed payment of monetary

117 *Ankush Shivaji Gaikwad v. State of Maharashtra [(2013) 6 SCC 770 : (2014) 1 SCC (Cri) 285] , Gang-Rape Ordered by Village Kangaroo Court in W.B., In re [(2014) 4 SCC 786 : (2014) 2 SCC (Cri) 437] , Mohd. Haroon v. Union of India [(2014) 5 SCC 252 : (2014) 2 SCC (Cri) 510] and Laxmi v. Union of India [(2014) 4SCC 427 : (2014) 4 SCC (Cri) 802]*

118 *2013 SCC OnLine Ori 493*

119 *Kewal Pati v. State of U.P. [(1995) 3 SCC 600 : 1995 SCC (Cri) 556] (death of prisoner by co- prisoner), Supreme Court Legal Aid Committee v. State of Bihar [(1991) 3 SCC 482 : 1991 SCC (Cri) 639] (failure to provide timely medical aid by jail authorities, Railway Board v. Chandrima Das [(2000) 2 SCC 465] (rape of Bangladeshi national by Railway staff), Nilabati Behera v. State of Orissa [(1993) 2 SCC 746 : 1993 SCC (Cri) 527] (custodial death), Khatri (1) v. State of Bihar [(1981) 1 SCC 623 : 1981 SCC (Cri) 225] (prisoners' blinding by jail staff), Union Carbide Corpn. v. Union of India [(1989) 1 SCC 674 : 1989 SCC (Cri) 243] (gas leakvictims).*

compensation as well as rehabilitative settlement where State or other authorities failed to protect the life and liberty of victims.

Expanding scope of Article 21 is not limited to providing compensation when the State or its functionaries are guilty of an act of commission but also to rehabilitate the victim or his family where crime is committed by an individual without any role of the State or its functionary. Apart from the concept of compensating the victim by way of public law remedy in writ jurisdiction, need was felt for incorporation of a specific provision for compensation by courts irrespective of the result of criminal prosecution. Accordingly, Section 357-A has been introduced in the CrPC and a Scheme has been framed by the State of Odisha called 'The Odisha Victim Compensation Scheme, 2012'. Compensation under the said section is payable to victim of a crime in all cases irrespective of conviction or acquittal. The amount of compensation may be worked out at an appropriate forum in accordance with the said Scheme, but pending such steps being taken, interim compensation ought to be given at the earliest in any proceedings."

In ***Ankush Shivaji Gaikwad v. State of Maharashtra***[120] the matter was reviewed by the Hon'ble Supreme Court with reference to development in law and it was observed:

> *"while the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order under Section 357 of the Code of Criminal Procedure would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family."*

S*tate of Assam, In re*[121], a Division Bench of the Gauhati High Court observed:

> *'We have heard the learned counsel for the parties on the issue whether in absence of any prohibition under the scheme, interim compensation ought to be paid at the earliest to the*

120 *(2013) 6 SCC 770*

121 *PIL No. 26 of 2013, decided on 24-4-2013 (Gau)*

victim irrespective of stage of enquiry or trial, either on applicationof the victim or suo motu by the Court."

In *Shail Kumari Devi v. Krishan Bhagwan Pathak*[122]

"We are of the view that above observations support the submission that interim compensation ought to be paid at the earliest so that immediate need of victim can be met. For determining the amount of interim compensation, the Court may have regard to the facts and circumstances of individual cases including the nature of offence, loss suffered and the requirement of the victim. On an interim order being passed by the Court, the funds available with the District/State Legal Services Authorities may be disbursed to the victims in the manner directed by the Court, to be adjusted later in appropriate proceedings. If the funds already allotted get exhausted, the State may place further funds at the disposal of the Legal Services Authorities."

Further, in ***Suresh v. State of Haryana***[123] it was stated that it is the duty of the courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the court ought to direct grant of interim compensation, subject to final compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given, irrespective of the application by the victim. At the stage of final hearing it is obligatory on the part of the court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case.

Therefore, in this case Rs 10 Lakhs was payable as compensation by the State of Haryana to the victim's family for the two deaths.

STATE V. SANJIV BHALLA, (2015) 13 SCC 444

The grant of compensation to the victim of a crime is equally a part of just sentencing. When it is not possible to grant compensation to the victim of a crime, the trial Judge must record his or herreasons.

122 *(2008) 9 SCC 632*
123 *(2015) 2 SCC 227*

GANG-RAPE ORDERED BY VILLAGE KANGAROO COURT IN W.B., IN RE, (2014) 4 SCC 786

No compensation can be adequate nor can it be of any respite for the victim but as the State has failed in protecting such serious violation of a victim's fundamental right, the State is duty-bound to provide compensation, which may help in the victim's rehabilitation. The humiliation or the reputation that is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace.

In 2009, a new Section 357-A was introduced in the Code which casts a responsibility on the State Governments to formulate schemes for compensation to the victims of crime in coordination with the Central Government whereas, previously, Section 357 ruled the field which was not mandatory in nature and only the offender can be directed to pay compensation to the victim under this section. Under the new Section 357-A, the onus is put on the District Legal Services Authority or the State Legal Services Authority to determine the quantum of compensation in each case. However, no rigid formula can be evolved as to have a uniform amount, it should vary infacts and circumstances of each case. In ***State of Rajasthan v. Sanyam Lodha***[124], this Court held that the failure to grant uniform ex gratia relief is not arbitrary or unconstitutional. It was held that the quantum may depend on facts of eachcase.

This Court in ***P. Rathinam v. State of Gujarat***[125], which pertained to rape of a tribal woman in police custody awarded an interim compensation of Rs 50,000 to be paid by the State Government. Likewise, this Court, in R***ailway Board v. Chandrima Das***[126], upheld the High Court's direction to pay Rs 10 lakhs as compensation to the victim, who was a Bangladeshi national. Further, this Court in ***Satya Pal Anand v. State of M.P.***[127] enhanced the interim relief granted by the State Government from Rs 2 lakhs to 10 lakhs each to two girl victims.

Nevertheless, the obligation of the State does not extinguish on payment of compensation, rehabilitation of victim is also of paramount importance. The mental trauma that the victim suffers due to the commission of such heinous crime, rehabilitation becomes a must in each and every case.

In this case, the Apex Court awarded a compensation of Rs. 5 Lakhs for the rehabilitation of the victim by the State, to be paid in addition to Rs 50,000 already sanctioned by the State government.

124 *(2011) 13 SCC 262*
125 *1994 SCC (Cri) 116*
126 *(2000) 2 SCC 465*
127 *(2014) 4 SCC 800*

MOHD. HAROON V. UNION OF INDIA, (2014) 5 SCC 252

No compensation can be adequate nor can it be of any respite for the victims but as the State has failed in protecting such serious violation of fundamental rights, the State is duty-bound to provide compensation, which may help in victims' rehabilitation. The humiliation or the reputation that is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace.

In 2009, a new Section 357-A was introduced in the Code which casts a responsibility on the State Governments to formulate schemes for compensation to the victims of crime in coordination with the Central Government whereas, previously, Section 357 ruled the field which was not mandatory in nature and only the offender can be directed to pay compensation to the victim under this section. Under the new Section357-A,the onus is put on the District Legal Services Authority or State Legal Services Authority to determine the quantum of compensation in each case. However, no rigid formula can be evolved as to have a uniform amount, it should vary in facts and circumstances of each case. Nevertheless, the obligation of the State does not extinguish on payment of compensation, rehabilitation of victim is also of paramount importance. The mental trauma that the victim suffers due to the commission of such heinous crime, rehabilitation becomes a must in each and every case.

Considering the facts and circumstances of these cases, The Apex Court was of the view that the victims in the given case should be paid a compensation of Rs 5 lakhs each for rehabilitation by the State Government. Accordingly, the State Government was directed to make payment of Rs 5 lakhs, in addition to various other benefits, within 4 weeks from today. Further, we also wish to clarify that, ***according to Section 357-B, the compensation payable by the State Government under Section 357-A shall be in addition to the payment of fine to the victim under Section 326-A or Section 376-D IPC.***

SWARN KAUR V. GURMUKH SINGH, (2013) 12 SCC 732

In this case, the accused was convicted for the offence of 304 part II wherein the sentence of 7 years' rigorous imprisonment each and a fine of Rs50,000 was given.Each of the accused shall deposit the fine amount within three months failing which they shall suffer imprisonment for a further period of one year. Out of the fine amount the appellants shall be paid a sum of Rs 2 lakhs.

GOPI NATH GHOSH V. STATE OF JHARKHAND, 2014 SCC ONLINE JHAR 47

In this case, the petitioner has filed a Public Interest Litigation to issue writ of mandamus directing the respondents to immediately settle all claims of compensation and Government employment as per the existing schemes for civilian deaths that might have occurred in the

course of violence between the State Security Forces and the Naxalities. The High Court of Jharkhand directed the strict observance of the Central Government Scheme which provided for a compensation of Rs. 3 Lakhs in case of death or permanent incapacitation. In case of pending cases, 6 months to 1 year time period was provided for settling the compensation claims. And the new cases were also directed to be settled in 6 months period from the date of its receipt by the respective District Magistrate/Deputy Commissioner/District Committee.

BABBAN V. STATE OF JHARKHAND, 2018 SCC ONLINE JHAR 1455

This was a case of murder wherein the Jharkhand High Court directed DLSA to formulate a rehabilitation scheme for the victim and also provide financial help to the victim taking help from the State fund as ad interim compensation in terms of Jharkhand Victim Compensation Scheme and is also directed to provide benefit of any of the ten schemes as sponsored by the NALSA and executed by JHALSA and DLSA and to submit its report to the Court within 16 weeks.

NIPUN SAXENA AND ANOTHER V. UNION OF INDIA AND OTHERS, 2018 SCC ONLINE SC 2010

In this case, vide order dated 05.09.2018, the Hon'ble Court had held that the NALSA's Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes- 2018 should function as a guideline to the Special Court for the award of compensation to victims of child sexual abuse under Rule 7 of Protection of Children from Sexual Offences Rules, 2012 until the Rules are finalized by the Central Government. The Special Judge will, of course, take the provisions of the POCSO Act into consideration as well as any circumstances that are special to the victim while passing an appropriate order. The legislation is gender neutral and, therefore, the Guidelines will be applicable to all children. The Hon'ble Court further held that the Special Judge will also pass appropriate orders regarding actual physical payment of the compensation or the interim compensation so that it is not misused or mis-utilized and is actually available for the benefit of the child victim. If the Special Judge deems it appropriate, an order of depositing the amount in an interest-bearing account may be passed. As far as the date of the applicability of the Scheme is concerned, the Hon'ble Court held that the Scheme and the Guidelines would be operational from 2nd October,2018.

VICTIM COMPENSATION SCHEME IN JHARKHAND

The Government of Jharkhand had framed the Victim Compensation Scheme in the year 2012 which has been amended vide Notification dated 29.09.2016 and currently the same is applicable in the State of Jharkhand.

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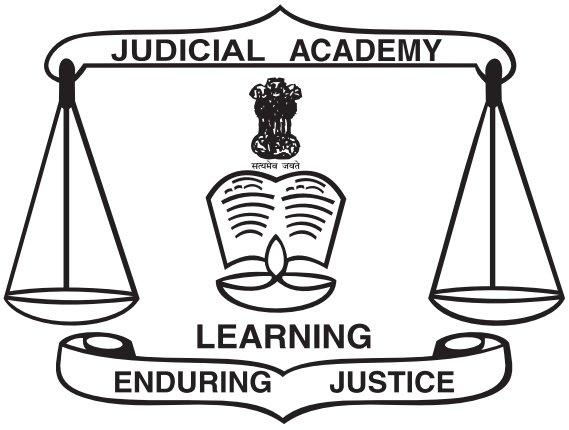

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