



PRISONERS' RIGHTS

Volume II

PRISONERS' RIGHTS

VOLUME II

Human Rights Law Network Vision

- To protect fundamental human rights, increase access to basic resources for the marginalised communities, and eliminate discrimination.
- To create a justice delivery system that is accessible, accountable, transparent, efficient and affordable, and works for the underprivileged. Raise the level of pro bono legal expertise for the poor to make the work uniformly competent as well as compassionate.
- Professionally train a new generation of public interest lawyers and paralegals who are comfortable in the world of law as well as in social movements, and who learn from social movements to refine legal concepts and strategies.

PRISONERS' RIGHTS VOLUME II

December 2011

© Socio Legal Information Centre*

ISBN: 81-89479-77-6

Compilation and text editing: Monica Sakhrani, Annie Fernandes,
Sr Suma Jose SD, Ritu Kumar, Sukrit Kapoor

Design: Birendra K Gupta

Printed at: Shivam Sundaram, E-9, Green Park Extn. New Delhi

Published by:

Human Rights Law Network (HRLN)
(A division of Socio Legal Information Centre)
576, Masjid Road, Jangpura, New Delhi – 110014, India
Ph: +91-11-24379855/56
E-mail: publications@hrln.org

Supported by:



European Union



Dan Church Aid



Irish Aid

Disclaimer

The views and opinions expressed in this publication are not necessarily views of the HRLN. Every effort has been made to avoid errors, omissions, and inaccuracies. However, for inadvertent errors or discrepancies that may remain nonetheless, the HRLN takes the sole responsibility.

*Any section of this volume may be reproduced without prior permission of the Human Rights Law Network for public interest purposes with appropriate acknowledgement.

Acknowledgements

The Human Rights Law Network – HRLN would like to extend heartiest thanks to Sukrit Kapoor, a graduate of Gujarat National Law University for compilation, case summaries and for the Introduction and Conclusion of the chapters.

The organisation would like to acknowledge Aviral Chauhan, Shreyasi Chakraborty, Saksham Marwah, Sooraj and Anirudh Soman, students of Gujarat National Law University and Arpit Jain, ILS, Pune for the research on case laws.

HRLN would also like to acknowledge Smriti Minocha for coordinating with the persons engaged in this book project and Advocate Ritu Kumar for doing the final text editing. The organisation would like to thank Monica Sakhrani and Annie Fernandes for compiling and editing parts of the volume.

Contents

Acknowledgements	iii
General Introduction	xv
COMPENSATION	
Introduction.....	2
<i>Supreme Court AIR 1983 SC 1086</i>	
Rudul Sah vs State of Bihar and Another.....	7
<i>Supreme Court AIR 1984 SC 1026</i>	
Sebastian M. Hongray vs Union of India and Others.....	12
<i>Supreme Court of India AIR 1986 SC 494</i>	
Bhim Singh, MLA vs State of Jammu & Kashmir.....	16
<i>Supreme Court of India AIR 1987 SC 355</i>	
Peoples' Union of Democratic Rights vs State of Bihar	24
<i>Supreme Court of India 1989 (4) SCC 730</i>	
People's Union for Democratic Rights and Another vs Police Commissioner, Delhi Police and Another.....	27
<i>Supreme Court of India AIR 1990 SC 513</i>	
Saheli, A Women's Resource Centre, Through Ms. Nalini Bhanot and Others vs Commissioner of Police, Delhi and Others	28
<i>Delhi High Court 1992 Cri. LJ 128</i>	
P. V. Kapoor and another vs Union of India	34
<i>Supreme Court of India 1993 (2) SCC 746</i>	
Smt. Nilabati Behera alias Lalita Behera vs State of Orissa and Others.....	56

<i>Supreme Court of India JT 1994 (6) SC 478</i>	
Arvinder Singh Bagga vs State of Uttar Pradesh and Others	74
<i>Andhra Pradesh High Court 1994 Cri. LJ 1469</i>	
Prof. S. Seshaiah vs State of Andhra Pradesh and Another	77
<i>Gauhati High Court 1995 Cri. LJ 347</i>	
Nagatangkhui vs State of Nagaland and Others	78
<i>Supreme Court of India 1995 (SU4) SCC 450</i>	
In Re:death of Sawinder Singh Grover.....	84
<i>Supreme Court of India 1995 Cri. LJ 2920</i>	
Smt. Kewal Pati vs State of Uttar Pradesh and Others.....	86
<i>Supreme Court of India 1997 (7) SCC 725</i>	
Postsangbam Ningol Thokchom (Smt) and Another vs General Officer Commanding and Others	88
<i>Supreme Court of India 1998 (9) SCC 351</i>	
Malkiat Singh vs State of Uttar Pradesh	90
<i>Supreme Court of India 1999 (6) SCC 754</i>	
Kaushalya and Another vs State of Punjab and Others	92
<i>Jharkhand High Court 2001 Cri. LJ 3573</i>	
Mrs. Meena Singh, Petitioner vs State of Bihar and others, Respondents.....	93
<i>Bombay High Court 2004 ALL MR (Cri) 636</i>	
Prem Bangar Swamy vs State of Maharashtra & Others	95
<i>Supreme Court of India AIR, 2000 SC 2083</i>	
State of AP vs Challa Ramkrisha Reddy	105
<i>Supreme Court 1991 (2) SCC 373</i>	
State of Maharashtra and Others vs Ravikant S. Patil	115
Conclusion	117
FAIR PROCEDURE	
Introduction.....	120
<i>High Court of Karnataka 1975 Cri. LJ 335</i>	
Abdul Azeez vs The State of Mysore.....	123

<i>Supreme Court of India AIR 1995 (SC) 980</i>	
Shivappa vs State of Karnataka	126
<i>High Court of Bombay 1993 Mah. LJ 1529</i>	
Saraswati Mahadeo Jadyal vs State of Maharashtra	132
<i>Bombay High Court 1993 Cri LJ 2984</i>	
State of Maharashtra vs Dr. B.K. Subbarao and another	142
<i>Supreme Court of India 2009 (7) SCC 104 (1)</i>	
Jayendra Vishnu Thakur vs State of Maharashtra and Another	172
<i>Supreme Court of India AIR 2000 SC 3203</i>	
Dadu @ Tulsidas vs State of Maharashtra	175
<i>Supreme Court of India AIR 2009 SC 628</i>	
Deepak Bajaj vs State of Maharashtra and Another.....	181
<i>Supreme Court of India 2009 (12) SCR 1093</i>	
Mohd. Farooq Abdul Gafur and Another vs State of Maharashtra AND State of Maharashtra vs Mohd. Zuber Kasam Sheikh and Others	186
Conclusion	194
HUMANE SENTENCING	
Introduction.....	196
<i>Supreme Court of India 1977 (3) SCC 287</i>	
Mohammad Giasuddin vs State of Andhra Pradesh.....	202
<i>Supreme Court of India AIR 1985 SC 1050</i>	
Bhagirath vs Delhi Administration	211
<i>Bombay High Court 1993 Mah. LJ 1425</i>	
Bhupesh Ramchandra More vs State of Maharashtra.....	218
<i>Supreme Court of India 1994 (3) SCC 430</i>	
Dr. Jacob George vs State of Kerala	224
<i>Supreme Court of India 1995 (6) SCC 593</i>	
Baldev Singh & Another vs State of Punjab	230
<i>Supreme Court of India 1999 (7) SCC 355</i>	
State of Haryana vs Balwan	233

<i>Supreme Court of India 1999 (8) SCC 375</i>	
Union of India and Others vs Sadha Singh.....	236
<i>Supreme Court of India 2001 Cri. LJ 2588</i>	
State of Maharashtra vs Najakat alias Mubarak Ali	239
<i>Supreme Court of India 2000 (7) SCC 626</i>	
Laxman Naskar (Life Convict) vs State of West Bengal and Another	243
<i>Supreme Court of India 2001 (3) SCC 750</i>	
Zahid Hussein and Others vs State of West Bengal	247
<i>Supreme Court of India 2003 (3) SCC 1</i>	
State of Madhya Pradesh and Another vs Bhola @ Bhairon Prasad Raghuvanshi	251
<i>Supreme Court of India 1976 (4) SCC 190</i>	
Santa Singh vs State of Punjab	258
<i>Supreme Court of India 1980 (2) SCC 604</i>	
Bachan Singh vs State of Punjab.....	263
<i>Supreme Court of India AIR 1983 SC 473</i>	
Mithu Singh vs State of Punjab.....	267
<i>Supreme Court of India</i>	
Rajendra Prasad vs State of Uttar Pradesh	282
<i>Supreme Court Cases 1977 (4) SCC 44</i>	
Hiralal Mallick vs State of Bihar	285
<i>Supreme Court of India 1994 (3) SCC 394</i>	
P. Rathinam vs Union of India.....	292
Conclusion	323
JUVENILE PRISONERS	
Introduction.....	326
<i>Supreme Court of India AIR 1988 SC 414</i>	
Sanjay Suri and Another vs Delhi Administration, Delhi and Another.....	331
<i>Patna High Court AIR 1989 Patna LJR 1024</i>	
Sanat Kumar Sinha vs State of Bihar and Others.....	337

<i>Patna High Court 1990 BBCJ 357</i>	
Sanat Kumar Sinha vs The State of Bihar through Chief Secretary and Others ..	340
<i>Supreme Court of India AIR 1982 SC 1297</i>	
Jaya Mala vs Home Secretary, Government of Jammu and Kashmir and Others.....	352
<i>Kerala High Court 1993 (3) Cri. 57</i>	
Cri. Reference no. 3 of 1991	356
<i>Supreme Court of India 1997 (8) SCC 720</i>	
Bhola Bhagat and Another vs State of Bihar	363
<i>Supreme Court of India 1998 (5) SCC 697</i>	
Santenu Mitra vs State of W.B.	366
<i>Supreme Court of India 2000 (6) SCC 89</i>	
Umesh Singh and Another vs State of Bihar.....	368
<i>Supreme Court of India 1982 (3) SCR 583</i>	
Umesh Chandra vs State of Rajasthan.....	370
<i>Supreme Court of India 2001 (7) SCC 657</i>	
Arnit Das vs State of Bihar	378
<i>Supreme Court of India 2005 (3) SCC 551</i>	
Pratap Singh vs State of Jharkhnad and Another	380
<i>Supreme Court of India 2002 (2) SCC 287</i>	
Rajinder Chandra vs State of Chhattisgarh and Another	389
<i>Supreme Court of India 2008 (13) SCALE 137</i>	
Babloo Pasi vs State of Jharkhand and Another	391
<i>Supreme Court of India 2009 (6) SCALE 695</i>	
Hari Ram vs State of Rajasthan and Another	394
Conclusion	402
PAROLE AND FURLough	
Introduction.....	404
<i>Supreme Court 2000 (3) SCC 409</i>	
Sunil Fulchand Shah vs Union of India and Others.....	407

<i>Supreme Court 2000 (3) SCC 394</i>	
State of Haryana vs Mohinder Singh	409
<i>Supreme Court 2002 (3) SCC 18</i>	
Avtar Singh vs State of Haryana and Another	415
<i>Supreme Court 2000 (3) SCC 514</i>	
State of Haryana vs Nauratta Singh and Others	418
<i>Supreme Court 2001 (8) SCC 306</i>	
Joginder Singh vs State of Punjab and Others.....	424
<i>Bombay High Court 1989 Cri LJ 681</i>	
Sharad Keshav Mehta vs State of Maharashtra and Others	429
Conclusion	431

PRESS

Introduction.....	434
<i>Supreme Court of India AIR 1982 SC 6</i>	
Smt. Prabha Dutt vs Union of India and Others.....	435
<i>Supreme Court of India 1988 (I) Bom. Cr 58</i>	
Sheela Barse vs	
State of Maharashtra.....	438
<i>Supreme Court of India 1999 Cri. LJ 2273</i>	
State through Superintendent Central Jail, N. Delhi vs Charulata Joshi and Another ...	443
Conclusion	445

PRISON FACILITIES

Introduction.....	448
<i>Bombay High Court 1987 Mah. LJ 68</i>	
Madhukar Bhagwan Jambhale vs State of Maharashtra and Others	455
<i>Madhya Pradesh High Court [1988 (16) Reports M.P. 147]</i>	
Ranchod vs State of M.P. and Others	465
<i>Bombay High Court 1989 Mah LJ 77</i>	
Inacio Manuel Miranda and Others vs State	475

<i>High Court of Kerala AIR 1983 Ker 261</i>	
In the Matter of: Prison Reforms Enhancement of Wages of Prisoners O.P. Nos. 6566 and 7472 of 1982 Section D/- 13.4.1983.....	481
<i>High Court of Himachal Pradesh AIR 1992 HP 70</i>	
Gurdev Singh and Others etc. vs State of Himachal Pradesh and Others.....	497
<i>Supreme Court of India AIR 1966 SC 424</i>	
State of Maharashtra vs Prabhakar Pandurang Sangzgiri and Another	517
<i>Kerala High Court AIR 1973 Ker 97</i>	
Kunnikkal Narayanan vs State of Kerala and Another	521
<i>Bombay High Court AIR 1967 SC 254</i>	
M.A. Khan vs State and Another	525
<i>Supreme Court of India AIR 1981 SC 746</i>	
Francis Coralie Mullin vs The Administrator, Union Territory of Delhi and Others.....	534
<i>Supreme Court of India AIR 2006 SC 1946</i>	
R.D. Upadhyay vs State of Andhra Pradesh and Others	545
<i>Supreme Court of India AIR 2004 SC 2223</i>	
State of Maharashtra and Others vs Asha Arun Gawali and Another	556
<i>Mumbai High Court 2004 Cri LJ 4312</i>	
Asgar Yusuf Mukadam and Others vs State of Maharashtra and the Superintendent of Prison	561
<i>Supreme Court of India AIR 1997 SC 1739</i>	
Rama Murthy vs State of Karnataka	565
<i>Supreme Court of India AIR 1998 SC 3164</i>	
State of Gujarat and Another vs Hon'ble High Court of Gujarat	572
Conclusion	577
SECURITY LEGISLATION	
Introduction.....	580
<i>Supreme Court of India 1987 (1) SCC 533</i>	
Balbir Singh vs State of Haryana.....	591

<i>Bombay High Court 1994 Mah. LJ 1743</i>	
Anil Vasant Chitnis and Others vs Senior Inspector of Police Alibaug Police Station, Raigad and Others.....	596
<i>Supreme Court of India 1994 (3) SCC 569</i>	
Kartar Singh vs State of Punjab	603
<i>Supreme Court of India 1994 (4) SCC 602</i>	
Hitendra Vishnu Thakur vs State of Maharashtra.....	653
<i>Supreme Court of India 1995 Cri LJ 477</i>	
Sanjay Dutt vs State Through C.B.I., Bombay	673
<i>Supreme Court of India 1998 (4) SCC 492</i>	
Khudeswar Dutta vs State of Assam	699
<i>Supreme Court of India 2001 Cri. LJ 3294</i>	
Vijay Pal Singh vs State, N.C.T. of Delhi	701
<i>Supreme Court of India 1995 (6) SCC 447</i>	
Bonkya Alias Bharat Shivaji Mane and Others vs State of Maharashtra.....	704
<i>Supreme Court of India 1999 (5) SCC 682</i>	
Balbir Singh and Another vs State of Uttar Pradesh.....	708
<i>Supreme Court of India 1999 (2) SCC 45</i>	
Kishore Prabhakar Sawant and Others vs State of Maharashtra	709
<i>Supreme Court of India 1997 (4) SCC 156</i>	
Paramjit Singh and Others vs State of Punjab and Others	712
<i>Supreme Court of India 2000 (4) SCC 454</i>	
Sagayam vs State of Karnataka	716
<i>Supreme Court of India 2003 (4) SCALE 428</i>	
Yusuf @ Babu Khan vs State of Rajasthan	719
<i>Supreme Court of India 2003 (6) SCC 641</i>	
State vs Navjot Sandhu.....	721
<i>Supreme Court of India 2003 (8) SCC 50</i>	
State of Gujarat vs Salimbhai Abdul Gaffar Shaikh and Others	727

<i>Supreme Court of India 1995 (1) SCC 684</i>	
State of West Bengal and Another vs Mohammed Khalid and Others.....	732
<i>Supreme Court of India AIR 1996 SC 2047</i>	
R.M. Tewari, Advocate vs State (NCT of Delhi) and Others AND Govt. of N.C.T., Delhi vs Judge, Designated Court II (TADA) AND Mohd. Mehfooz vs Chief Secretary and Another	744
<i>Supreme Court of India 1997 (7) SCC 744</i>	
Rambhai Nathabhai Gadhvi and Others vs State of Gujarat.....	749
<i>Supreme Court of India 1996 Cri. LJ 1986</i>	
Writ Petn. (CRI.) No. 117 of 1995 D/- 27-2-1996 AND Shaheen Welfare Association vs Union of India and Others	753
<i>Supreme Court of India 2001 (3) SCC 221</i>	
Lal Singh vs State of Gujarat and Another	760
<i>Supreme Court of India 1999 (5) SCC 253</i>	
T. Suthenthiraraja, P. Ravichandran, Robert Payas & Others vs State by DSP, CBI, SIT, Chennai	772
<i>Supreme Court of India 2000 (1) SCC 498</i>	
Gurdeep Singh Alias Deep vs State (Delhi Admn.).....	805
<i>Supreme Court of India AIR 2002 SC 1661</i>	
Devender Pal Singh vs State, N.C.T of Delhi and Another.....	809
<i>Supreme Court of India 1997 (8) SCC 732</i>	
Kalpnath Rai vs State (Through CBI)	822
<i>Supreme Court of India 1997 (7) SCC 231</i>	
Sahib Singh vs State of Haryana	830
<i>Supreme Court of India 1998 (7) SCC 337</i>	
Suresh Budharmal Kalani Alias Pappu Kalani vs State of Maharashtra.....	836
<i>Supreme Court of India 2000 (2) SCC 254</i>	
S.N. Dube vs N.B. Bhoir and Others.....	840
<i>Supreme Court of India AIR 2004 SC 588</i>	
Jameel Ahmed & Another vs State of Rajasthan	854

<i>Supreme Court of India 2004 (9) SCC 580</i>	
People's Union for Civil Liberties & Another vs Union of India	863
<i>Supreme Court of India 1998 (2) SCC 109</i>	
Naga People's Movement of Human Rights and Others vs Union of India.....	889
Conclusion	920
WOMEN	
Introduction.....	924
<i>Supreme Court of India 1983 (2) SCC 96</i>	
Sheela Barse vs State of Maharashtra.....	928
<i>Supreme Court of India AIR 1990 SC 658</i>	
State of Maharashtra vs Chandraprakash Kewal Chand Jain AND Stree Atyachar Virodhi Parishad, Maharashtra State vs Chandraprakash Kewalchand Jain, Police Sub-Inspector, Nagpur and Another	935
<i>Bombay High Court 1995 (4) Bom. CR 263</i>	
Rekha M. Khokkar vs State of Goa and Others	951
<i>Bombay High Court 1996 (1) Bom. CR 70</i>	
Christian Community Welfare Council of India (Regd.) vs Government of Maharashtra and Another	956
<i>Supreme Court of India AIR 2006 SC 1946</i>	
R.D. Upadhyay vs State of A.P. and Others	970
<i>Supreme Court of India 2003 (8) SCC 546</i>	
State of Maharashtra vs Christian Community Welfare Council of India and Another .	989
<i>Andhra Pradesh High Court 2003 (1) ALT 221</i>	
The Legal Aid Committee, High Court of A.P. vs The Director General and Inspector General of Prisons and Others	993
<i>High Court of Jammu and Kashmir AIR 2004 J&K 6</i>	
World Human Rights Protection vs Union of India (UOI) and Others.....	1001
Conclusion	1010

General Introduction

The second edition of Prisoners Rights: a compilation of landmark judgements comes after a decade since its first edition and at a time when serious attempts are being made by governments to change the entire criminal justice system with the sole aim that every arrested person should be guilty. These changes in the criminal law are being brought on the pretext of fighting terrorism and to deliver justice to victims. Yet rules of free and fair trial and the basic time tested principles of criminal law are being tampered with and torturous procedures such as the Narco Analysis test and brain mapping are being resorted to without any scientific credibility to those tests.

The system of video conferencing for the production of accused in court has been introduced in the various parts of the country. In some states even criminal trials are being conducted through video conferencing. The system of production and trial through video conferencing is full of flaws. The trial conducted not via video conferencing cannot be termed as a free and fair trial with prisoner being in jail where he can be deemed to be free to give instructions to his lawyer. Besides he might be under duress where he may not be able to communicate with the courts freely. The visits to the courts once a fortnight, or a month, are the only times a prisoner can meet his family members. Considering the faulty prison visitation system, the visit to the court by the prisoners is very important as it provides the only chance to meet his family members and speak to them.

Recently the government has introduced the 'Fast Track Court' across the country for speedy disposal of criminal trials. Many times criminal trials have been completed in matter of days. This is a dangerous trend as from delayed trials at one point of time, the system is now moving towards ultra quick trial where the notion of justice may be forgotten for the sake of speed. The Bombay High Court while hearing an appeal from one of the 'Fast Track Courts' came down lightly on the functioning of these courts and stated that, 'We are certainly of the view that though the 'Fast Track Courts' should act fast and justice should be delivered as quickly as possible, decision of a criminal trial cannot be speedily given at the cost of justice.'

In last couple of years the country has only witnessed media frenzy over criminal cases and has held trials almost through the electronic and the print media. Several bar associations passed resolutions appealing to its members to defend the accused in the trial in certain cases. The constitutional right of an accused to be represented by an advocate is ignored. Justice for the victim does not mean the basic principles of criminal justice should be ignored. The thin dividing line between the media campaign and media trial is often breached in number of cases.

The Malimath Committee, which was formed for the reforms in the criminal justice system, tried its best to dismantle the minimum protection given to the accused during trials and tried to bring in draconian provisions in the mainstream criminal law. Though the Malimath Committee Report was rejected by the government, efforts are afoot to give it a backdoor entry through the committee formed to draft the criminal policy of the country.

The attack on the Parliament ensured Terrorist and Disruptive Activities (Prevention) Act smooth passing of the Prevention of Terrorism Act (POTA). The draconian provision of the earlier TADA were not incorporated in POTA and but there have been reports of its widespread misuse across the country. The Act was ultimately repealed under sustained pressure from the groups fighting civil liberties and human rights but the amendment to the Unlawful Activities Act, resulted in incorporation of some of this provisions.

Today almost every state in the country has its own anti terror law and the anti-organised crime act. All these acts have basically draconian provisions, enacted to strengthen the hands of the police and see that convictions happen on a very little, or flimsy evidence, or no evidence worth the name.

Armed Forces Special Powers Act, one of the most draconian legislations, continues to be imposed on the north eastern states of the country and citizens continue to be tortured and killed in the name of insurgency without any proper investigation or enquiry into these killings.

The last decade also saw a huge increase in extra judicial killings. Apart from a few convictions in the cases of custodial violence and the encounter killings many extra judicial killings went unnoticed and unquestioned.

In the beginning of the decade courts were initiated across the country for the speedy delivery of justice and disposal of justice. The jail courts were mainly handing out convictions to the accused who were pleading guilty. Many times the accused understanding the

consequence of a conviction use to plead guilty only to avoid prolonged cases which took years to finish owing to non production of prisoners in courts.

The prisons in the country continue to be populated with mainly under trials who are poor, illiterate and also form minority or fringe groups. These prisons around the country are over crowded with basic amenities like clean drinking water and essential medical facilities missing. The legal aid system remains in shambles resulting in the denial of the basic right of free and fair trial to the poor prisoners.

The much hyped Criminal Law Amendment 2005, which the government authorities claimed will almost empty the prisons across the country, has not brought in any major changes vis-à-vis the prison population as was claimed by the Government. Lakhs of people continue to languish behind bars mainly because they are poor.

Nothing much has changed vis-à-vis the conditions of prisons and prisoners rights since the last edition of the Prisoners Rights Book. There have been few landmark judgements but the implementation of the judgements seems to be a distant possibility.

The Mulla Committee report on jail report came out in the early 1980's but it has not been implemented until this day though over two decades have elapsed since the report was submitted to the government. The visitation rights of the prisoners leave much to be desired where the whims and fancies of the jail administration matter most. Prisoners continue to get food which can hardly be termed as fit for human consumption and they continue to live under most unhygienic or even hazardous conditions.

On the other hand there are instances of prisoners who have stayed in prison for many years beyond their sentence period. The overall conditions of the prisons and the prisoners show that they are the most ignored section of people in this country.

The need of the hour is to move towards a genuine reformative system. Changing the name of prisons as 'Reformation Centres' is not going to help as these are just superficial changes and do not in actual terms bring in any reform in the prison and the life of the prisoners. It is high time the voting rights and the conjugal rights of the prisoners in India are recognized. Though in prison it should not be forgotten the prisoner still has the right to live with dignity.

This book is divided in two volumes where best efforts have been made to bring in under its covers all the landmark judgements regarding prisons and prisoners passed by courts until this day, or the year 2007, in the fervent hope that it serves as a resource material for lawyers, activists and conscientious citizens and civil society groups.

COMPENSATION

Introduction

The Supreme Court of India has advanced the Right to Compensation to prisoners by declaring it to be a fundamental right under Article 21 of the Constitution of India. Hence a prisoner can approach the Supreme Court under Article 32 and claim for compensation for the violation of his rights while in custody of the police or a prison setting. The aspect of compensation to prisoners was acknowledged and introduced world over by the *International Covenant on Civil and Political Rights* in 1976. The two principles laid down in the covenant are as follows:

[I] Article 9, Clause 5 states:

"Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

[II] Article 14, Clause 6 states:

"When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

The right to compensation further extends to a prisoner if he/she is subjected to unlawful treatment and abuse in any form in the prison. The right extends to under-trials, detainees and other prisoners in custody. The case-laws presented in this chapter highlight the circumstances under which prisoners have been and can be granted compensation.

In *Rudul Sah's* case (AIR 1983 SC 1086), the petitioner was released from Tihar jail 14 years after he was acquitted. The excuse was insanity. The Court noted that no data of any kind was produced to show that the prison authorities had a basis for either declaring the prisoner insane or for detaining him on that account. No measures were taken to cure him. Insanity was clearly alleged as an after thought.

The Court observed that if a prisoner was at all insane, it must have been caused by the jail conditions itself. It was shocking that such a case should emerge after the *Bhagalpur blinding* case. The said case was widely reported all over the world and brought the entire prison system of Bihar into disrepute. It appears that such publicity had no effect on the criminals who run our prison systems.

The Supreme Court directed the High Court to call for statistical data from the Home Department in respect of the number of convicts who have been in jail for periods in excess of 10, 12, and 14 years respectively.

The interesting part of the judgment relates to compensation. The Court granted compensation of Rs. 35,000/- as a palliative to the petitioner and specifically indicated that a suit for compensation over and above this amount would lie in an appropriate Court. Article 21 will be denuded of its significant content if the powers of the Court were limited to passing orders merely of release. One way in which due compliance with the mandate of Article 21 is secured is to mulct its violators in the payment of monetary compensation. It cannot be corrected by any other method.

Interestingly for 14 years of illegal custody the poor prisoner was given compensation of only Rs. 35,000/. Why not 35 lacs? Would not the latter amount be more appropriate for such a violation of the Fundamental Rights of a citizen of India?

Sebastian Hongray's case (AIR 1984 SC 1026) was a habeas corpus petition. Sebastian was a Naga Priest who was a Head Master of a school. His school was visited by the army. There the army engaged in certain atrocities and took away certain persons including the petitioner. He was last seen alive in an army camp. A petition for habeas corpus was filed, but the State refused to obey. The Court asked "What is the appropriate mode of enforcing obedience to a writ of habeas corpus?". Here there was a wilful disobedience of the writ by misleading the Court and by presenting a distorted version of facts. It was a case of civil contempt. In a landmark judgment the Court ordered that the State pay Rs. 1 lac each to the wives of the missing persons.

Reiterating the principle laid down in the earlier decisions, the Supreme Court awarded compensation of Rs. 50,000/- in *Bhim Singh's* case (AIR 1986 SC 494), for imprisonment with "mischievous or malicious intent", where an MLA was kept in police custody and remand orders were obtained without his production before a magistrate.

In *Peoples' Union of Democratic Rights vs. State of Bihar* (AIR 1987 SC 355), the Supreme Court enhanced the amount of compensation from Rs. 10,000/- to Rs. 20,000/- to be paid to the 21 persons belonging to backward classes who died in indiscriminate firing by the police while holding a peaceful meeting in the District of Gaya, Bihar, and Rs. 5000/- each to the persons injured. The Court held that payment of such compensation does not absolve the liability of the wrong-doer but such compensation is being paid as a working principle and for convenience and with a view to rehabilitating the dependants of the deceased.

In *Peoples' Union of Democratic Rights and another vs. Police Commissioner, Delhi Police and another* (1989 (4) SCC 730), the Supreme Court directed the payment of Rs. 50,000/- to the family of the person killed by the police officers at the police station for demanding payment for their labour. A woman who was stripped was paid Rs. 500/- and Rs. 25/- to eight others. The amount was ordered to be recovered from the salaries of the officers found guilty after investigation and inquiry.

In *Saheli, A Women's Resource Centre Vs. Commissioner of Police, Delhi* (AIR 1990 SC 513), the Supreme Court directed that compensation be paid to the mother of a nine year old child who died because of beating and assault by a police officer.

In *P.V. Kapoor's case* (1992 Cri. LJ 128), the Delhi High Court, extending the principle laid down in *Nilabati Behera's case*, awarded compensation to the victims of police firing on the illegal assemblies during the Mandal agitation.

The law regarding strict liability of the State for violation of fundamental rights to which the defence of sovereign immunity is not applicable was laid down by the Supreme Court in *Nilabati Behera's case* (JT 1993 (2) SC 503). In this case where compensation was awarded to the mother of a victim of custodial death, the Supreme Court expressed the need of the Court "to evolve 'new tools' to give relief in public law by moulding it accordingly to the situation with a view to preserve & protect the rule of law."

The Supreme Court in *Arvinder Singh Bagga's case* (JT 1994 (6) SC 478), directed that the state pay compensation to persons illegally detained and directed prosecution of the concerned police officers for the "blatant abuse of law".

The Andhra Pradesh High Court also awarded compensation in case of illegal detention and quashed the prosecution pending against the detenu filed subsequently as being an abuse of the process of Court in *S. Seshaiah vs. State of Andhra Pradesh* (1994 Cri. LJ 1469).

The Gauhati High Court awarded compensation to the father of deceased against whom no case had been registered in *Nagantangkhui's case* (1995 Cri. LJ 347).

In *Re: death of Sawinder Singh Grover* (1995 (SU4) SCC 450), the Supreme Court directed that a sum of Rs. two lakhs be paid as an interim measure by the Union of India/ Directorate of Enforcement to the widow of the deceased. This direction was based on the report of the Additional Sessions Judge which suggested a strong suspicion of some misfeasance including torture by the officers of the Directorate who had wrongfully confined the deceased. The Central Bureau of Investigation was asked to conduct the prosecution and further investigation in the matter.

In *Smt. Kewal Pati's* case (1995 Cri LJ 2920), the Supreme Court held that the legal heirs of deceased are entitled to compensation from the State if a prisoner is killed in jail by a co-accused.

The facts of the case in *Postsangbam Ningol Thokchom (Smt) and another vs. General Officer Commanding and others* (1997 (7) SCC 725) being similar to that of the *Nilabati Behera's* case, the Supreme Court directed the Union of India to deposit an amount of Rs. 1,25,000 in the names of the mothers of the two boys who were not released from custody after being picked up for interrogation by the Army in Imphal, and were suspected to be killed.

In another similar case, *Kaushalya and another vs. State of Punjab and Others* (1999 (6) SCC 754), the Supreme Court awarded a sum of Rs. 2 lakhs to the mother of the deceased Amrik Singh who was killed in police custody.

In *Malkiat Singh vs. State of Uttar Pradesh* (1989 (9) SCC 351), the Supreme Court awarded a compensation of Rs. five lakhs to the father whose son was killed in an alleged encounter between the police and four sikh youths. The compensation was made based on a similar case, Writ Petition No. 632 of 1992, where the Supreme Court had awarded Rs. 5 lakhs as compensation.

In *Mrs. Meena Singh vs. State of Bihar and others* (2001 Cri. LJ 3573), the High Court of Jharkhand awarded a compensation of Rs. 3 lakhs to the wife of an undertrial prisoner, noting that it was the prime duty of the jail authority to provide security and safety to the life of prisoners while in jail custody. The order was passed based on the principle expounded in *Smt. Kewalpati's* case.

In *Prem Bangar Swamy vs. State of Maharashtra and Others* (2004 ALL MR (Cri) 636), the High Court of Bombay awarded an amount of Rs. 2 lakhs as compensation for wrongful detention of the petitioner for 2 years 9 months inspite of her acquittal by the Special Court in Mumbai and that order being confirmed in appeal by the High Court. The High Court referred to the apex court judgements in *Rudal Sah and D.K. Basu's* cases for illegal detention, while deciding the amount which was awarded as an interim measure noting that the same was not a punitive compensation.

State of Andhra Pradesh vs. Challa Ramkrishna Reddy and Others (AIR 2000 SC 2083) was filed against the order of the High Court whereby a sum of Rs. 1,44,000/- was awarded to the son whose father died while in custody for the negligence of the authorities. The case was challenged on two grounds, as being barred due to limitation and that the State would not be liable in damages as it was immune from any legal action in respect of its

sovereign acts. The Supreme Court held that the present case would invoke the provisions of Article 113 and not Article 72 of the Limitation Act, 1963 which prescribed a period of three years, as the action of the officers was wholly malafide, and thus the suit was within limitation.

With regards to the second plea relating to the immunity of the State Government, the Court relied on various judgements on deciding the issue of a person being deprived of his personal liberty (Article 21) in accordance with the procedure established by law, and that the same must be reasonable, fair and just as laid down in *Maneka Gandhi vs. Union of India* (1978 (1) SCC 248), *D. Bhuvan Mohan Patnaik vs. State of Andhra Pradesh* (AIR 1074 SC 2092), *Charles Sobhraj vs. Superintendent, Central Jail, Tihar* (AIR 1978 SC 1514), *Francis Coralie Mullin vs. The Administrator, Union Territory of Delhi* (1981 (1) SCC 608), *Sunil Batra vs. Delhi Administration* (AIR 1980 SC 1579), *N. Nagendra Rao & Co. vs. State of A.P.* (AIR 1994 SC 2663), and *Common Cause, A Registered Society vs. Union of India and Ors.* (1999 (6) SCC 667). The Court rejected the plea of immunity and further held that in the instant case, two vital factors, namely police negligence as also the Sub-Inspector being in conspiracy were established as a fact, therefore the decisions in *Nilabati Behera, In Re: Death of Sawinder Singh Grover, and D.K. Basu*, would hold so far as fundamental rights and human rights or human dignity are concerned, and that the law has marched ahead like a Pegasus but the Government attitude continues to be conservative and it tries to defend its action or the tortious action of its officers by raising the plea of immunity for sovereign acts or acts of State, which must fail.

In *Ravikant Patil's* case [1991 (2) SCC 373], the Supreme Court rejected the appeal of the State against the decision of the Bombay High Court directing that compensation be paid to the undertrial prisoner for handcuffing and being taken through the streets as the police officers were guilty of violating a fundamental right under Article 21.

**Supreme Court
AIR 1983 SC 1086**

**Rudul Sah
vs
State of Bihar and Another**

Y.V. Chandrachud, Amarendra Nath Sen, Ranganath Misra, JJ.

1. This writ petition discloses a sordid and disturbing state of affairs. Though the petitioner was acquitted by the Court of Session, Muzaffarpur, Bihar, on June 3, 1968 he was released from the jail on October 16, 1982, that is to say, more than 14 years after he was acquitted. By this habeas corpus petition, the petitioner asks for his release on the ground that this detention in the jail is unlawful. He has also asked for certain ancillary reliefs like rehabilitation, reimbursement of expenses which he may incur for medical treatment and compensation for the illegal incarceration.
2. This petition came up before us on November 22, 1982 when we were informed by Shri. Goburdhun, counsel for the State of Bihar, that the petitioner was already released from the jail. The relief sought by the petitioner for his release thus became infructuous but despite that, we directed that a Notice to show cause be issued to the State of Bihar regarding prayers 2,3 and 4 of the petition. By prayer No. 2 the petitioner asks for medical treatment at Government expense, by prayer No. 3 he asks for an ex-gratia payment for his rehabilitation, while by prayer No. 4 he asks for compensation for his illegal detention in the jail for over 14 years.
3. We expected a prompt response to the Show Cause Notice from the Bihar Government at least at this late stage, but they offered no explanation for over four months. The writ petition was listed before us on March 31, 1983 when Shri. Goburdhun restated that the petitioner had been already released from the jail. We passed a specific order on that date to the effect that the release of the petitioner cannot be the end of the matter and we called upon the Government of Bihar to submit a written explanation supported by an affidavit as to why the petitioner was kept in the jail for over 4 years after his acquittal. On April 16, 1983, Shri. Alakh Deo Singh, Jailor, Muzaffarpur Central Jail, filed an affidavit in pursuance of that order. Shorn of its formal recitals, the affidavit reads thus:

- (2) *That the petitioner was received on 25.3.67 from Hazaribaug Central Jail and was being produced regularly before the Additional Sessions Judge, Muzaffarpur and on 30.8.68 the learned Judge passed the following order:*
- The accused is acquitted but he should be detained in prison til further order of the State Government and I.G. (Prisons), Bihar. (A true copy of the same is attached as Annexure I).*
- (3) *That accused Rudul Sah was of unsound mind at the time of passing the above order. This information was sent to the Law Department in letter No. 1838 dated 10.5.74 of the Superintendent, Central Jail, Muzaffarpur through District Magistrate, Muzaffarpur.*
- (4) *That the Civil Surgeon, Muzaffarpur, reported on 18.2.77 that accused Rudul Sah was normal and this information was communicated to the Law Department on 21.2.77.*
- (5) *That the petitioner, Rudul Sah was treated well in accordance with the rules in the Jail Manual, Bihar, during the period of his detention.*
- (6) *That the petitioner was released on 16.10.82 in compliance with the letter No. 11637 dated 14.10.82 of the Law Department."*
4. The writ petition came up before us on April 26, 1983 when we adjourned it to the first week of August 1983 since it was not clear either from the affidavit as Annexure I, as to what was the basis on which it was stated in the affidavit that the petitioner was of unsound mind or the reason why the learned Additional Sessions Judge directed the detention of the petitioner in jail, until further orders of the State Government and the Inspector General of Prisons.
5. The writ petition has come up for hearing once again before us today. If past experience is any guide, no useful purpose is likely to be served by adjourning the petition in the hope that the State authorities will place before us satisfactory material to explain the continued detention of the petitioner in jail after his acquittal. We apprehend that the present state of affairs, in which we are left to guess whether the petitioner was not released from the prison for the benign reasons that he was insane, is not likely to improve in the near future.
6. The jailor's affidavit leaves much to be desired. It narrates with an air of candidness what is notorious, for example, that the petitioner was not released from the jail upon his acquittal and that he was reported to be insane. But it discloses no data on the basis of which he was adjudged insane, the specific measures taken to cure him of that affliction and, what is most important, whether it took 14 years to set right his mental imbalance. No medical opinion is produced in support of the diagnosis that he was

insane nor indeed is any jail record produced to show what kind of medical treatment was prescribed for and administered to him and for how long. The letter (No. 1838) dated May 10, 1974 which, according to paragraph 3 of the affidavit, was sent to the Law Department by the Superintendent of the Central Jail, Muzaffarpur, is not produced before us. There is nothing to show that the petitioner was found insane on the very date of his conviction. And, if he was insane when he was convicted, he could neither have been tried nor convicted, for the simple reason that an insane person cannot enter upon his defence. Under the Code of Criminal Procedure, insane persons have certain statutory rights in regard to the procedure governing their trial. According to paragraph 4 of the affidavit the Civil Surgeon, Muzaffarpur, reported on February 18, 1977 that the petitioner was normal and that this information was communicated to the Law Department on February 21, 1977. Why was the petitioner not released for over 5 1/2 years thereafter? It was on October 14, 1982 that the Law Department of the Government of Bihar directed that the petitioner should be released. Why was the Law Department so insensitive to justice? We are inclined to believe that the story of the petitioner's insanity is an afterthought and is exaggerated out of proportion. If indeed he was insane, at least a skeletal medical record could have been produced to show that he was being treated for insanity. In these circumstances, we are driven to the conclusion that, if at all the petitioner was found insane at any point of time, the insanity must have supervened as a consequence of his unlawful detention in jail. A sense of helplessness and frustration can create despondency and persistent despondency can lead to a kind of mental imbalance.

7. The concerned Department of the Government of Bihar could have afforded to show a little more courtesy to this Court and to display a greater awareness of its responsibilities by asking one of its senior officers to file an affidavit in order to explain the callousness which pervades this case. Instead, the jailor has been made a scapegoat to own up vicariously the dereliction of duty on the part of the higher officers who ought to have known better. This is not an isolated case of its kind and we feel concerned that there is darkness all around in the prison administration of the State of Bihar. The Bhagalpur blindings should have opened the eyes of the Prison Administration of the State. But that bizarre episode has taught no lesson and has failed to evoke any response in the Augean Stables. Perhaps, a Hercules has to be found who will clean them by diverting two rivers through them, not to the breakdown of Prison Administration in the State and rectify the grave injustice which is being perpetrated on helpless persons. The High Court of Patna should itself examine this matter and call for statistical data from the Home Department of the Government of

Bihar on the question of unlawful detentions in the State Jails. A tabular statement from each jail should be called for disclosing how many convicts have been in jail for more than 10 years, 12 years, 14 years and for over 16 years. The High Court will then be in a position to release prisoners who are in unlawful detention in the jails and to ask the State Government to take steps for their rehabilitation by payment of adequate compensation wherever necessary.

8. That takes us to the question as to how the grave injustice which has been perpetrated upon the petitioner can be rectified, in so far as it lies within our power to do in the exercise of our writ jurisdiction under Article 32 of the Constitution. That Article confers power on the Supreme Court to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari, whichever may be appropriate, for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of Courts, Civil and Criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a Court of lowest grade competent to try it. But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. The instant case is illustrative of such cases. The petitioner was detained illegally in the prison for over 14 years after his acquittal in a full-dressed trial. He filed a habeas corpus petition in this Court for his release from illegal detention. He obtained that relief, our finding being that his detention in the prison after his acquittal was wholly unjustified. He contends that he is entitled to be compensated for his illegal detention and that we ought to pass an appropriate order for the payment of compensation in this habeas corpus petition itself.
9. We cannot resist this argument. We see no effective answer to it save the stale and sterile objection that the petitioner may, if so advised, file a suit to recover damages from the State Government. Happily, the State's counsel has not raised that objection. The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a Civil Court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages, would have to be passed in that suit, though it is not possible to predicate in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner

will be doing mere lip-service to his fundamental right to life and liberty be denuded of its significant content if the power of this Court were limited to passing order of release from illegal detention of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present others too well-known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers.

10. Taking into consideration that great harm done to the petitioner by the Government of Bihar, we are of the opinion that, as an interim measure, the state must pay to the petitioner a further sum of Rs.30,000/- (Rupees thirty thousand) in addition to the sum of Rs.5,000/- (Rupees five thousand) already paid by it. The amount shall be paid within two weeks from today. The Government of Bihar agrees to make the payment though, we must clarify, our order is not based on their consent.
11. This order will not preclude the petitioner from bringing a suit to recover appropriate damages from the State and its erring officials. The order of compensation passed by us is, as we said above, in the nature of a palliative. We cannot leave the petitioner penniless until the end of his suit, the many appeals and the execution proceedings. A full-dressed debate on the nice points of fact and law which takes place leisurely in compensation suits will have to await the filing of such a suit by the poor Rudul Sah. The Leviathan will have liberty to raise those points in that suit. Until then, we hope, there will be no more Rudul Sah in Bihar or elsewhere.

Supreme Court
AIR 1984 SC 1026

Sebastian M. Hongray
vs
Union of India and Others

D.A. DESAI, O. CHINNAPPA REDDY, JJ.

1. On Nov. 24, 1983, the Court by its Judgment and order directed that a writ of habeas corpus be issued. The operative portion of the order reads as under:

"Accordingly, this petition is allowed and we direct that a writ of habeas corpus be issued to the respondents 1, 2 and 4 commanding them to produce C. Daniel, retired Naik Subedar of Manipur Rifles and Headmaster of the Junior High School of Huining Village and C. Paul, Assistant Pastor of Huining Baptist Church, who were taken to Phungrei Camp by the jawans of 21st Sikh Regiment on March 10, 1982 before this Court on Dec. 12, 1983 and file the return."

The Registry issued the writ and served the same upon first respondent-Union of India, second respondent- Secretary, Ministry of Home Affairs and 4th respondent-Commandant, 21st Sikh Regiment, Phungrei Camp. Pursuant to the writ, it was obligatory upon respondents 1, 2 and 4 to file the return and to produce C. Daniel and C. Paul. A return on affidavit by one Ajai Vikram Singh, Director, Ministry of Defence dated December 9, 1983 was produced in the Court on December 12, 1983 stating therein "that with all the will and the best efforts, the respondents are unable to produce S/Shri C. Daniel and C. Paul for the reasons set out in the affidavit and crave for indulgence of the Hon'ble Court for their inability to produce the above- named individuals due to circumstances beyond their control." It was reiterated that C. Daniel and C. Paul were not in the custody or control of respondents 1, 2, and 4. To this return several affidavits and messages were 547 annexed saying that the Army authorities conducted an extensive search for tracing C. Daniel and C. Paul but nothing fruitful has been achieved. One Surendra Kumar, Deputy Secretary, Ministry of Home Affairs had also filed the return stating that C. Daniel and C. Paul are neither in the custody or control of respondent No. 2. It was stated that Central Bureau of Investigation (CBI for short) have been directed to conduct enquiries to locate the aforementioned two persons and to intimate the result thereof. The matter was adjourned to enable the respondents to pursue their efforts. Nothing fruitful came up even though the

matter was twice adjourned at the request of learned Attorney General who entered appearance on behalf of respondents Nos. 1, 2 and 4. The writ petition was posted for further hearing and orders on April 19, 1984. On that day, a summary of enquiry made by CBI was submitted to the Court in which it was stated that 'the field enquiries made by the CBI and the efforts made to locate the two persons have yielded no results and it has not been possible to locate Sri Daniel and Sri Paul'. The report was submitted by the Dy. Inspector General of Police (S).

2. It is now necessary to deal with the failure of respondents 1, 2 and 4 to file the return to the writ of habeas corpus. After a preliminary enquiry and after hearing the respondents and after negativing their contentions that Shri C. Daniel and Shri C. Paul were not seen last alive in the custody of the 4th respondent, the Court directed to issue a writ of habeas corpus. The writ of habeas corpus was issued and was served on respondents 1, 2 and 4. In compliance with the mandatory direction contained in the writ of habeas corpus, the person to whom it is directed is under a legal obligation to produce the body of person alleged to be unlawfully detained before the Court on the day specified and to make a formal return to the writ. (1) Such a writ has been issued and there has been failure to produce the missing persons in respect of whom writ is issued and to file the return as mandated by law.
3. The next question therefore, is: what is the appropriate mode of enforcing obedience to a writ of habeas corpus?
4. The Contempt of Courts Act, 1971 defines 'contempt of court' in Sec. 2(a) to mean 'civil contempt or criminal contempt'. 'Civil con 548 tempt' is defined in Sec. 2(b) to mean wilful disobedience to any judgment decree, direction, order, writ or other process of a Court or wilful breach of an undertaking given to a Court.' Wilful disobedience to a writ issued by the Court constitutes civil contempt. The question is: whether this disobedience is wilful? Mere failure to obey the writ may not constitute civil contempt depending upon the facts and circumstances of the case. But wilful disobedience to a writ issued by a Court constitutes civil contempt. Again it is well-settled that 'the appropriate mode of enforcing obedience to a writ of habeas corpus is by committal for contempt. A committal order may be made against a person who intentionally makes a false return to a writ of habeas corpus, but an unintentional misrepresentation on a return is not a ground for committal.'(ibid para 1497)
5. The view of this Court as expressed in the main judgment clearly indicates that the assertion of respondents 1, 2 and 4 that C.Daniel and C.Paul left Phungrei Camp where

21st Sikh Regiment were stationed is not correct and that to avoid responsibility flowing from the mysterious disappearance of C.Daniel and C.Paul an attempt was made to suggest that they had left alive in the company of their compatriots. The Court has rejected this submission as untenable and uncorrected. On that conclusion one can say that there is a wilful disobedience to the writ of habeas corpus by misleading the court by presenting a distorted version of facts not borne out by the record. It is thus established that the respondents 1, 2 and 4 have committed civil contempt by their wilful disobedience to the writ.

6. Civil contempt is punishable with imprisonment as well as fine. In a given case, the court may also penalise the party in contempt by ordering him to pay the costs of the application. (Halsbury's "Laws of England", Fourth Edition, Vol.9, para 100 at p.61) A fine can also be imposed upon the contemnor.
7. Now in the facts and circumstances of the case, we do not propose to impose imprisonment nor any amount as and by way of fine but keeping in view the torture, the agony and the mental oppression through which Mrs. C. Thingkuila, wife of Shri C. Daniel and Mrs. C. Vangamla, wife of Shri C. Paul had to pass and they being the proper applicants, the formal application being by Sebastian M. Hongray, we direct that as a measure of exemplary costs as is permissible in such cases, respondents Nos. 1 and 2 shall pay Rs 1 lac to each of the aforementioned two women within a period of four weeks from today.
8. A query was posed to the learned Attorney General about the further step to be taken. It was made clear that further adjourning the matter to enable the respondents to trace or locate the two missing persons is to shut the eyes to the reality and to pursue a mirage. As we are inclined to direct registration of an offence and an investigation, we express no opinion as to what fate has befallen to Shri C. Daniel and Shri C. Paul, the missing two persons in respect of whom the writ of habeas corpus was issued save and except saying that they have not met their tragic end in an encounter as is usually claimed and the only possible inference that can be drawn from circumstance already discussed is that both of them must have met an unnatural death. Prima facie, it would be an offence of murder. Who is individually or collectively the perpetrator of the crime or is responsible for their disappearance will have to be determined by a proper, thorough and responsible police investigation. It is not necessary to start casting a doubt on anyone or any particular person. But prima facie there is material on record to reach an affirmative conclusion that both Shri C. Daniel and Shri C. Paul are not alive and have met an unnatural death. And the Union of India cannot disown

the responsibility in this behalf. If this inference is permissible which we consider reasonable in the facts and circumstances of the case, we direct that the Registrar (Judicial) shall forward all the papers of the case accompanied by a writ of mandamus to the Superintendent of Police, Ukhrul, Manipur State to be treated as information of a cognizable offence and to commence investigation as prescribed by the relevant provisions of the Code of Criminal Procedure.

S.R. Rule made absolute.

Supreme Court of India
AIR 1986 SC 494

Bhim Singh, MLA
vs
State of Jammu & Kashmir

O. Chinnappa Reddy, V. Khaild, JJ.

1. Shri. Bhim Singh, a Member of the Legislative Assembly of Jammu & Kashmir, incurred the wrath of the powers that be. They were bent upon preventing him from attending the Session of the Legislative Assembly of Jammu & Kashmir, which was to meet on 11th September, 1985. That appears to be the only inference that we can draw from the circumstances of the case to which we shall now refer. On August 17, 1985, the opening day of the Budget Session of the Legislative Assembly. Shri. Bhim Singh was suspended from the Assembly. He questioned the suspension in the High Court of Jammu & Kashmir. The order of suspension was stayed by the High Court on 9th September, 1985. On the intervening night of 9th-10th September, 1985, he was proceeding from Jammu to Srinagar. En route, at about 3.00 A.M. (on 10th), he was arrested at a place called Qazi Kund about 70 kms from Srinagar. He was taken away by the police. As it was not known where he had been taken away and as the efforts to trace him proved futile, his wife Smt. Jayamala, acting on his behalf, filed the present application for the issue of a writ to direct the respondents to produce Shri. Bhim Singh before the Court, to declare his detention illegal and to set him at liberty. She impleaded the State of Jammu & Kashmir through the Chief Secretary as the first respondent, the Chief Minister, the Deputy Chief Minister and the Inspector General of Police, Jammu & Kashmir as respondents 2, 3 and 4. On Sept. 13, 1985, we directed notice to be issued to the respondents and we also directed the Inspector General of Police to inform Smt. Jayamala where Shri. Bhim Singh was kept in custody. On Sept, 16, 1985, Shri. Bhim Singh was released on bail by the learned Additional Sessions Judge of Jammu before whom he was produced. Shri. Bhim Singh filed a supplementary affidavit on 20th September, 1985 stating more facts in addition to what had already been stated by Smt. Jayamala in the petition. He categorically asserted that he was kept in police lockup from 10th to 14th and that he was produced before a Magistrate for the first time only on the 14th. Thereafter on 24th Sept. 1985, we issued notice to the Director General of Police, State of Jammu & Kashmir, Mr. Mir,

Superintendent of Police, Anantnag, Mohd. Shafi Rajguru, Inspector of Police, Amin Amjum, Deputy Superintendent of Police, Udhampur, Gupta, Deputy Superintendent of Police, Jhajar Kolli and the officer in charge of Police Station, Satwari. A counter-affidavit has been filed on behalf of the State of Jammu & Kashmir by Abdul Qadir Parrey. Affidavit have also been filed by M. M. Khajuria, Inspector General of Police, M. A. Mir, Superintendent of Police, Anantnag, Mohd. Shafi Laigroo, Inspector of Police, District Police Lines, Anantnag, Mohd. Amin Amjum, Deputy Superintendent of Police Headquarters, Udhampur and Rajinder Gupta, Probationary Deputy Superintendent of Police, Udhampur. Shri. Bhim Singh has also filed a rejoinder affidavit.

2. From the affidavits filed by the several police officers, it transpires that an FIR under Section 153A of the Ranbir Penal Code was registered against Shri. Bhim Singh on Sept. 9, 1985 at Police Station, Pacca Danga, Jammu on the allegation that he had delivered an inflammatory speech at a public meeting held near Parade Ground, Jammu at 7.00 P.M. on Sept. 8, 1985. The officer in charge of Police Station, Pacca Danga brought the matter to the notice of the Senior Superintendent of Police, Jammu, who in turn informed the Deputy Inspector General of Police of Jammu range. On 10th Sept. 1985, requisition for the arrest of Shri. Bhim Singh was sent to the Superintendent of Police, Anantnag through the Police Control Room, Srinagar. This fact is sworn to by Shri. M. M. Khajuria, Inspector General of Police, Jammu & Kashmir. Shri. M. A. Mir, Superintendent of Police, Anantnag has, however, stated in his affidavit that on Sept. 9, 1985 at about 11.30 P.M. he was informed by the Police Control Room, Srinagar that Shri. Bhim Singh, MLA was required to be apprehended as he was wanted in a case registered under Section 153A of Ranbir Penal Code. According to him, he immediately directed the officer in charge of Police Station, Qazi Kund that Shri. Bhim Singh may be apprehended as and when he reached his jurisdiction. He further instructed him that he should be brought to the District Headquarters, Anantnag after his arrest. These statements are obviously untrue in view of the affidavit of Shri. Khajuria, Inspector General of Police that the information to the Superintendent of Police, Anantnag was conveyed through the Police Control Room, Srinagar on 10th Sept., 1985. Shri. Mir has not chosen to explain why he expected Shri. Bhim Singh to pass through Qazi Kund that night. Quite obviously even before he had received any information from the Police Control Room about the alleged case registered against Shri. Bhim Singh, Shri. Mir had instructed the office in charge, Police Station, Qazi Kund to arrest Shri. Bhim Singh if he came within his jurisdiction. Whether he did it on his own and if so, for what reason or whether he did it on other instructions received by him is a matter which requires our consideration. At about 3.00 a.m., according to Shri. Mir,

Shri. Bhim Singh was arrested at Qazi Kund by the officer in charge of Police Station, Qazi Kund and brought to the District Headquarters where it appears Shri. Bhim Singh was provided with facilities for rest, wash, breakfast, etc. It is necessary to mention here that no affidavit has been filed before us by the officer in charge of Police Station, Qazi Kund, the officer who arrested Shri. Bhim Singh. It appears that under the orders of the Superintendent of Police, Anantnag, Shri. Bhim Singh was taken from Anantnag by Shafi Laigroo, Inspector of Police, District Police Lines. Anantnag in a Matador at about 7.30 a.m. on 10th September, 1985. They reached, according to Mohd. Shafi Laigroo, Batota at 2.00 p.m. where Bhim Singh was provided with lunch. They reached Udhampur at 5.00 p.m. where Bhim Singh was provided with tea and finally they reached Jammu City Police Station at 7.30 p.m. There they learnt that Bhim Singh was wanted in connection with a case registered by the police of Pacca Danga Station. He was, therefore, taken to Pacca Danga Police Station and handed over to the officer in charge of Pacca Danga Police Station. Mohd. Amin Amjum, Deputy Superintendent of Police Headquarters, Udhampur and Shri. Rajender Gupta, Probationary Deputy Superintendent of Police, Udhampur were directed by the Senior Superintendent of Police, Udhampur to see to the safe passage of Bhim Singh through Udhampur District. They were informed that Bhim Singh was taken from Anantnag to Jammu in a matador. So they followed the matador in which Bhim Singh was being taken from Chenani Police Station to Jammu and thereafter returned to their respective stations. According to the Inspector General of Police, Shri. Bhim Singh was taken to Police Station Pacca Danga at about 9.30 P.M. On 11th Sept. 1985, a remand to police custody for two days was obtained from an Executive Magistrate First Class. A copy of the application for remand made in Urdu with the endorsement of the Executive Magistrate First Class has been filed as an annexure to the affidavit of Shri. Khazuria. The endorsement says, 'Remanded for two days with effect from 11th instant.' It is signed by the Magistrate and dated 11th Sept., 1985. Neither the application nor the endorsement shows that Shri. Bhim Singh was produced before the Magistrate when remand was sought. Shri. Bhim Singh expressly denied that he was produced before any Magistrate on 11th. With reference to the remand obtained on 11th Sept. 1985, Shri. Khajuria does not state in his affidavit that Shri. Bhim Singh was produced before the Executive Magistrate, First Class on 11th Sept., 1985. But in very careful and guarded language he says, 'A remand to police custody for two days was obtained by Pacca Danga Police Station from Executive Magistrate, First Class on 11th Sept., 1985.' The officer in charge Police Station, Pacca Danga has not filed any affidavit. It has to be mentioned here that Shri. Bhim Singh moved an application before the

Executive Magistrate on 24th Oct. 1985 to be informed as to the time when remand was obtained from the Magistrate. The Magistrate made the following endorsement on the application of Shri. Bhim Singh :

Returned in original to the applicant with the remarks that the remand application was moved before me by the SHO Pacca Danga Jammu on 11th September, 1985 after office hours in the evening at my residence and the (illegible) remanded the applicant in police custody for a period of two days alone.

3. On the expiry of the remand of two days granted by the Executive Magistrate, a further remand was obtained for one day, this time, not from the Executive Magistrate, First Class, but, from the Sub-Judge. It was probably thought not wise to go before the same Magistrate and ask for a second remand. The application made in Urdu to the Sub-Judge with the endorsement of the Sub-Judge has also been filed as an annexure to the Affidavit of Shri. Khajuria. The endorsement of the Sub-Judge reads :

Application for police remand has been moved by Shri. Bansi Lal (illegible), S. H. O. P/S Pacca Danga with the submission that the accused Shri. Bhim Singh is sick (Medical Certificate attached) and he be removed to the police lockup as the investigation in the case is still in progress.

Perused the police diaries with the SHO and also the medical (illegible) examination slip. The accused is authorised to be left in police lockup for one day. The accused be produced in the Court by tomorrow for further necessary remand orders.

4. The endorsement is signed by the Sub-Judge and is dated 13th Sept., 1985. We have again to mention here that Shri. Bhim Singh requested the Magistrate to give him a copy of the medical certificate purported to have been submitted by the S. H. O. Pacca Danga. On this application, the Sub-Judge made the following endorsement :

Shri. Bhim Singh has moved an application requesting this Court to certify the time when the police remand application was moved before me by Police P/S Pacca Danga on 13.9.85. The application is also accompanied with a photostat copy of the remand order passed by me on 13.9.85 as a duty Magistrate. The application in original was forwarded to the I/C Police Station Pacca Danga for report and production of case diaries of the case for perusal, but it has been reported that the case diaries are with SHO who is out on law and order duty.

From the perusal of the photostat copies of the remand order and from my recollection, it is certified that the remand application was moved before me at my residence after Court hours in the evening.

5. Shri. Bhim Singh swears in his rejoinder affidavit that he was not produced before the Sub-Judge on 13th nor was he examined at any time by any doctor. Shri. Khajuria in his

affidavit again uses very careful language and says, 'On the expiry of this remand, an application for further remand was submitted before the Sub-Judge (Judicial Magistrate First Class) on 13th Sept., 1985, who extended the remand by one day.' Shri. Khajuria does not say a word about Shri. Bhim Singh having been examined by any doctor. He makes no reference to the production of any medical certificate before the Sub-Judge. As already mentioned, the officer in charge of the Pacca Danga Police Station has not filed any affidavit before us. Thereafter on 14th Sept., 1985, Shri. Bhim Singh was produced before the Sub-Judge and was remanded to judicial custody for two days with a direction to produce him before the Sessions Judge, Jammu on 16th Sept., 1985. He was accordingly taken to the Court of the Sessions Judge on 16th Sept., 1985, but as the Sessions Judge was absent, he was produced before the Additional Sessions Judge. He was released on bail on his personal bond by the Additional Sessions Judge. That he was produced before the Magistrate on 14th, remanded to judicial custody for two days, produced before the Additional Sessions Judge on 16th and released on bail are facts which are not disputed by Shri. Bhim Singh. In his affidavit when he refers to the events of 14th and 16th September, 1985, Shri. Khajuria takes good care to use the words 'produced before the Sub-Judge' and 'produced before the Additional Sessions Judge'. As mentioned by us earlier, with reference to the events on 11th and 13th Sept., 1985, Shri. Khajuria very carefully refrained from using the word 'produced'. He merely said 'remand was obtained. Shri. Bhim Singh in his supplemental and rejoinder affidavits has stated certain facts relating to alleged further harassment by the police. We are not concerned with those further facts for the purposes of this case. We are only concerned with the detention of Shri. Bhim Singh from 3.00 a.m. on 10th Sept., 1985 until he was produced before the Sub-Judge on 14th Sept., 1985. The two remand orders said to have been made by the Executive Magistrate First Class and Sub-Judge on 11th and 13th Sept., 1985 respectively do not contain any statement that Shri. Bhim Singh was produced either before the Executive Magistrate First Class or before the Sub-Judge. The applications for remand also do not contain any statement that Shri. Bhim Singh was being produced before the Magistrate or the Sub-Judge. Shri. Khajuria, the Inspector General of Police has very carefully chosen his words and stated in the affidavit that remand orders were obtained. He refrained from stating that Shri. Bhim Singh was produced before the Magistrate or the Sub-Judge on 11th and 13th. The Medical Certificate referred to in the application dated 13th Sept., 1985 has also not been produced and Shri. Khajuria makes no reference to it in his affidavit. In addition we have the important circumstance that no affidavit of the officer in charge of the Police Station

Pacca Danga has been filed before us. Nor has the affidavit of the officer, who arrested Shri. Bhim Singh has been filed before us. At the time of hearing the petition on 19th Nov. 1985, Shri. E. C. Aggarwal stated to us that the affidavit of the two police officers had been got ready but were mislaid. He tried to show us some photostat copies of the alleged affidavits and prayed that the case might be adjourned for filing the affidavits of the two police officers. We refused to accede to the request. There was ample time for the respondents to file the affidavits of the two police officers after we issued notice to the respondents. It is not disputed that right from the beginning, they were aware of the writ petition filed in this Court. The affidavits of Shri. Khajuria and others were filed as far back as 16th Oct., 1985 and there was no reason whatsoever for not filing the affidavits of the two police officers at that time. When the complaint was of illegal arrest and detention, the least one would expect the respondents to do is to file the affidavits of the officer who arrested the petitioner and the officer who produced him before the Magistrate for the purpose of obtaining orders of remand. Instead of filing their affidavits, several inconsequential affidavits were filed perhaps only to confuse the issue. Shri. Khajuria, the Inspector General of Police filed a lengthy affidavit containing statements of fact, most of which he could not be personally aware. However, he chose to use careful language, as pointed out by us, whenever he referred to the remand of Shri. Bhim Singh or his production before a Magistrate or Sub-Judge. We are convinced that the failure to file the affidavits of the officers, who arrested Shri. Bhim Singh and the Sub-Inspector, in charge of Pacca Danga Police Station was deliberate. They were to be kept back until there was dire necessity. We do not have the slightest hesitation in holding that Shri. Bhim Singh was not produced before the Executive Magistrate First Class on 11th and was not produced before the Sub-Judge on 13th. Orders of remand were obtained from the Executive Magistrate and the Sub-Judge on the applications of the police officers without the production of Shri. Bhim Singh before them. The manner in which the orders were obtained, i.e. at the residence of the Magistrate and the Sub-Judge after office hours, indicates the surreptitious nature of the conduct of the police. The Executive Magistrate and the Sub-Judge do not at all seem to have been concerned that the person whom they were remanding to custody had not been produced before them. They acted in a very casual way and we consider it a great pity that they acted without any sense of responsibility or genuine concern for the liberty of the subject. The police officers, of course, acted deliberately and malafide and the Magistrate and the Sub-Judge aided them either by colluding with them or by their casual attitude. We do not have any doubt that Shri. Bhim Singh was not produced either before the Magistrate on 11th or

before the Sub-Judge on 13th, though he was arrested in the early hours of the morning of 10th. There certainly was a gross violation of Shri. Bhim Singh's constitutional rights under Articles 21 and 22(2). Earlier we referred to the circumstance that though Shri. Khajuria, Inspector General of Police stated that information was sent to Superintendent of Police. Anantnag through the Police Control Room, Srinagar on 10th Sept., 1985, Shri. Mir, the Superintendent of Police, Anantnag stated that on 9th Sept., 1985 at 11.30 P.M., he was informed by the Police Control Room, Srinagar that Shri. Bhim Singh was required to be apprehended as he was wanted in a case registered under Section 153A of the Ranbir Penal Code. Nobody cared to explain why it was thought that Bhim Singh would pass through Qazi Kund in Anantnag District on the night of September 9-10. Nobody thought fit to explain how and why the Senior Superintendent of Police, Udhampur came to direct his officers to escort Bhim Singh. It has not been explained how and when the Senior Superintendent of Police, Udhampur came to know of the arrest of Bhim Singh and who required him to arrange for the 'safe passage' of Bhim Singh through Udhampur District. To our minds, it appears as if it was expected that Bhim Singh would proceed from Jammu to Srinagar on the intervening night of 9-10 September, 1985 as there was a meeting of the Assembly on 11th September and the police were alerted to arrest him when sighted en route to Srinagar and take him back to prevent him from proceeding to Srinagar to attend the Session of the Legislative Assembly. We can only say that the police officers acted in a most highhanded way. We do not wish to use stronger words to condemn the authoritarian acts of the police. If the personal liberty of a Member of the Legislative Assembly is to be played with in this fashion, one can only wonder what may happen to lesser mortals! police officers who are the custodians of law and order should have the greatest respect for the personal liberty of citizens and should not flout the laws by stooping to such bizarre acts of lawlessness. Custodians of law and order should not become depredators of civil liberties. Their duty is to protect and not to abduct.

6. However the two police officers, the one who arrested him and the one who obtained the orders of remand, are but minions, in the lower rungs of the ladder. We do not have the slightest doubt that the responsibility lies elsewhere and with the higher echelons of the Government of Jammu and Kashmir but it is not possible to say precisely where and with whom, on the material now before us. We have no doubt that the constitutional rights of Shri Bhim Singh were violated with impunity. Since he is now not in detention, there is no need to make any order to set him at liberty, but

suitably and adequately compensated, he must be. That we have the right to award monetary compensation by way of exemplary costs or otherwise is now established by the decisions of this Court in *Rudul Sah vs. State of Bihar*, (1983) 3 SCR 508: (AIR 1983 SC 1086) and *Sebastian M. Hongray Vs. Union of India*, AIR 1984 SC 1026. When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation. We consider this an appropriate case. We direct the first respondent, the State of Jammu and Kashmir to pay to Shri Bhim Singh a sum of Rs. 50,000/- within two months from today. The amount will be deposited with the Registrar of this Court and paid to Shri. Bhim Singh.

7. Order accordingly.

Supreme Court of India
AIR 1987 SC 355

Peoples' Union of Democratic Rights
vs
State of Bihar

Ranganath Misra and M.M. Dutt, JJ.

1. Peoples' Union for Democratic Rights, an organization said to be committed to the upholding of fundamental rights of citizens has filed this application under Article 32 of the Constitution. It is alleged that on 19th April, 1986, 600 to 700 poor peasants and landless people mostly belonging to backward classes had collected for holding a peaceful meeting within the compound of Gandhi Library in Arwal, a place within the District of Gaya in the State of Bihar. Without any previous warning by the police or any provocation on the part of the people who had so collected, the Superintendent of Police, Respondent No.3 herein, reached the spot with police force, surrounded the gathering and opened fire as a result of which several people were injured and at least 21 persons including children died. The petitioner alleged that separate unofficial inquiries have been held into the atrocity and the reports indicated that the number of deaths was much more than 21 and there was no justification for the firing. It appears that there was a dispute relating to possession of 26 decimals of low lying land adjacent to the canal at Arwal and to such dispute members of a rich Rajak family on one side and members of nine poor families on the other were parties. Even though several people died and many more were injured by the ruthless and unwarranted firing resorted to by the police, to give a cover to the atrocities, the police started a false case being Arwal P.S. Case No.59 of 1986 and therein implicated several innocent people including even some of the people who had been killed in the firing. Three specific prayers were made in the writ petition, namely:

- (1) To issue an appropriate writ to make an order or direction in the matter of payment of full and proper compensation to the victims-relations of the dead and to the people who were injured by police firing;
- (2) For a direction to withdraw the police case referred to above; and
- (3) For a direction to the Respondent No.1 to settle the land in dispute within the nine poor families.

2. During the hearing of the matter, an additional relief was pressed, namely this Court should give a direction for instituting a judicial inquiry into the alleged atrocity.
3. It may be pointed out that during the pendency of this writ application the State Government in response to the growing demand for a judicial inquiry into the matter directed an inquiry therein by Shri Vinod Kumar, Member, Board of Revenue, Bihar. The said inquiry has been completed and the report has already been furnished to the Government. On the orders of the Court, the report has been produced before this Court with a claim to privilege against the disclosure thereof.
4. The incident drew a lot of publicity and attention both within the State as also outside. Coming to know about it, Shri B.D. Sharma, Assistant Commissioner for Scheduled Castes and Scheduled Tribes visited the locality and made a report. At the instance of the petitioner, that document was summoned and has been produced. In respect thereof the Union Government has also claimed privilege.
5. In the affidavits in opposition filed on behalf of the respondents the factual assertions raised in the writ petition have been disputed. It has also been brought to our notice that a writ petition has been filed before the Patna High Court prior to filing of this application under Article 32 before this Court and the writ petition in the High Court is still pending. Once this fact was brought to our notice, Mr. Mukati for the petitioner submitted that we should direct transfer of the writ petition pending in the High Court to this Court so that both the matters can be heard together. We are of the view that it would be appropriate that the matter is examined by the High Court. It would be convenient to the parties to produce material before the High Court on account of proximity; the High Court will be in a position to call the documents and, if necessary, affidavits of parties concerned as and when necessary while dealing with the matter; and without notice and without affording a reasonable opportunity to the parties to the writ petition before the High Court an order to transfer may not be appropriate. In these circumstances, we have not thought it proper to have the writ petition in the High Court transferred to this Court. On the other hand, we have considered it expedient and proper in the interest of justice to dispose of some aspects of the matter now and leave it open to the petitioner to canvass the other aspects by getting itself impleaded before the High Court in the pending writ petition or by the filing of an independent application.
6. There has been no dispute that as a result of police firing 21 people died and several others were injured. The heirs and relations of a few of the dead people had been

compensated by the State to the tune of Rupees ten thousand as found from the record. No justification has been indicated as to why the said compensation has not been given in every case of death or injury. It is a normal feature of which judicial notice can be taken that when such unfortunate consequences emerge even in police firing, the State comes forward to give compensation. Mr. Jaya Narayan, for the State candidly stated before us that it is not the intention of the State to deprive the relatives of some of the victims who succumbed to the injuries sustained by police firing from benefit of compensation. Ordinarily in the case of death compensation of Rupees twenty thousand is paid and we see no reason as to why the quantum of compensation should be limited to rupees ten thousand. We may not be taken to suggest that in the case of death the liability of the wrong-doer is absolved when compensation of Rupees twenty thousand is paid. But as a working principle and for convenience and with a view to rehabilitating the dependants of the deceased such compensation is being paid. We direct that:

- (1) without prejudice to any just claim for compensation that may be advanced by the relations of the victims who have died or by the injured persons themselves, for every case of death compensation of Rupees twenty thousand and for every injured person compensation of Rupees five thousand shall be paid. Where some compensation has already been paid, the same maybe adjusted when the amount now directed is being paid. These payments be made within two months hence.
- (2) In case the petitioner gets impleaded in the pending writ petition before the High Court or files a separate writ petition and presses for disclosure of the report of Mr. Kumar, the High Court may examine the question as to whether the report will be made public and in the event of privilege being claimed, the question of privilege will also be examined by the High Court.
- (3) We have read the report furnished by the Assistant Commissioner of Scheduled Castes and Scheduled Tribes and since the report is not relevant to the point in issue, it is not necessary to ask the High Court to call for the report. We direct that the report be returned to the appropriate Ministry from where it has been brought.
- (4) The investigation of the pending police case shall be completed within three months from now. In case charge-sheet is submitted, it would be open to the petitioner or any other aggrieved party to challenge the maintainability of the charges in accordance with law.

Supreme Court of India
1989 (4) SCC 730

People's Union for Democratic Rights and Another
vs
Police Commissioner, Delhi Police and Another

G.L. Oza, K.N. Saikia, JJ

.....

2. It is an unfortunate case where the police collected poor people and took them to the police station for doing some work. They were asked to work without labour charges. On demand they were beaten and it appears that one of them Ram Swaroop succumbed to the injuries and the body has also been disposed of. Petitioner 2 Patasi, as alleged, was also stripped of her clothes and was thrashed in the police station. The other eight persons namely (1) Dandwa (2) Ram Prasad (3) Jaipal (4) Mahavir (5) Kannu (6) Munsjia (7) Hukka and (8) Pratap were also beaten up rather than they should have been paid for the work they did at the police station.
3. We are happy and we record our appreciation that Mr. A.S. Khan, Deputy Commissioner of Police in his Affidavit has frankly accepted the atrocity committed by the Police Officers and it also appears some action has been taken and Station House Officers has been arrested. The matter is being investigated for criminal prosecution. It is unfortunate that the Police to whom the citizen can approach for protection and help acted in such a manner.
4. Under the above circumstances we direct that the family of Ram Swaroop who is dead will be paid Rs.50,000 as compensation, which will be invested in some scheme under the Life Insurance Corporation, so that the destitute family may get some amount monthly and the money may also be kept secured. It is also directed that petitioner 2 Patasi who were stripped of her clothes at the Police Station, shall be paid Rs.500 as compensation and the 8 other persons namely (1) Dandwa (2) Ram Prasad (3) Jaipal (4) Mahavir (5) Kannu (6) Munsjia (7) Hukka and (8) Pratap, who were take in the police station without being paid for their work will be paid Rs.25 each. It is directed that after investigation and inquiry officers who are found guilty, the amount paid as compensation or part thereof may be recovered from these persons out of their salaries after giving them opportunity to show cause.
5. This order will not prevent any lawful action for compensation. But in case some compensation is ordered by a competent court, this will be given credit to.

Supreme Court of India
AIR 1990 SC 513

**Saheli, A Women's Resource Centre,
Through Ms. Nalini Bhanot and Others**
vs
Commissioner of Police, Delhi and Others

B.C. Ray, S. Ratnavel Pandian, JJ.

1. These writ petitions have been filed by the Women's and Civil Rights Organization known as SAHELI, a Women's Resources Centre on behalf of two women Maya Devi and Kamlesh Kumari who have been residing in one room tenement each on the ground floor of house No. 408/5/AL Gali No. 29, Anand Parbat and were severely beaten up by the alleged landlord in collision with the S. H. O., Shri. Lal Singh and the police of Anand Prabat Police Station. The facts of the case giving rise to these writ petitions are as follows.
2. Kamlesh Kumari and her husband Inder Singh moved into the house No. 408/5/A L, Gali No. 29, Anand Parbat in 1974. They had three children Saroj 13 years old girl, Naresh 9 years old boy (now deceased) and Suresh 7 years old boy. They were living in one room on the ground floor of the said house which is a double storeyed. The other lady, Maya Devi has also been living in another room of the said house on the ground floor with her husband and children. The husbands of both Kamlesh Kumari and Maya Devi are truck drivers and they often remain away from their home. There is a dispute over the ownership of the house. In or about 1984, the old landlord, one Tajinder Singh left the house and one Manohar Lal claims to be the new landlord. At present one Puran Chand and his two sons Shambu Dayal and Prakash Chand claim to have bought the said property from Manohar Lal and they have been illegally evicting all the tenants from the said premises. In their attempt they succeeded in evicting all the tenants except the two tenants named Kamlesh Kumari and Maya Devi. It is because of these illegal threats of eviction, Kamlesh Kumari obtained an order of stay from the Court against her forceful eviction and that said order is in force. Some time in October, 1987 the so-called landlords cut off the water and electricity supply to Kamlesh Kumari's room and the same has not been restored till this day. On November, 2, 1987 the then S. H. O. of Anand Parbat Police Station, Lal Singh called for Kamlesh Kumari and told her to vacate the room. On November 4, 1987, the said S. H. O. again

called for Kamlesh Kumari and when she arrived at the police station she found that the so-called landlords were already present there. In the presence of Shambu Dayal and others, Lal Singh told Kamlesh Kumari to take some money and leave the room whereon Kamlesh Kumari said that she should be given some time especially because her children are studying in schools. On Nov. 12, 1987, the said S.H.O. once again called Kamlesh Kumari and this time he threatened to lock her up if she refused to vacate the room. On November 13, 1987, Kamlesh Kumari went to Tis Hazari Court to consult her lawyer. On coming back she found her children missing and Maya Devi was standing outside, all her belongings thrown out Maya Devi told Kamlesh Kumari that the Sub-Inspector of Police K. I. Nanda of Anand Parbat Police Station had come and had taken away her children and had thrown away Maya Devi from her room. Kamlesh Kumar immediately went to the police station and met the S. H. O. Lal Singh and asked him about her children. The S. H. O. said that her children had been kept locked up and she would not allowed to see her children unless she vacated the room. Kamlesh Kumari then went to Tis Hazari Court to see her lawyer. The lawyer phoned the police control room and rushed back to Anand Parbat Police Station. With great difficulty the lawyer got the three children released from the police station.

3. On the same day, i.e. November 13, 1987, after Kamlesh Kumari and her children had just taken their dinner, Shambu Dayal trespassed into her room and hit Kamlesh Kumari on the forehead with a brick. She rushed to the police station and reported the matter to the police. The police had her medically examined but refused to take any action against the assailants.
4. On November 14, 1987, Kamlesh Kumari was attacked by Shambu Dayal, his brother Prakash Chand accompanied by Lal Singh in civilian clothes and Sham Lal, Sub-Inspector in uniform accompanied by two others. They beat Kamlesh Kumari, tore her clothes and molested her. Her nine years old son clung to his mother to protect her when Lal Singh took him away and forcibly threw him on the floor. Lal Singh also asked Shambu Dayal to beat Naresh. Kamlesh Kumari was dragged away to the police station and a criminal case was imposed upon her of trespass. She was sent to Tihar Jail and her lawyer got her released on November 16, 1987. Kamlesh Kumari on her release came back and found that her child, Naresh was in a very bad condition. The children took shelter at a neighbour's house and the neighbours had got local doctors to look after Naresh. On the advice of the doctors, Naresh was admitted to Ram Manohar Lohia Hospital on Nov. 18, 1987. However, no medical legal case was registered Kamlesh Kumari's lawyer tried to get a medical legal case registered. At last medical legal case

was registered on Nov. 23, 1987 by the ACP, Patel Nagar at 11.30 p.m. In the FIR No. 143/87 the said ACP had written that she had said that no policeman had beaten her son although she had specifically named Lal Singh and others. On Nov. 26, 1987, Naresh died in hospital and an inquest was carried out. This news was published in the Hindi newspapers.

5. On December 10, 1987, S. D. M. Vipul Mittra called Kamlesh Kumari to his office stating that he was conducting an enquiry into the facts and circumstances leading to Naresh's death. On December 6, 1987 the Crime Branch filed its report in the Court opposing bail for Shambu Dayal. In the said report, it has been stated that the details of the D.D. entries mentioned in the bail application itself show conspiracy or connivance of the local police with the accused. This report was annexed as Annexure 'C' to these petitions. Kamlesh Kumari and her neighbours and lawyer on the day of Naresh's death sat on dharna outside the residence of the Lt. Governor and demanded that a judicial enquiry be ordered into the death of Kamlesh's son, Naresh. The report given by the fact-finding-team of the Peoples's Union for Democratic Rights, into the death of Naresh was also published. The said report states that the representatives of the Peoples' Union for Democratic Rights met the S.D.M. Vipul Mittra who told them that he would intimate them his findings, but subsequently when they contacted him they were told that it was a sensitive report and it can be made public only by the Lt. Governor. As such the instant writ petitions were moved before this Court praying amongst others the issuance of a writ for directions directing the respondents to pay Kamlesh Kumari exemplary damages for the death of her son, Naresh.
6. On June 13, 1988, this Court directed to implead the Medical Superintendent, Ram Manohar Lohia Hospital, New Delhi as respondent No. 4 and also directed the Medical Superintendent to keep the record relating to Naresh, son of Kamlesh Kumari in a sealed cover and deposit the same with the Registrar of this Court within two weeks from the date of the order. By order dated August 22, 1988 the respondents were given two weeks time to file counter-affidavit and one week's time thereafter was given to the petitioners to file rejoinder.
7. Kanwaljit Deol, Deputy Commissioner of Police, Headquarters (II), Delhi on behalf of Commissioner of Police affirmed an affidavit in counter wherein it has been stated that :

On the basis of the aforesaid complaint ACP/Patel Nagar got registered case FIR No. 143 dated 24.11.1987 under Section 308/34 IPC, P. S. Anand Parbat, New Delhi and entrusted investigation to Inspector, Vigilance, Central Dist., who arrested accused

Shambu Dayal, son of Puran Chand on 24.11.1987. On 26.11.1987 Naresh expired in Ram Manohar Lohia Hospital and post-mortem was got conducted. The autopsy doctor opined that injuries were ante-mortem caused by blunt force impact/possible injuries were not sufficient to cause death. Death was due to pneumonitis as diagnosed clinically. Offence was charged to Section 304/34, IPC.

8. It has also been stated therein that Maya Devi was residing in one room adjacent to room of Kamlesh Kumari for 6-7 months, the landlords did not issue any rent receipt. It was also stated that :

On 13.11.1987 the landlord forcibly got vacated the room in possession of Maya Devi with the connivance of local police which is evident from the DD entry made by Asst. Sub-Inspector, Kishan Lal who visited the spot on the information of quarrel between Maya Devi and landlords' men.

9. It has further been stated that :

On 14.11.1987, Shambu Dayal got registered a false case under Section 448, IPC to get the above objective and the local police arrested Smt. Kamlesh Kumari the same day. She was not admitted to bail despite approach by her relatives. The S. H. O. himself took part in the beatings and the minor child (Naresh) of Smt. Kamlesh was also not spared, and was thrown away while he clunged to feet of his mother, while she was being beaten mercilessly. Naresh sustained severe injury in his left leg and could not be attended by the doctors in absence of his parents. On 16.11.1987 only Naresh was attended by his mother after release from jail and by then the child had suffered from old ailments. She took him to R. M. L. Hospital on the advice of the local doctors. The injuries inflicted to Naresh on 14.11.87 caused fever and pneumomitis and finally resulted in his death. Later on the nature of injury on left leg of the child was opined to be grievous one.

10. The relevant portion of the report dated 5.12.1987 submitted Puran Sing, Inspector, Crime Branch, Delhi is quoted hereunder :

So far it seems that there is a high level conspiracy in getting the rooms of tenants vacated by the landlord if the accused is bailed out, it will be difficult to find out the truth. Smt. Shobha and the doctor are already under pressure. As the local police involved in all this episode so bailing out the accused will definitely affect the fate of the case. The accused should not be bailed out as it is clear case under Section 302/120B, IPC. The details of DD entries mentioned in the bail application itself show the conspiracy or connivance of the local police with the accused. Therefore the bail is opposed strongly.

11. The landlord, Shambu Dayal and Puran Prakash and Lal Singh, S. H. O. and Shyam Lal, Sub-Inspector have been impleaded as respondents by order dated September 20, 1988 in these writ petitions. They also filed counter-affidavits.

12. It is now apparent from the report dated 5.12.1987 of the Inspector of the crime Branch, Delhi as well as the counter-affidavit of the Deputy Commissioner of Police, Delhi on behalf of the Commissioner of Police, Delhi and also from thefact that the prosecution has been launched in connection with the death of Naresh, son of Kamlesh Kumari showing that Naresh was done to death on account of the beating and assault by the agency of the sovereign power acting in violation and excess of the power vested in such agency. The mother of the child, Kamlesh Kumari, in our considered opinion, is so entitled to get compensation for the death of her son from the respondent No. 2, Delhi Administration.
13. An action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In cases of assault, battery and false imprisonment the damages are at large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death. As we have held hereinbefore that the son of Kamlesh Kumari aged 9 years died due to beating and assault by the S. H. O., Lal Singh and as such she is entitled to get the damages for the death of her son. It is well settled now that the State is responsible for the tortious acts of its employees. The respondent No. 2, Delhi Administration is liable for payment of compensation to Smt. Kamlesh Kumari for the death of her son due to beating by the S. H. O. of Anand Parbat Police Station, Shri. Lal Singh.
14. It is convenient to refer in this connection the decision in *Joginder Kaur Vs. The Punjab State*, 1968 Acc CJ 28 at p. 32: (1969) Lab IC 501 at p. 504) (Punj), wherein it has been observed that :
In the matter of liability of the State for the torts committed by its employees, it is now the settled law that the State is liable for tortious acts committed by its employees in the course of their employment.
15. In *State of Rajasthan Vs. Mst. Vidhyawati*, 1962 Supp (2) SCR 989 at p. 1007 : (AIR 1962 SC 933 at p. 940) it has been held that :
Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the common law immunity never operated in India.....

16. *In Peoples Union for Democratic Rights through its Secretary and Another Vs. Police Commissioner, Delhi Police Headquarters and Another* (writ petitions (Cri.) Nos. 401-402 of 1986 orders in which were pronounced by this Court on January 13, 1989) one of the labourers who was taken to the police station for doing some work and on demand for wages was severely beaten and ultimately succumbed to the injuries. It was held that the State was liable to pay compensation and accordingly directed that the family of the aforesaid labourer will be paid Rs. 75,000/- as compensation.
17. On a conspectus of these decisions we deem just and proper to direct the Delhi Administration, respondent No. 2 to pay compensation to Kamlesh Kumari, mother of it deceased, Naresh a sum of Rs. 75,000/- within a period of four weeks from the date of this Judgement. The Delhi Administration may take appropriate steps for recovery of the amount paid as compensation or part thereof from the officers who will be found responsible, if they are so advised. As the police officers are not parties before us, we state that any observation made by us in justification of this order shall not have any bearing in any proceedings specially criminal prosecution pending against the police officials in connection with the death of Naresh. The writ petitions are disposed of accordingly.
18. Order accordingly.

Delhi High Court
1992 Cri. LJ 128

P. V. Kapoor and another
vs
Union of India

B.N. Kirpal, D.K. Jain, JJ.

1. Two lawyers of this Court have filed this writ petition, under Article 226 of the Constitution, in the nature of Public Interest Litigation, alleging that in the police firing on a crowd of unarmed students on 25th September, 1990 in or about INA Market, New Delhi, one Devinder Kumar Sharma was mercilessly and cold-bloodedly killed. The evidence for this occurrence is stated to be contained in a video film which was shot by M/s. Living Media House Limited and distributed in the October, 1990 issue of a video news magazine in the name and style of NEWS TRACK.
2. The petition is based on the aforesaid issue of NEWS TRACK. According to the averments in the petition, Devinder Kumar Sharma was shot at somewhere above the waist by the Delhi Police and thereafter he was dragged for a considerable distance by the very shattered arm which hung limp and twisted and he was thereafter lifted into a police jeep. It is further alleged that while he was being dragged in this manner, Devinder Kumar Sharma bled profusely, leaving a trail of his blood behind him and in fact he was also asked to get up but when he was unable to do so, he was again dragged for a considerable distance till he was put in the police jeep. It is further stated that no police vehicle was immediately made available for his being carried to the hospital and nor was any first aid or medical aid provided.
3. According to the petitioners, Devinder Kumar Sharma was participating in a protest against the Mandal Commission Report, which the Government had decided to implement. It is contended that the police resorted to shooting above the waist following an injury received by one of the police men as a result of stone throwing. According to the petitioners, full riot gear techniques and disproportionate force was utilised that what was demanded by the situation. It is further submitted that gross brutality has gone unnoticed and there has been violation of basic human rights. The prayer in the writ petition, inter alia, is that order should be passed directing compensation of Rs. 5 lakhs to the family of Devinder Kumar Sharma. It is also prayed

that direction be issued to the Union of India to initiate appropriate criminal action under the relevant and applicable provisions of the Indian Penal Code against such of the officers or constables of the Delhi Police who were responsible for causing death of Devinder Kumar Sharma and also for such other criminal and culpable action as seen in the said video film.

4. Vide order dated 26th October, 1990, Living Media was directed to be impleaded as one of the respondents. Medical records were sent from the hospital to which the injured of the firing of 25th September, 1990 at the INA Market area had been taken. It also transpired that apart from NEWS TRACK, there were other video films which were being shot. Orders were then passed directing M/s Living Media to file in Court, with copies to the parties, the un-edited version of the story which had appeared in the NEWS TRACK of October, 1990. Pursuant to the directions issued by this Court, the Press Trust of India were also directed to file an un-edited version of what their video team had recorded at the INA Market. Both the Living Media as well as the Press Trust of India filed their cassettes. In addition thereto, the police also filed a cassette without disclosing as to who had shot the said video film.
5. During the course of the preliminary hearing of this petition it came to light that on 25th September, 1990, in an area adjoining the INA Market viz., at Sarojini Nagar, the police had also resorted to firing and one 15 year old boy Aditya Narain had been shot. The said Aditya Narain was removed to the hospital but after a few days, he expired. Shri. R. N. Sharma, the father of Aditya Narain, with leave of the Court, filed an affidavit narrating the incidents which, according to him, had taken place on that fateful day at the Sarojini Nagar area.
6. With the filing of the affidavit by Shri. R. N. Sharma, the scope of the writ petition was enlarged so as to encompass the incidents at Sarojini Nagar and INA Market because firing had been resorted to at both the places within a radius of 1 Km. The respondents have filed a detailed reply dealing with the incidents at INA Market and also at Sarojini Nagar area.
7. While the respondents have not denied that firing was resorted to as a result of which two persons died at INA Market and one boy viz. Aditya Narain died after a firing at Sarojini Nagar, the case of the respondents, however, on merits, is that there were riotous mobs at both the areas. The said mobs were armed and despite having used tear gas and lathis, the mob did not disperse and the respondents had no alternative but to resort to firing at INA Market. With regard to the firing at Sarojini Nagar, it is

alleged that there were only two police men who were present who had to face a very large crowd who were throwing stones at the police officials and had also tried to snatch the rifle of a police constable. It is admitted that the police constable as well as the Sub-inspector fired one shot each but, according to the respondents, there was justification on the part of the police in resorting to firing at both the places. The respondents have also placed on record, entries of the case diaries and the log books in an effort to show that there was riotous mob which was present and the action of the police could, under no circumstances, be regarded as excessive. Apart from justifying the resort to firing, the respondents have also contended that this petition cannot be regarded or treated as a public interest litigation and that disputed questions of fact are involved.

8. The three video films which have been filed, were seen by us as well as by counsel for the parties. For the purpose of ascertaining the facts, therefore, we not only have before us the averments made in the pleadings, and the affidavits in support thereof, but we also have the advantage of viewing the video cassettes. At the outset we would like to observe that none of the parties has alleged that any of the three video cassettes which have been placed on the record, are 'doctored'. In fact viewing of the three cassettes shows that they corroborate each other with regards to what has been recorded therein.
9. Before dealing with the question as to whether this petition can be regarded as PIL, we may dispose of the contention of the learned counsel for the respondents relating to the alleged availability of alternative remedy. In this connection it was also submitted that one of the persons who had died in the firing at INA Market was Pawan Sahni. His brother had filed a criminal complaint before the Magistrate but the said complaint had been rejected. The submission, therefore, was that as the alternative remedy had already been availed of, where the allegation was with regard to the firing at INA Market, this Court should not interfere under Article 226 of the Constitution. It was also submitted that because the crowd was indulging in rioting, the police itself had lodged FIRs in respect thereto and, therefore, because the Court had issued summons, it should be left to the Court to decide whether the firing was justified or not. It was contended that the investigation of the fact whether any unlawful activity was carried on by the rioters, will be gone into by the Court of competent jurisdiction and, therefore, the petition under Article 226 of the Constitution was not maintainable.
10. We, however, find that the complaint of the brother of Pawan Sahni was not rejected or dismissed on merits. Copy of the order of the Magistrate had been placed before us

which shows that the Magistrate was of the opinion that before seeking to prosecute the police officers, permission under Section 132 Criminal Procedure Code should have been obtained. As the complainant had not obtained the necessary sanction, the Magistrate rejected the complaint. In our opinion, the decision of the Magistrate to this effect cannot oust the jurisdiction of this Court which is called upon to decide inter alia whether the resort to firing by the police was justified or not and whether Devinder Kumar Sharma was or was not properly handled after he had been shot. The filing of the FIRs under Section 173 of the Cr. P. C. against the rioters is also of no consequence. Whereas in those proceedings action is sought to be taken against the rioters, in the present writ petition, it is the acts of the police which are sought to be impugned. The pendency of the cases against the rioters can, therefore, be no bar to the decision on the issues arising in the present petition.

11. With regard to the contention whether to entertain this petition and treat it as a Public Interest Litigation, it was submitted by learned counsel for the respondents that Devinder Kumar Sharma was not a student and he was a part of an unlawful assembly. According to the police, this unlawful assembly was armed with stones, sticks, petrol bombs, country made arms etc., and was indulging in various riotous acts. It was submitted, that the Supreme Court had exercised jurisdiction in public interest litigation only when there had been violation of fundamental rights. In the present case it was submitted, there has been no violation of fundamental rights and furthermore, the petitioners had no locus standi to file the present petition.
12. It is evident, therefore, that in public interest litigation, the normal rules of recording evidence are not adhered to and an effective and speedy course is adopted with a view to ascertain the correct facts. In the present case, we have not thought it necessary to appoint any commissioner of commission for ascertainment of facts. We have the advantage of three video cassettes. Two of these cassettes have been prepared by independent agencies viz., Living Media and the Press Trust of India. The third cassette has infact been placed on record by the police department. All the three cassettes are more or less similar and in modern age and times when audio visual reproduction of events with the help of electronic media is available, we see no reason as to why we should disregard the audio visual evidence, which is available, in preference for a traditional recording of oral evidence in a Court room, of witnesses trying to recreate the scene by testifying in Court. Such witnesses may not tell the whole truth, intentionally or unintentionally, specially in view of the fact that the testimony would be recorded long after the events have taken place. With the

passage of time, the memory of the witness may become blurred. On the other hand we have with us the contemporaneous record of the events which had taken place on the 25th September, 1990, at or about the INA Market in the form of video cassettes. It is not suggested by any of the parties that these cassettes have been doctored or edited. They represent true recording of what was seen by the photographers. Each of the cassettes corroborates the other. Under these circumstances, we see no reason as to why facts should not be determined on the basis of what is recorded on the video cassettes. It is possible that each and every event which occurred at the INA Market was not shot by the photographers, nevertheless, for the view that we are taking on demonstratively evidenced facts which are recorded on the video cassettes, the correctness of which is not disputed, it is possible to decide this petition.

13. What do these video cassettes show? It is not necessary to graphically describe each and every event which is recorded on these cassettes. We propose, however, to refer to those portions of the cassettes which are relevant for our purpose,

14. All the three cassettes show the presence of a crowd which has been described as students by the petitioners. Perhaps all the members of the assembly were not students as is evident from the fact that Devinder Kumar Sharma was certainly not a student. The cassettes further show a large number of local residents also joining the assembly of persons. The heterogeneous assembly of course had one common object and that was to protest against the decision of the Government to implement the Mandal Commission report. The video cassettes record a lot of slogan shouting by the said assembly of persons. There is, however, no record of any violent act being performed by any part of the assembly, except the act of throwing stones at the police. The cassettes show that at a number of times, stones were thrown at the police by the gathered assembly. The police force was adequately clad and interestingly enough, cameras have recorded number of instances of the policemen picking up the stones and brick bats which had been thrown at them and their hurling them back at the students. At times it appears as if a new type of sport of throwing stones at each other was going on between the crowd and the polices. What is clear, however, is that the video cassettes do not show any lathis, acid bombs or any other weapon, lethal or otherwise, being used by the crowd against the police.

15. It was contended on behalf of the petitioners that there was no justification for resort to firing. There seems to be some justification in this submission. Viewing of the video cassettes shows that the mob was not so large as to be uncontrollable by the police without resort to firing. We find that the mob, initially had gathered in the

morning. The same was present throughout the day. In presence of the police, no act of arson appears to have been committed by the mob. The mob was being adequately controlled by use of tear gas shells and lathi charge. It is the case of the respondents itself that a large crowd had gathered at Safdarjung Hospital but no untoward incident had taken place there and even tear gas shells were not fired. Merely because a mob is present or does not disperse despite requests to that effect, cannot be a sufficient reason for resorting to firing. No property, moveable or immoveable can be more valuable or precious than the human life. It is no doubt true that, in law, the crowd could be regarded as an unlawful assembly but then there may be peaceful unlawful assemblies and violent unlawful assemblies. There cannot be a universal rule that under no circumstances should the police not resort to firing but we feel that where the crowd is peaceful or is incapable of resorting to large scale arson and violence, which will be a threat to the life and liberty of others, firing should not be resorted to. If the crowd can be contained or prevented from causing large scale damage to life and property by the use of tear gas shells and lathi charge, then there is no reason as to why firing should be ordered. The video cassettes show that the police was in a position to and did contain the crowd with the help of tear gas shells and lathi charge. Suddenly and without any apparent prior warning or notice, the police resorted to firing. There is no evidence of the situation having deteriorated with the presence of the crowd which could justify the use of such force. Had there been police force in large numbers, they would have no doubt been able to even disperse the crowd which was present there. In this connection it will be useful to note the following passage from Shri. R. Deb's book '*Police and Law Enforcement*' Second Edition, page 247 concerning the use of minimum force :

8. Use of Minimum Force : It must, however, be said in this context that when the crowd has already turned into a violent mob after going through the process of psychological milling, only a determined show of force can check its depredations. Members of such a riotous mob lose their individual capacity of thinking and act only on the suggestions of their ring leaders or other associates. With the loss of discriminating faculty of the individual mind, an appeal to reason is obviously meaningless. In such a situation an effective show or use of permissible force arouses the instinct of fright in the mob and it often disperses as a pack of animals in the face of gripping fear. And even when the use of force becomes inevitable, the police must use only the minimum force that is essential to preserve law and order. Whether they act in exercise of the right of private defence of body or property, or in exercise of their powers to disperse an unlawful assembly or an assembly of five or more persons likely to cause a disturbance of the public peace, the law enjoins on them to use no more force than is absolutely necessary for the protection of life and property, or for the maintenance of peace.

Thus taking of life can only be justified by the extreme necessity of dispersing a riotous crowd which is dangerous unless dispersed, so if dispersal can be effected simply by a warning, there is no justification to use any kind of force at all; and if a tear-gas charge or failing it, a lathi charge can cause the dispersal of the crowd, there is no scope of having a recourse to firing unless the mob becomes so violent as to necessitate the opening of immediate fire for the protection of life and property. The Sixth Principle of the Code of Conduct for the British Police, therefore, very wisely lays down :

To use physical force only when the exercise of persuasion, advice and warning is found to be insufficient to obtain public co-operation to an extent to restore order; and to use minimum degree of physical force which is necessary on any particular occasion for achieving a police objection.

The fourth clause of the Police Code of Conduct for the Indian Police too runs to the same effect. In dealing with crowds and unlawful assemblies it should never be forgotten that the police go to disperse a riotous mob in order to correct a situation in the interest of the public peace and not to punish the wrong-doers.

16. The Inspector Generals of Police Conference of 1961 constituted a Committee of Police Officers which formulated principles of police conduct, which were circulated to all the States in India in 1963. One of the principles mentioned therein is that in securing the observance of law or in maintaining order, the police should use the method of persuasion, advice and warning. Should these fail, and application of force become inevitable, only the absolute minimum required in the circumstances should be used. Even in Punjab Police Rule 14.56 it is provided that :

The degree of force used shall be the minimum which the responsible officer, with the exercise of due care and attention decides to be necessary for the effective dispersal of the crowd and the making of such arrests as may be desired. The degree and duration of the use of force shall be limited inasmuch as possible and the least deadly weapon which the circumstances permit shall be used.

17. Further instructions under the said Rule also provide that :

The degree of force employed shall be regulated according to the circum-stances of each case. The object of the use of force is to quell a disturbance of the peace or to disperse an assembly which threatens such disturbance and has either refused to disperse or shows a determination not to disperse; no ulterior objects such as punitive or repressive effect shall be taken into consideration.

18. It was contended by learned counsel for the respondents that on the night of 24/25th September, 1990, the crowd of students which had occupied the road crossing intersection at the All India Institute of Medical Sciences had been cleared by the police force without any resistance being encountered by the police. He further stated that in the early hours of 25th September, 1990, one S. S. Chauhan, who had, prior

to that date, tried to immolate himself, had expired. In view of his death, the police expected trouble. S. S. Chauhan had died in the Safdarjung Hospital which is not even 1 Km. away from the INA Market. A lot of police force was, accordingly, deployed at the Safdarjung Hospital. From the documents on record, it is evident that a very large crowd had assembled at Safdarjung Hospital and some of the members of the crowd had even forced their way inside the hospital premises. Nevertheless no untoward incident occurred at the Safdarjung Hospital. The reason for this is obvious viz., that sufficient number of police was deployed at Safdarjung Hospital.

19. It has been admitted by the learned counsel for the respondents that at INA Market area, there was only about 60 police constables and officers who were present. It cannot be denied that the police force at this place was not adequate in number. The size of the crowd at INA Market is not exactly known. The estimates, as per the log book maintained by the police vary from time to time. Whereas at one time it is recorded that a few hundred students were present, but at the peak, the number of students alleged to be there was 6000 to 8000. It is clear that when a fairly large crowd is present and the situation is volatile, then adequate police force should have been deployed. If a strong police force could prevent any untoward incident at Safdarjung Hospital, where not even a single tear gas shell was fired or lathi charge resorted to, we see no reason as to why sufficiently large police force was not deployed at the INA Market. Had such a deployment taken place, perhaps even tear gas shells need not have been fired. It is an old saying that 'there is safety in numbers'. Perhaps resort to firing by the police was nothing more than a panic reaction on its part by seeing a large crowd of students and miscreants which was throwing stones at the police. But over-reaction or excessive use of force is certainly not expected from a well trained or disciplined force which is the custodian of law and order in the city. Perhaps the authorities would be well advised to see whether adequate and proper training is being imparted to the police personnel in relation to the crowd or mob control.
20. At this juncture it will be pertinent to note that for some reason, which is not very clear, in the evening of 25th September, 1990 large number of policemen who were present at the INA Market, went to Safdarjung Hospital and got themselves medically examined. The police were examined between the time 7.15 p.m. and 11.30 p.m. The Medico-Legal Reports which have been placed on the record, do not show any injury on any of the police personnel who were so examined which was more serious than a simple hurt by a blunt weapon, possibly a stone. There certainly is no injury on any of the policemen which could have been caused by any lethal weapon or by

a petrol or bottle bomb. We are reverting to this in some details because, as already noted, the respondents have stated in their affidavit in reply that the crowd at the INA Market was armed with stones, sticks, petrol bombs, country made arms etc. We do not find any evidence of any one of the crowd having used any sticks or petrol bombs or country made arms at the police.

21. During the course of hearing and even along with the affidavit in reply, relevant extracts of the log books maintained by the police stations concerned, were produced before us. In none of the log books is there any entry with regard to the students using any acid bulbs, fire arms or any other lethal weapons, even though there are entries to the effect that the students had been throwing stones and were burning vehicles. A reply to the writ petition dated 11th December, 1990 was filed on behalf of the Commissioner of Police, Delhi. This reply is supported by an affidavit of Dy. Commissioner of Police which has been prepared on the basis of the police records and documents furnished by the officers at the spot and the information alleged to have been conveyed by them to the Commissioner of Police. Along with this reply, a report has also been placed on the record which purports to contain a record of the incidents which happened on various dates between 24th August, 1990 and 27th September, 1990. With regard to the incident of 25th September, 1990, it is mentioned in this report that one S. S. Chauhan, who had tried to self-immolate on 24th September, 1990, had died on 25th September, 1990. Thereafter about 1,000 to 1500 agitated students and residents of Sarojini Nagar, Vinay Nagar and Laxmi Bai Nagar are stated to have gone on a rampage. It is further alleged in this report that the agitators set on fire DTC buses and a jeep and also indulged in heavy stoning, thereby causing damage to railway reservation counter at Sarojini Nagar. The report further states that to quell the rampaged mob and to disperse them, the police opened fire as a result of which a 16 year old boy Aditya Narain Sharma suffered head injuries and was rushed to the Safdarjung Hospital.
22. With regard to the INA Market area, this report mentions the presence of a mob of about 7,000/8,000 students and residents and it is further stated that this mob indulged in heavy brick batteing on the police deployed there as well as arson. In order to disperse the crowd, the police resorted to firing. This report nowhere states that the students or the mob had any point of time used any weapons more lethal than stones. Of course it is alleged that vehicles were burnt it is nowhere stated in this report that the mob used country made weapons, acid bulbs. On 25th September, 1990, an FIR was also recorded at the instance of the police, the complainant being

the SHO, Police Station, Kotla Mubarakpur. In this, the incidents alleged to have taken place between 12 noon and 4.30 p.m. are set out. In this report it is mentioned that the crowd of boys was pelting stones and throwing bottles. At one place, in relation to an incident, it is also mentioned in the FIR that the crowd 'pelted stones and bottles on police force with sarias, lathis in their hands.'

23. In an effort to prove that the rioters were armed with lethal weapons, the respondents filed a number of photographs along with this reply. One of the photographs (C.30) shows a crowd armed with lathis, spears, rods etc. There was no indication as to who had taken the photographs. The respondents were accordingly required to file affidavits of the photographers giving more details with regard to these 57 photographs which have been filed. Affidavits of S/Shri. S. N. Sikka of Hindustan Times, N. D. Prabhu of PTI, J. C. Jain of Sunday Mail, PCM Tripathi of Indian Express were filed, wherein they identified the photographs which had been taken by their staff photographers. In addition thereto, affidavit of S. I. Anant Lakra was filed in which he stated that he had obtained six of the photographs from two of the Delhi newspapers. Shri. Surender Singh, In charge, Saket Police Station also filed an affidavit to the effect that he had taken 17 photographs. What is important to note is that none of these deponents has stated that anyone of them took the photograph C-30. There is no explanation on the record which would indicate as to from where did the police obtain the photograph showing a mob with lathis, spears etc. The perusal of the photograph itself does not show that it pertained to the area in question. There is no similarity, in the background of the photograph, to the other photographs which have been placed on the record. We are not satisfied that the said photograph was taken either at the INA Market area or at the Sarojini Nagar area. In fact there is nothing to indicate as to when and where that photograph was taken. It appears to us that the said photograph has been filed with a view to support the reply affidavit in which it is alleged that the members of the crowd were carrying lathis, spears and even country made fire arms. A large number of police officers trooped into the Safdarjung Hospital in the evening of 25th September, 1990 and got themselves medically examined. None of the police personnel, so examined, had any injuries on his person which could have been caused by acid bulbs, petrol bombs, iron rods or fire arms. There is no mention of the use of these lethal weapons either in the FIR or in the log books. In none of the video cassettes can these weapons be seen in the hands of the crowd. There is also no evidence of the crowd possessing any country made fire arms. We have no manner of doubt that the averment made in the reply filed on behalf of the police 'that the police was attacked with Soda Water bottles, acid bulbs, petrol bombs, iron

rods, even country made fire arms "katta" were fired upon at the police party', is vastly exaggerated and incorrect. It is unfortunate that a false averment in this regard has been made in the reply affidavit filed on behalf of the Commissioner of Police. This averment has been made possibly in an effort to try and justify the firing which was resorted to by the police. It must have appeared to the police authorities that it may be difficult to justify resort to firing on a crowd which was armed only with sticks.

24. It is unfortunate that the allegation with regard to use of the fire arms against the police had also been made by Dr. Aditya Arya, Addl. Deputy Commissioner of Police (South) in his affidavit dated 13th March, 1991 filed before us. It has been averred in this affidavit that 'police was fired upon with country made weapons capable of firing 12 bore cartridge'. As we have already observed, here is no injury caused to the police personnel with any weapon more lethal than a stick. In none of the log books is there any mention of any country made weapons being used against the police. It is further surprising that if any member of the mob was using such weapons, not a single weapon has been snatched by the police. The said averment of Dr. Arya is clearly an attempt to justify the resort to firing by the police. This averment is also an improvement on the report which was submitted by the said Dr. Arya on 7th January, 1991, to the Dy. Commissioner of Police (HQs) in reply to a Rajya Sabha Question No. 2937. In reply to an office memorandum of 4th January, 1991, pertaining to the said Rajya Sabha question regarding anti-reservation agitation, the Addl. DCP in his report, inter alia, mentioned that there were a large number of students who had gathered at Laxmi Bai Nagar (East), West Kidwai Nagar and INA Market. They set two police booths, DTC booth, an Ambassador car, a jeep, a motor cycle and a Post Office on fire in the area. To control the riotous mob, the police fired 168 tear gas shells and resorted to lathi charge several times. It was then stated that 'when the unlawful assembly did not disperse, the police had to resort to firing. In the firing, the above two persons sustained bullet injuries and subsequently died in the hospital.' This report does give in detail the property which was damaged by the mob but it nowhere mentions that any member of the mob resorted to any firing on the police.
25. After going through all the three cassettes, and the record of this case, it seems that, as already observed by us, there was an unlawful assembly present at the INA Market. Some miscreants in the said assembly were indulging in stone throwing at the police while some of the others did burn two or three vehicles in and around the area. Nevertheless the crowd was well under control of the police with the help of the police firing tear gas shells and, at times charging at the crowd. Unfortunately none of

the video cameras has recorded any prior warning having being given to the members of the assembly that if they did not disperse, then firing will be resorted to. There is nothing to show that the situation had become so volatile so as to have necessitated the police in resorting to firing. In the afternoon when the stone throwing had been intensified then again, suddenly and without prior warning, firing was resorted to and Devinder Kumar Sharma was shot.

26. There can be no denying of the fact that the policemen were faced with a law and order problem. The wrath of the assembly was against the police; it is the police personnel, who were the targets of the stones thrown by the assembly. While there can be no possible justification for the assembly resorting to stone throwing, we have no hesitation in coming to the conclusion that there was an excessive use of force by the police when it resorted to firing.
27. If there was an excessive use of force, can any individual police officer be blamed for it. On the facts of this case, the answer to this question must be in the negative. We do not find any mala fides on the part of the police in resorting to firing. It is clear that tension was prevailing in the area since the morning of 25th September, 1990. Adequate number of police force had not been deployed for which the blame cannot be fastened with the policemen who were present at the INA Market and the blame must lie elsewhere. The inadequate number of policemen which was present had been exchanging stones with the unlawful assembly and had also been firing tear gas shells and had resorted to lathi charge when ordered to do so. Firing was resorted to either because of misjudgement or by way of a panic reaction but certainly not due to any mala fide intention on the part of the police. With the promulgation of the Delhi Police Act, the powers of the Executive Magistrate have been conferred on the police officers of the rank of Sub-inspector and above. Under the provisions of Section 130, Cr. P. C. firing is resorted to if it is ordered by the Executive Magistrate or if the Executive Magistrate is not present and firing has to be resorted to, then under Section 131, Cr. P. C. he has to be informed about the same. With the promulgation of the Delhi Police Act, the decision making authority and the executing authority has now become one and the same viz., the police officer. We would not like, in this regard, to comment on the advisability of such a situation but the fact remains that it is the officers who were being subjected to stone throwing and who had not been able to disperse the crowd, despite firing of the tear gas shells, who decided that firing should be resorted to. Perhaps the officers felt that the only way to disperse the crowd was to resort to firing. It is a moot question whether dispersal of the crowd was so

- important that human beings had to be killed in order to do so and also whether the decision to resort to firing should not be taken by an officer e.g. Magistrate, who may himself not be involved in the struggle and can view the situation more objectively.
28. Coming to the question of the manner in which the injured must be treated, we find that an important instruction which has been issued under Punjab Police Rule 14.56 is that when fire arms are used against unlawful assembly, it should be the duty of the Magistrate present to make adequate arrangements for the care of the wounded persons and for their removal to the hospital. The Magistrate is also enjoined to draw up a full report in consultation with the senior police officers present, stating all the circumstances and noting the number of rounds of ammunition issued and expended.
29. In the present case, there were several companies of police present at the INA Market. Some of the police officers were armed with fire arms. The superior officers must have visualised the possible use of the fire arms on the crowd. Having deployed armed policemen at the INA Market, it was the duty of the police authorities to see that adequate arrangements were made to aid and assist the wounded if firing was to be resorted to. No such arrangements were made. All the video cassettes show, and this is also admitted by the Commissioner of Police, that D. K. Sharma was bodily lifted by four policemen after he had been shot and wounded. He was picked up from near the shops at the INA Market by four policemen. They lifted him by holding his arms and legs. He was lifted for a considerable distance. When the policemen got tired, he was placed on the road. After a few minutes he was picked up again and again the police officials walked while holding him like a sack of wheat till he was put into a police van. No attempt was made to take either an ambulance or a police van to the place where he was lying injured. He was lifted in an inhuman manner, carried over a long distance even though he was bleeding profusely, and without regard to human life or dignity was, in a most contemptuous manner, placed in the police van. It is incomprehensible as to why no arrangements had been made for providing adequate medical attention if firing was resorted to. There is no explanation forthcoming as to why the van or other vehicle did not drive up to the place where the wounded D. K. Sharma was lying. Till the time he was placed in the police van and till after he had reached the hospital he was alive. We are not sure to what extent the police's indifference and callousness in the manner in which they handled him has been a contributory factor to his death.
30. Even the Commissioner of Police is reported to have taken notice of the manner in which the injured D. K. Sharma was lifted. The Delhi Police issued a press note dated 31st October, 1990, after the present writ petition had been filed and notices issued.

The relevant portion of the press release dealing with the handling of D. K. Sharma is as follows :

The Commissioner of Police has taken a very serious note of the irresponsible manner in which some police personnel lifted the injured body of Devender Kumar Sharma on September 25, 1990 after the police firing, as depicted in the NEWSTRACK of October, 1990. A vigilance enquiry into the manner was ordered on October 21, 1990. The officers who lifted the injured person did so against all procedural requirements and cannons of human conduct. Though their intentions were may be not suspect as they kept on asking for a vehicle to carry the injured for medical aid, yet the manner of doing so was a total negation of what has been taught to them during their training. In fact, there are clear existing orders that those dead and injured in public disturbances should be carried on stretchers. In March this year, fresh orders were issued to all units concerned to carry stretchers and invariably use them in such situations.

We very much regret that our efforts to take on a more human face have suffered a blow due to the incorrect handling of a handful of policemen who might have worked under strain but had no reason to display a conduct unbecoming of their profession and training.

All efforts are being made to prevent the recurrence of such insensitivity while dealing with the citizens. The training inputs are being revised and restructured and the lacunae in training are being explored. Efforts will be made to lay profound stress upon refinement of behaviour, especially under conditions of stress and to ensure, by very intensive training, that whatever the provocation, the police does not over react and indulge in excesses.

Restraint, use of minimum force and help to injured persons should be hall-marks of the police action during riots.

In fact, following the anti-reservation agitation, the Delhi Police recently started earnestly exploring softer methods of mob control and has even acquired a water cannons and has been conducting field trials in plastic bullets.

31. The said press release is a clear admission of the following things :

- i) There should be restraint in the police action during riots;
- ii) Minimum force should be used by the police;
- iii) The police should help the injured persons;
- iv) Softer methods of mob control are available;
- v) The Delhi Police is acquiring water cannons and conducting trials in plastic bullets for the purpose of mob control.

32. Had the police acted by keeping the aforesaid principles in mind on 25th September, 1990, human lives would not have been lost on that date. It is, however, heartening

to note that the Commissioner of Police did become aware of the shortcomings in the manner in which the police acted on that date. What is, however, surprising is that the awareness came about only after the Commissioner had seen the News Track of October, 1990.

33. It has been vehemently contended on behalf of the petitioner that D. K. Sharma died because of excessive use of force by the police. The submission is that compensation should be awarded to his next of kin and, further more, proceedings should be ordered to be taken against the police officers who were responsible for such excessive use of force and/or the manner in which D. K. Sharma was bodily lifted and then carried to the police jeep while he was bleeding profusely.
34. In the reply filed on behalf of the Commissioner of Police, it has been stated that the Commissioner leaves it to the discretion of this Court to pass appropriate orders with regard to the compensation to the injured persons. It is, however, submitted that this Court should take into consideration whether it is appropriate to grant compensation to rioters who committed large scale acts of violence including arson, attempt to assault police officers on duty, damage of public property and even endangering lives of the inhabitants by their acts after having armed themselves with deadly weapons or having joined groups carrying deadly weapons including country made weapons. It was submitted that it would be paying premium to the rioters and the Government would find it difficult to act in such a situation. Furthermore, like minded people would get encouraged by the grant of compensation to the rioters.
35. There is considerable force in the aforesaid contention. If any person is injured by police action and that person was a member of an unlawful assembly, which is indulging in acts of violence etc. and the said assembly is armed with deadly weapons then we have no doubt in our mind that in such cases, compensation for injury suffered by reason of the police action would rarely, if at all be awarded. We would, however, not like to express any final opinion on this matter because of two reasons, firstly we are not satisfied that in the present case, the crowd or a section thereof, was carrying deadly weapons, including country made weapons. Secondly, we feel that compensation should be awarded because of the inhuman manner in which the police personnel treated the injured body of D. K. Sharma. The action of the said police officers has been condemned by the Commissioner of Police himself and we need not add anything more to what has been stated in the aforesaid press release.
36. There is little doubt that at INA Market, an unlawful assembly was present. The crowd was not dispersing and was, on occasions, resorting to stone throwing. At the when D.

K. Sharma was shot, the crowd was in the vicinity of the shops in the INA Market. It is in that direction that the firing was resorted to and D. K. Sharma was injured. The very presence of D. K. Sharma amongst the crowd, on which firing was resorted to, seem to indicate that he was a part of that assembly. He was neither a resident of the area nor had he work in INA Market. He had obviously come there to join and participate with the other members of the crowd. The said assembly was unlawful though not very violent. The members of the assembly must have been aware of the fact that the police had fire arms with them. They could have expected that the police may resort to firing. Even while being aware of this, when individuals continued to remain a part of the unlawful assembly, would the Court be justified in directing compensation to be paid when a member of the unlawful assembly is injured or killed when the police resorts to firing in the discharge of its official duties, even though such use of force may be excessive or un-called for.

37. Firing was not resorted to, in the present case, due to any personal animosity on the part of any police official. There was perhaps an error of judgement in resorting to firing but we have reason to hold that the action of the police in resorting to firing was a deliberate and vindictive act on its part. D. K. Sharma took a risk in continuing to be a member of an unlawful assembly because there was always a possibility that the police, which was armed, could resort to firing. The crowd, of which D. K. Sharma must have been a part, was throwing stones and the police, in return, was firing tear gas shells and resorting to lathi charge, if at that time excessive force is used by the police and firing is resorted to, we do not feel that there would be any justification in awarding compensation to a member of an unlawful assembly who is hit by the bullets. One wrong-doer cannot ordinarily, benefit from the other party's wrongful act, unless it can be shown that the use of force was so grossly disproportional to the injured party's wrongful act so as to lead one to believe that the use of excessive force was mala fide or vindictive.
38. While compensation ought not to be awarded because of the police resorting to firing at INA Market, which caused D. K. Sharma's death, in our opinion compensation should, however, be awarded to the next of kin of D. K. Sharma because of the manner in which the police personnel handled him after he was injured. It was the responsibility of the police to take care of the wounded. There was no justification in the manner in which D. K. Sharma was treated by the police personnel after he had been lifted in an injured state. The manner in which he was carried was most shocking and this has even admitted by the Commissioner of Police.

39. Before dealing with the quantum of compensation which can and should be awarded to the legal heirs of D. K. Sharma, it would be appropriate to deal, at this stage, with the death of one Aditya Narain. Aditya Narain was, admittedly, a student of Class-X in a school and was only 15 years of age. He was the only son of his parents but he had two younger sisters. The family was a resident of Sarojini Nagar. On 25th September, 1990, near about noon time, he was shot while he was standing behind a water tanker in the colony itself with a school friend of his. In the affidavit of Shri. R. N. Sharma, the father of Aditya Narain, it is inter alia, stated that his son and a friend of his were standing behind a water tanker in the Sarojini Nagar area near Nav Yug School. This water tanker had been placed across a part of the road. It is further averred that certain anti-social elements had set fire to a Government 3-wheeler scooter in the area and some policemen armed with rifles, pistols and lathis, fired a few shots whereby residents who had assembled were dispersed. After the residents had re-assembled, the deponent heard a few shots being fired and some of the boys started throwing stones in the direction of the policemen and started shouting slogans. It is further stated in this affidavit that two policemen hid behind a tree and after sometime one of them came out from behind the shelter and he pulled out his revolver and aimed directly in the direction of the boys who had assembled at a traffic crossing. It is as a result of those that Aditya Narain was shot in the temple. It is further alleged that the shooting took place from a distance of about 50 feet.
40. In the reply to the said affidavit of Shri. R. N. Sharma, the respondents have set out their version of what had happened in the Sarojini Nagar area on that fateful day. The respondents have set out sequence of events in their reply, which is as follows :
- Information was then received at 9.55 a.m. regarding the damage of vehicles and setting them on fire behind Babu Market, Sarojini Nagar.*
- At 10.05 a.m. an information was received regarding further damage to the vehicles on the main road 'I' Block.*
- At 10. 15 a.m. a CPWD jeep was set on fire on the main road at 'I' Block, Sarojini Nagar.*
- At 10.35 a.m. an information was received that the boys and girls of DG/G-1 Block are pelting stones.*
- At 10.37 a.m. an information was received that near Deer Park Harsukhman Picket an attempt is being made to set fire to the Police Booth.*
- At 11.00 a.m. an information was received that a tanker of charcoal and one water tanker had been over-turned near Safdarjung Hospital.*
- At 11.04 a.m. an information was received that the buses at 'I' Avenue, Sarojini Nagar have been set on fire.*

At 11.10 a.m. an information was received that the boys were pelting stones at 'B' Block, Safdarjung Enclave Main Road.

Similar information was received with regard to the damage to the property by stones and by acts of arson continuously. The information so received of widespread violence covering vast areas within the jurisdiction of Police Station Vinay Nagar and around, showed that a grave situation had arisen suddenly on account of the death of Mr. Chauhan.

41. It is further the case of the respondents, in the said reply that one Inspector D. P. Singh was on emergency duty and he left the police station to attend an emergency call at 9.30 a.m. Shri. D. P. Singh is stated to have reached Sarojini Nagar Depot at 9.40 a.m. where he noticed that a private bus had been damaged with stones and tyres deflated. When he was returning to the police station he received another information that some students were causing damage to the property at Sarojini Nagar 'I' Block. When he reached there, he noticed that students were shouting anti-Mandal slogans and he also found that a police assistance booth had been set on fire. The crowd was stated to have moved towards a market where a jeep was alleged to have been set on fire and when the Sub-inspector tried to apprehend the culprits, the crowd resorted to pelting of stones. Thereupon the Sub-inspector retreated and crowd from two directions joined at a place known as 'I' Avenue 3rd Cross Road where the water tanker had been over-turned. It is further alleged that this crowd started throwing stones at the police party and when the Sub-Inspector tried to advise them not to indulge in stone throwing, they did not pay any heed. It is also averred that there was a crowd of about 1,000 people and the SI D. P. Singh directed the Constable to shoot in the air. The mob retreated and then regrouped and when the crowd is stated to have come closer to them, the Sub-inspector took shelter behind a tree and fired shots. In the said reply it is alleged that the shots were fired only in the air.
42. Reference is also made to an inquiry report of an Addl. DCP which was submitted after a report had been lodged by Aditya Narain's father. This report gives interesting reasons. The Addl. DCP recorded the evidence of a number for witnesses and came to the conclusion that the bullet which entered the skull of Aditya Narain, was fired by SI D. P. Singh. In the FIR dated 25th September, 1990 which had been lodged at Vinay Nagar Police Station at the behest of the police. It had not been mentioned that the shot had been fired by the said Sub-Inspector. The Addl. DCP interrogated SI D. P. Singh who admitted that he himself had opened firing from his service revolver and it was due to a disturbed state of mind that it had been wrongly written in the FIR that SI D. P. Singh had ordered the Constable to fire. It is further stated that SI D. P. Singh was on a emergency duty and he left the police station without any vehicle, tear gas

or wireless. The material part of the report relating to the injury which was sustained by Aditya Narain is as follows:

In fact all the public witnesses have claimed that SI D. P. Singh made advances towards the crowd from behind the tree. Again it seems that SI D. P. Singh kept on imploring the crowd not to take law into their hands but seeing no other recourse to disperse the unlawful assembly. SI D. P. Singh to the best of his intentions did open fire from this service revolver presumably in the air (as stated by Mahender Singh.....). However, it is a sheer tragedy and most unfortunate that this bullet which was fired presumably in the air and in which no mala fide happened to trajectory and had hit Aditya Narain who was very much present at the inter-face of police and violent mob. Since the police party was heavily out-numbered by the angry crowd and there was no tear gas etc. with SI D. P. Singh, therefore, opening fire by the service weapon was only alternative left with police. After the bullet in its dying moments had hit Aditya, and crowd started dispersing. Due to the tanker which was occulting sight between SI D. P. Singh's position and the spot, where Aditya Narain had fallen down on the ground, D. P. Singh could be believed that he did not see anybody getting injured from his bullet shot.

43. It is also concluded by the Addl. DCP that the SI had opened fire in the air but 'as ill-luck would have been, the bullet in its dying moments happened to graze through skull of Aditya Narain who was a part of unlawful assembly near the overturned water tanker at Navyug School crossing.'
44. It is not necessary for us to try and find out the discrepancy between the affidavit of Aditya Narain's father on the one hand and the reply of the police and the report of the Addl. DCP on the other. What is apparent is that the Police Station at Vinay Nagar was receiving information about acts of arson since 9.30 a.m. It is also the case of the police that a large crowd had gathered. Only two police personnel viz., SI D. P. Singh and Constable Dharam Vir had been despatched to try and control the situation. Neither of them had any tear gas or lathis. SI D. P. Singh was armed with service revolver and the Constable had a .303 revolver. Neither of the two received any injury. According to the police, they saved themselves because they were wearing protective clothing and the stones did not hurt them.
45. What is clear from the averments made on behalf of the respondents in that apart from setting fire to one or two objects, the crowd is only alleged to have thrown stones. Aditya Narain was standing behind a water tanker along with a friend of his. Adequate police personnel had not been deployed. No attempt was made to disperse the crowd by firing tear gas shells or by lathi charge. The only measure which was resorted to by the two police personnel, who were present, was to fire. In our opinion there is absolutely no justification for resorting to firing as being the only means or

method of controlling the mob. We are also not satisfied that Aditya Narain was a member of an unlawful assembly. There is merely a surmise on the part of the Addl. DCP, who had, in our opinion, tried to cover up the actions of the policemen. No comment has been made by the Addl. DCP to the fact that an FIR was lodged by D. P. Singh at 1.30 p.m. after Aditya Narain has been shot taken to the police. There is no mention in this FIR that SI D. P. Singh, had fired the shot. There is also no mention that Aditya Narain had suffered an injury. By stating in the FIR that Constable Dharam Vir had fired under instructions of D. P. Singh, it is clear that D. P. Singh did not want to own the responsibility of firing the shot which had injured Aditya Narain. The finding of the Addl. DCP about the bullet taking awry trajectory and in its dying moments crossing through the skull, is difficult to accept as a plausible explanation. The bullet was fired from a revolver and it got embedded in the skull of Aditya Narain. It was, therefore, fired from not too distant a position. According to Aditya Narain's father, the bullet was fired from a distance of about 50 feet and looking at the nature of the injury this is more probable. It could not be that a bullet was fired in the air and it took an awry trajectory and in its dying moments got embedded in Aditya Narain's skull. The bullet, if it was falling down on the ground, as the Addl. DCP expects one to believe, could not have had sufficient force or momentum to pierce the skull of Aditya Narain and thereafter causing his death.

46. None of the witnesses of the colony has stated or mentioned that Aditya Narain took part in any stone throwing. There is no reason to believe that he was a member of an unlawful assembly. In fact the learned counsel for the respondents very frankly conceded that it was unfortunate that Aditya Narain had died and he was, in all probabilities, only a spectator and not a participant. Unlike D. K. Sharma, Aditya Narain was a resident of that colony and, out of curiosity, had come out of his house only to meet an unfortunate end.
47. The police was negligent in not sending sufficient force. It was the duty of the police to see that only minimum force is required to control the crowd. Firing is to be resorted to only if there is no other option. In the neighbourhood of Sarojini Nagar, since the morning, the police had been using tear gas shells. There is no explanation forthcoming as to why this was not done at Sarojini Nagar. The action of resorting to firing on the crowd which resulted in the death of Aditya Narain was clearly unwarranted. Inasmuch as Aditya was not a member of the unlawful assembly as conceded to by the respondents' counsel during the course of arguments, we feel that adequate compensation should be awarded to the next of kin of Aditya Narain.

48. From the aforesaid it is clear that the Supreme Court, dealing with the public interest litigation, thought it proper that the allegations against the police, in that case, should be examined by the High Court exercising jurisdiction under Article 226 of the Constitution. Another similarity with the present case is that the police had, relating to the said incident of firing, started cases against several persons, who took part in the said meeting. Notwithstanding the pendency of these cases, the Supreme Court directed that the matter be considered by the High Court under Art. 226 of the Constitution. In the present case also merely because FIRs have been lodged against some of the members of the alleged unlawful assembly, cannot be a ground for the Court not to exercise its jurisdiction under Article 226 of the Constitution.
49. *People Union for Democratic Rights Vs. Police Commissioner* (1989) 4 SCC 730 was an other case where, in exercise of its jurisdiction under Article 32 of the Constitution, compensation to victims of police atrocities was awarded. In that case the police had collected some people and taken them to the police station for doing work. When the workers demanded wages, they were beaten up by the police and one person succumbed to his injuries. Though the case was being examined for criminal prosecution of the police officers concerned, nevertheless the family of the deceased was directed to be paid Rs. 50,000/- as compensation. The other labourers were also directed to be paid different sums of money.
50. An important decision on the question with regard to award of compensation in such cases is that of *Saheli Vs. Commr. of Police* (1990) 1 SCC 422 : (AIR 1990 SC 513). The question of grant of compensation, in this case, arose because of the action of police officers who, at the behest of the landlord, beat a tenant Kamlesh Kumari and her son Naresh Kumar. Naresh subsequently succumbed to his injuries. Thereupon a news item about the incident appeared in the Hindi newspaper and a petition under Article 32 of the Constitution was filed wherein besides the landlord, two police officers were also impleaded as respondents. The Supreme Court held that the son of the tenant had been (p. 515 of AIR) :
- Done to death on account of the beating and assault by the agency of the sovereign power acting in violation and excess of the powers vested in such agency. The mother of the child Kamlesh Kumari, in our considered opinion, is so entitled to get compensation for the death of her son from respondent 2, Delhi Administration.*
51. It was further observed that (p. 516 of AIR) :
11. *An action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In case of assault, battery and false*

imprisonment the damages are at large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death. As we have held hereinbefore that the son of Kamlesh Kumari aged 9 years died due to beating and assault by the SHO, Lal Singh and as such she is entitled to get the damages for the death of her son. It is well settled now that the State is responsible for the tortious acts of its employees. Respondent 2, Delhi Administration is liable for payment of compensation to Smt. Kamlesh Kumari for the death of her son due to beating by the SHO of Anand Parbat Police Station, Shri. Lal Singh.

52. The Court ultimately awarded a sum of Rs. 75,000/- by way of compensation and further observed that the Delhi Administration may take appropriate steps for the recovery of the amount paid as compensation from the officers who were found responsible.
53. From *Saheli's* case (AIR 1990 SC 513) (supra) it is clear that even when public interest litigation is commenced challenging the police action, like in the present case, and where there is loss of life and the action of the police is wholly unjustified and in excess of the power, then adequate and reasonable compensation can be awarded.
54. From the aforesaid discussion we come to the conclusion that with regard to the inhuman manner in which Devinder Kumar Sharma was handled after he had been wounded, compensation should be awarded. Compensation is also payable on account of the death of Aditya Narain because of the police firing. Unlike Devinder Kumar Sharma, Aditya Narain was not a member of the unlawful assembly. He was only 15 years old and was a school student having three younger sisters.
55. Keeping in view the quantum of damages and compensation which has been awarded by the Supreme Court, in the aforesaid cases, we issue a writ of mandamus directing the Delhi Administration, which has the administrative control over the Delhi Police, to pay a sum of Rs. 50,000/- to the next of kin of Devinder Kumar Sharma and a sum of Rs. 2,50,000/- to the next of kin of Aditya Narain.
56. Order accordingly.

**Supreme Court of India
1993 (2) SCC 746**

**Smt. Nilabati Behera alias Lalita Behera
vs
State of Orissa and Others**

J.S. VERMA, N. VENKATACHALIAH, DR. A.S. ANAND, JJ.

1. A letter dated 14.9.1988 sent to this Court by Smt. Nilabati Behera alias Lalit Behera, was treated as a writ petition under Article 32 of the Constitution for determining the claim of compensation made therein consequent upon the death of petitioner's son Suman Behera, aged about 22 years, in police custody. The said Suman Behera was taken from his home in police custody at about 8 a.m. on 1.12.1987 by respondent No. 6, Sarat Chandra Barik, Assistant Sub-Inspector of Police of Jaraikela Police Outpost under Police Station Bisra, Distt. Sundergarh in Orissa, in connection with the investigation of an offence of theft and detained at the police outpost. At about 2 p.m. the next day on 2.12.1987, the petitioner came to know that the dead body of her son Suman Behera was found on the railway track near a bridge at some distance from the Jaraikela railway station. There were multiple injuries on the body of Suman Behera when it was found and obviously his death was unnatural, caused by those injuries. The allegation made is that it is a case of custodial death since Suman Behera died as a result of the multiple injuries inflicted to him while he was in police custody; and thereafter his dead body was thrown on the railway track. The prayer made in the petition is for award of compensation to the petitioner, the mother of Suman Behera, for contravention of the fundamental right to life guaranteed under Article 21 of the Constitution.
2. The State of Orissa and its police officers, including Sarat Chandra Barik, Assistant Sub-Inspector of Police and Constable No. 127, Chhabil Kujur of Police Outpost Jeraikela, Police Station Bisra, are impleaded as respondents in this petition. The defence of the respondents is that Suman Behera managed to escape from police custody at about 3 a.m. on the night between the 1st and 2nd December, 1987 from the Police Outpost Jeraikela, where he was detained and guarded by Police Constable Chhabil Kujur; he could not be apprehended thereafter inspite of a search; and the dead body of Suman Behera was found on the railway track the next day with multiple injuries which indicated that he was run over by a passing train after he had escaped from

police custody. In short, on this basis the allegation of custodial death was denied and consequently the respondents responsibility for the unnatural death of Suman Behera.

3. In view of the controversy relating to the cause of death of Suman Behera, a direction was given by this Court on 4.3.1991 to the District Judge, Sundergarh in Orissa, to hold an inquiry into the matter and submit a report. The parties were directed to appear before the District Judge and lead the evidence on which they rely. Accordingly, evidence was led by the parties and the District Judge has submitted the Inquiry Report dated 4.9.1991 containing his finding based on that evidence that Suman Behera had died on account of multiple injuries inflicted to him while he was in police custody at the Police Outpost Jeraikela. The correctness of this finding and report of the District Judge, being disputed by the respondents, the matter was examined afresh by us in the light of the objections raised to the Inquiry Report.
4. The admitted facts are, that Suman Behera was taken in police custody on 1.12.1987 at 8 a.m. and he was found dead the next day on the railway track near the Police Outpost Jeraikela, without being released from custody, and his death was unnatural, caused by multiple injuries sustained by him. The burden is, therefore, clearly on the respondents to explain how Suman Behera sustained those injuries which caused his death. Unless a plausible explanation is given by the respondents which is consistent with their innocence, the obvious inference is that the fatal injuries were inflicted to Suman Behera in police custody resulting in his death, for which the respondents are responsible and liable.
5. To avoid this obvious and logical inference of custodial death, the learned Additional Solicitor General relied on the respondents defence that Suman Behera had managed to escape from police custody at about 3 a.m. on the night between the 1st and 2nd December, 1987 and it was likely that he was run over by a passing train when he sustained the fatal injuries. The evidence adduced by the respondents is relied on by the learned Additional Solicitor General to support this defence and to contend that the responsibility of the respondents for the safety of Suman Behera came to an end the moment Suman Behera escaped from police custody. The learned Additional Solicitor General, however, rightly does not dispute the liability of the State for payment of compensation in this proceeding for violation of the fundamental right to life under Article 21, in case it is found to be a custodial death. The argument is that the factual foundation for such a liability of the State is absent. Shri M.S. Ganesh, who appeared as amicus curiae for the petitioner, however, contended that the evidence

adduced during the inquiry does not support the defence of respondents and there is no reason to reject the finding of the learned District Judge that Suman Behera died in police custody as a result of injuries inflicted to him.

6. The first question is : Whether it is a case of custodial death as alleged by the petitioner? The admitted facts are : Suman Behera was taken in police custody about 8 a.m. on 1.12.1987 by Sarat Chandra Barik, Asstt. Sub-Inspector of Police, during investigation of an offence of theft in the village and was detained at Police Outpost Jeraikela; Suman Behera and Mahi Sethi, another accused, were handcuffed, tied together and kept in custody at the police station; Suman Behera's mother, the petitioner, and grandmother went to the Police Outpost at about 8 p.m. with food for Suman Behera which he ate and thereafter these women came away while Suman Behera continued to remain in Police custody; Police Constable Chhabil Kujur and some other persons were present at the Police Outpost that night; and the dead body of Suman Behera with a handcuff and multiple injuries was found lying on the railway track at kilometre No. 385/29 between Jeraikela and Bhalulata railway stations on the morning of 2.12.1987. It is significant that there is no cogent independent evidence of any search made by the police to apprehend Suman Behera, if the defence of his escape from police custody be true. On the contrary, after discovery of the dead body on the railway track in the morning by some railwaymen, it was much later in the day that the police reached the spot to take charge of the dead body. This conduct of the concerned police officers is also a significant circumstance to assess credibility of the defence version.
7. Before discussing the other evidence adduced by the parties during the inquiry, reference may be made to the injuries found on the dead body of Suman Behera during post-mortem. These injuries were the following :
External injuries :
 - (i) *Laceration over with margin of damaged face.*
 - (ii) *Laceration of size – 3" x 2" over the left temporal region upon bone.*
 - (iii) *Laceration 2" above mastoid process on the rightsde of size 1 1/2" x 1/4" bone exposed.*
 - (iv) *Laceration on the forehead left side of size 1 1/2" x 1/4" upto bone in the mid-line on the forehead 1/2" x 1/4" bone deep on the left lateral to it 1" x 1/4" bone exposed.*
 - (v) *Laceration 1" x 1/2" on the anterior aspect of middle of left arm, fractured bone protruding.*

(vi) Laceration 1" x 1/2" x 1/2" on the medical aspect of left thigh 4" above the knee joint.

(vii) Laceration 1/2" x 1/2" x 1/2" over left knee joint.

(viii) Laceration 1" x 1/2" x 1/2" on the medical aspect of right knee joint.

(ix) Laceration 1" x 1/2" x 1/2" on the posterior aspect of left leg, 4" below knee joint.

(x) Laceration 1" x 1/4" x 1/2" on the plantar aspect of 3rd and 4th toe of right side.

(xi) Laceration of 1" x 1/4" x 1/2" on the dorsum of left foot.

(xii) Injury on the neck :

(i) Bruises of size 3" x 1" obliquely alongwith sternocleidomastoid muscle 1" above the clavical left side (2) lateral to this 2" x 1" bruise (3) and 1" x 1" above the clavicle left side (4) posterol aspect of the neck 1" x 1" obliquely placed right to mid line.

Right Shoulder:

(i) Bruise 2" x 2", 1" above the right scapula.

(ii) Bruise 1" x 1" on the tip of right shoulder.

(iii) Bruise on the dorsum of right palm 2" x 1".

(iv) Bruise extenses surface of forearm left side 4" x 1".

(v) Bruise on right elbow 4" x 1".

(vi) Bruise on the dorsum of left palm 2" x 1"

(vii) Bruise over left patella 2" x 1".

(viii) Bruise 1" above left patella 1" x 1".

(ix) Bruise on the right iliac spine 1" x 1/2"

(x) Bruise over left scapula 4" x 1".

(xi) Bruise 1" below right scapula 5" x 1".

(xii) Bruise 3" medial to inferior angle of right scapula 2" x 1".

(xiii) Bruise 2" below left scapula of size 4" x 2".

(xiv) Bruise 2" x 6" below 12th rib left side.

(xv) Bruise 4" x 2" on the left lumber region.

(xvi) Bruise on the buttock of left side 3" x 2".

(xviii) On dissection found :

(a) Fracture of skull on right side parietal and occipital bone 6" length.

(b) Fracture of frontal bone below laceration 2" depressed fracture.

(c) Fracture of left temporal bone 2" in length below external injury No. 2 i.e. laceration 2" above left mastoid process.

- (d) Membrane ruptured below depressed fracture, brain matter protruding through the membrane.
- (e) Intracranial haemorrhage present.
- (f) Brain lacerated below external injury No. 3, 1" x 1/2" x 1/2".
- (g) Bone chips present on temporal surface of both sides.
- (h) Fracture of left humerus 3" above elbow.
- (i) Fracture of left femur 3" above knee joint.
- (j) Fracture of mandible at the angle mandible both sides.
- (k) Fracture of maxillary.

The face was completely damaged, eye ball present, nose, lips, cheeks absent. Maxilla and a portion of mandible absent.

No injury was present on the front side of body trunk. There is rupture and laceration of brain.

8. The doctor deposed that all the injuries were caused by hard and blunt object; the injuries on the face and left temporal region were post-mortem while the rest were ante-mortem. The doctor excluded the possibility of the injuries resulting from dragging of the body by a running train and stated that all the ante-mortem injuries could be caused by lathi blows. It was further stated by the doctor that while all the injuries could not be caused in a train accident, it was possible to cause all the injuries by lathi blows. Thus, the medical evidence comprising the testimony of the doctor who conducted the post-mortem, excludes the possibility of all the injuries to Suman Behera being caused in a train accident while indicating that all of them could result from the merciless beating given to him. The learned Additional Solicitor General placed strong reliance on the written opinion of Dr. K. K. Mishra, Professor & Head of the Department of Forensic Medicine, Medical College, Cuttack, given on 15.2.1988 on a reference made to him wherein he stated on the basis of the documents that the injuries found on the dead body of Suman Behera could have been caused by rolling on the railway track in-between the rail and by coming into forceful contact with projecting part of the moving train/engine. While adding that it did not appear to be a case of suicide, he indicated that there was more likelihood of accidental fall on the railway track followed by the running engine/train. In our view, the opinion of Dr. K. K. Mishra, not examined as a witness, is not of much assistance and does not reduce the weight of the testimony of the doctor who conducted the post-mortem and deposed as a witness during the inquiry. The opinion of Dr. K. K. Mishra is cryptic, based on conjectures for which there is no basis, and says nothing about the injuries being both

ante-mortem and post-mortem. We have no hesitation in reaching this conclusion and preferring the testimony of the doctor who conducted the post-mortem.

9. We may also refer to the report dated 19.12.1988 containing the findings in a joint inquiry conducted by the Executive Magistrate and the Circle Inspector of Police. This report is stated to have been made under Section 176 Cr. P. C. and was strongly relied on by the learned Additional Solicitor General as a statutory report relating to the cause of death. In the first place, an inquiry under Section 176 Cr. P. C. is contemplated independently by a Magistrate and not jointly with a police officers itself is a matter of inquiry. The joint finding recorded is that Suman Behera escaped from police custody at about 3 a.m. on 2.12.1987 and died in a train accident as a result of injuries sustained therein. There was handcuff on the hands of the deceased when his body was found on the railway track with rope around it. It is significant that the report dated 11.3.1988 of the Regional Forensic Science Laboratory (Annexure 'R- 8', at p. 108 of the paperbook) mentions that the two cut ends of the two pieces of rope which were sent for examination do not match with each other in respect of physical appearance. This finding about the rope negatives the respondents' suggestion that Suman Behera managed to escape from police custody by chewing off the rope with which he was tied. It is not necessary for us to refer to the other evidence including the oral evidence adduced during the inquiry, from which the learned District Judge reached the conclusion that it is a case of custodial death and Suman Behera died as a result of the injuries inflicted to him voluntarily while he was in police custody at the Police Outpost Jeraikela. We have reached the same conclusion on a reappraisal of the evidence adduced at the inquiry taking into account the circumstances, which also support that conclusion. This was done in view of the vehemence with which the learned Additional Solicitor General urged that it is not a case of custodial death but of death of Suman Behera caused by injuries sustained by him in a train accident, after he had managed to escape from Police Outpost. On this conclusion, the question now is of the liability of the respondents for compensation to Suman Behera's mother, the petitioner, for Suman Behera's custodial death.
10. In view of the decisions of this Court in *Rudul Sah Vs. State of Bihar and Another*, (1983) 3 SCR 508, *Sebastian M. Hongray Vs. Union of India and Others*, (1984) 1 SCR 904 and (1984) 3 SCR 544, *Bhim Singh Vs. State of J & K* 1984 (Supp) SCC 504 and (1985) 4 SCC 677, *Saheli, A Women's Resources Centre and Others Vs. Commissioner of Police, Delhi Police Headquarters and Others*, (1990) 1 SCC 422 and *State of Maharashtra and Others Vs. Ravikant S. Patil*, (1991) 2 SCC 373, the liability of the State of Orissa

in the present case to pay the compensation cannot be doubted and was rightly not disputed by the learned Additional Solicitor General. It would, however, be appropriate to spell out clearly the principle on which the liability of the State arises in such cases for payment of compensation and the distinction between this liability and the liability in private law for payment of compensation in an action on tort. It may be mentioned straightaway that award of compensation is a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. This is a distinction between the two remedies to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings. We shall now refer to the earlier decisions of this Court as well as some other decisions before further discussion of this principle.

11. In *Rudul Sah* (supra), it was held that in a petition under Article 32 of the Constitution, this Court can grant compensation for deprivation of a fundamental right. That was a case of violation of the petitioner's right to personal liberty under Article 21 of the Constitution. Chandrachud, C. J., dealing with this aspect, stated as under :

It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of Courts, Civil and Criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a Court of lowest grade competent to try it. But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. The instant case is illustrative of such cases.....

..... The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil Court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders to release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights

cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers." (pp. 513-14) (emphasis supplied).

12. It does appear from the above extract that even though it was held that compensation could be awarded under Article 32 for contravention of a fundamental right, yet it was also stated that 'the petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial' and 'Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes'. This observation may tend to raise a doubt that the remedy under Article 32 could be denied 'if the claim to compensation was factually controversial' and, therefore, optional, not being a distinct remedy available to the petitioner in addition to the ordinary processes. The later decisions of this Court proceed on the assumption that monetary compensation can be awarded for violation of constitutional rights under Article 32 or Article 226 of the Constitution, but this aspect has not been adverted to. It is, therefore, necessary to clear this doubt and to indicate the precise nature of this remedy which is distinct and in addition to the available ordinary processes, in case of violation of the fundamental rights.
13. Reference may also be made to the other decisions of this Court after *Rudul Sah*. In *Sebastian M. Hongray Vs. Union of India and Others* (1), (1984) 1 SCR 904, it was indicated that in a petition for writ of habeas corpus, the burden was obviously on the respondents to make good the positive stand of the respondents in response to the notice issued by the Court by offering proof of the stand taken, when it is shown that the person detained was last seen alive under the surveillance, control, and command of the detaining authority. In *Sebastian M. Hongray Vs. Union of India & Others* (II), (1984) 3 SCR 544, in such a writ petition, exemplary costs were awarded on failure of the detaining authority to produce the missing person, on the conclusion that they were not alive and had met an unnatural death. The award was made in *Sebastian M. Hongray-II* apparently following *Rudul Sah*, but without indicating anything more. In *Bhim Singh Vs. State of J & K and Others*, (1985) 4 SCC 677, illegal detention in police custody of the petitioner Bhim Singh was held to constitute violation of his rights under Articles 21 and 22(2) and this Court exercising its power to award compensation

under Article 32 directed the State to pay monetary compensation to the petitioner for violation of his constitutional right by way of exemplary costs or otherwise, taking this power to be settled by the decisions in *Rudul Sah* and *Sebastian M. Hongray*. In *Saheli*, (1990) 1 SCC 422, the State was held liable to pay compensation payable to the mother of the deceased who died as a result of beating and assault by the police. However, the principle indicated therein was that the State is responsible for the tortious acts of its employees. In *State of Maharashtra and Others Vs. Ravikant S. Patil*, (1991) 2 SCC 373, the award of compensation by the High Court for violation of the fundamental right under Article 21 of an undertrial prisoner, who was handcuffed taken through the streets in a procession by the police during investigation, was upheld. However, in none of these cases, except *Rudul Sah*, anything more was said. In *Saheli*, reference was made to the State's liability for tortious acts of its servants without any reference being made to the decision of this Court in *Kasturilal Ralia Ram Jain Vs. The State of Uttar Pradesh*, (1965) 1 SCR 375, wherein sovereign immunity was upheld in the case of vicarious liability of the State for the tort of its employees. The decision in *Saheli* is, therefore, more in accord with the principle indicated in *Rudul Sah*.

14. In this context, it is sufficient to say that the decision of this court in *Kasturilal* upholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme, and is no defence to the constitutional remedy under Articles 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights, when the only practicable mode of enforcement of the fundamental rights can be the award of compensation. The decisions of this Court in *Rudul Sah* and others in that line relate to award of compensation for contravention of fundamental rights, in the constitutional remedy under Articles 32 and 226 of the Constitution. On the other hand, *Kasturilal* related to value of goods seized and not returned to the owner due to the fault of Government servants, the claim being of damages for the tort of conversion under the ordinary process, and not a claim for compensation for violation of fundamental rights. *Kasturilal* is, therefore, in-applicable in this context and distinguishable.
15. The decision of *Privy Council in Maharaj Vs. Attorney-General of Trinidad and Tobago* (No. 2), (1978) 3 All ER 670, is useful in this context. That case related to Section 6 of the Constitution of Trinidad and Tobago 1962, in the chapter pertaining to human rights and fundamental freedoms, wherein Section 6 provided for an application to

the High Court for redress. The question was, whether the provision permitted an order for monetary compensation. The contention of the Attorney-General therein, that an order for payment of compensation did not amount to the enforcement of the rights that had been contravened, was expressly rejected. It was held, that an order for payment of compensation, when a right protected had been contravened, is clearly a form of 'redress' which a person is entitled to claim under Section 6, and may well be the 'only practicable form of redress'. Lord Diplock who delivered the majority opinion, at page 679, stated :

It was argued on behalf of the Attorney-General that section 6(2) does not permit of an order for monetary compensation despite the fact that this kind of redress was ordered in Jaundoo Vs. Attorney-General of Guyana [1971] SC 972. Reliance was placed on the reference in the sub-section to 'enforcing, or securing the enforcement of, any of the provisions of the said foregoing Sections' as the purpose for which orders etc could be made. An order for payment of compensation, it was submitted, did not amount to the enforcement of the rights that had been contravened, In their Lordships' view an order for payment of compensation when a right protected under Section 1 'has been' contravened is clearly a form of 'redress' which a person is entitled to claim under Section 6(1) and may well be the only practicable form of redress, as by now it is in the instant case. The jurisdiction to make such an order is conferred on the High Court by para (a) of Section 6(2), viz jurisdiction to hear and determine any application made by any person in pursuance of sub-section (1) of this Section'. The very wide powers to make orders, issue writs and give directions are ancillary to this.

16. Lord Diplock further stated at page 680, as under :

Finally, their Lordships would say something about the measure of monetary compensation recoverable under Section 6 where the contravention of the claimant's constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone..... (emphasis supplied).

17. Lord Hailsham while dissenting from the majority regarding the liability for compensation in that case, concurred with the majority opinion of this principle and stated at page 687, thus :

.... I am simply saying that, on the view I take, the expression 'redress' in sub-section (1) of Section 6 and the expression 'enforcement' in sub-section (2), although capable of embracing damages where damages are available as part of the legal consequences of contravention, do not confer and are not in the context capable of being construed so as to confer a right of damages where they have not hitherto been available, in this case against the state for the judicial errors of a judge.....

18. Thus, on this principle, the view was unanimous, that enforcement of the constitutional right and grant of redress embrace award of compensation as part of the legal consequences of its contravention.
19. It follows that 'a claim in public law for compensation' for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution. This is what was indicated in *Rudul Sah* and is the basis of the subsequent decisions in which compensation was awarded under Articles 32 and 226 of the Constitution, for contravention of fundamental rights.
20. A useful discussion on this topic which brings out the distinction between the remedy in public law based on strict liability for violation of a fundamental right enabling award of compensation, to which the defence of sovereign immunity is inapplicable, and the private law remedy, wherein vicarious liability of the State in tort may arise, is to be found in Ratanlal & Dhirajlal's '*Law of Torts*', 22nd Edition, 1992, by Justice G. P. Singh, at pages 44 to 48.
21. This view finds support from the decisions of this Court in the Bhagalpur blinding cases : *Khatri and Others (II) Vs. State of Bihar and Others*, (1981) 1 SCC 627 and *Khatri and Others (IV) Vs. State of Bihar and Others*, (1981) 2 SCC 493, wherein it was said that the Court is not helpless to grant relief in a case of violation of the right to life and personal liberty, and it should be prepared to forge new tools and devise new remedies' for the purpose of vindicating these precious fundamental rights. It was also indicated that the procedure suitable in the facts of the case must be adopted for conducting the inquiry, needed to ascertain the necessary facts, for granting the relief, as the relief, as the available mode of redress, for enforcement of the guaranteed

fundamental rights. More recently in *Union Carbide Corporation and Others Vs. Union of India and Others*, (1991) 4 SCC 584, Misra, C. J. stated that:

We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future....., there is no reason why we should hesitate to evolve such principle of liability.....

To the same effect are the observations of Venkatachaliah, J. (as he then was), who rendered the leading judgement in the Bhopal gas case, with regard to the Court's power to grant relief.

22. We respectfully concur with the view that the Court is not helpless and the wide powers given to this Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The power available to this Court under Article 142 is also an enabling provision in this behalf. The contrary view would not merely render the Court powerless and the constitutional guarantee a mirage, but may, in certain situations, be an incentive to extinguish life, if for the extreme contravention the Court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence, and recovery of damages under private law, by the ordinary process. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate.
23. We may also refer to Article 9(5) of the International Covenant on Civil and Political Rights, 1966 which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. Article 9(5) reads as under:

Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
24. The above discussion indicates the principle on which the Court's power under Articles 32 and 226 of the Constitution is exercised to award monetary compensation

for contravention of a fundamental right. This was indicated in *Rudul Sah* and certain further observations therein adverted to earlier, which may tend to minimise the effect of the principle indicated therein, do not really detract from that principle. This is how the decisions of this Court in *Rudul Sah* and others in that line have to be understood and *Kasturilal* distinguished therefrom. We have considered this question at some length in view of the doubt raised, at times, about the propriety of awarding compensation in such proceedings, instead of directing the claimant to resort to the ordinary process of recovery of damages by recourse to an action in tort. In the present case, on the finding reached, it is a clear case for award of compensation to the petitioner for the custodial death of her son.

25. The question now, is of the quantum of compensation. The deceased Suman Behera was aged about 22 years and had a monthly income between Rs.1200/- to Rs.1500/-. This is the finding based on evidence recorded by the District Judge, and there is no reason to doubt its correctness. In our opinion, a total amount of Rs.1,50,000/- would be appropriate as compensation, to be awarded to the petitioner in the present case. We may, however, observe that the award of compensation in this proceeding would be taken into account for adjustment, in the event of any other proceeding taken by the petitioner for recovery of compensation on the same ground, so that the amount to this extent is not recovered by the petitioner twice over. Apart from the fact that such an order is just, it is also in consonance with the statutory recognition of this principle of adjustment provided in Section 357(5) Cr. P. C. and Section 141(3) of the Motor Vehicles Act, 1988.
26. Accordingly, we direct the respondent State of Orissa to pay the sum of Rs. 1,50,000/- to the petitioner and a further sum of Rs.10,000/- as costs to be paid to the Supreme Court Legal Aid Committee. The mode of payment of Rs.1,50,000/- to the petitioner would be, by making a term deposit of that amount in a scheduled bank in the petitioner's name for a period of three years, during which she would receive only the interest payable thereon, the principal amount being payable to her on expiry of the term. The Collector of the District will take the necessary steps in this behalf, and report compliance to the Registrar (Judicial) of this Court within three months.
27. We clarify that the award of this compensation, apart from the direction for adjustment of the amount as indicated, will not affect any other liability of the respondents or any other person flowing from the custodial death of petitioner's son Suman Behera. We also expect that the State of Orissa would take the necessary further action in this behalf, to ascertain and fix the responsibility of the individuals responsible for

the custodial death of Suman Behera, and also take all available appropriate actions against each of them including their prosecution for the offence committed thereby.

28. The writ petition is allowed in these terms.
29. Dr. Anand, J. (Concurring) The lucid and elaborate judgement recorded by my learned Brother Verma J. obviates the necessity of noticing facts or reviewing the case law referred to by him. I would, however, like to record a few observations of my own while concurring with His Lordship's judgement.
30. This Court was bestirred by the unfortunate mother of deceased Suman Behera through a letter dated 14.9.1988, bringing to the notice of the Court the death of her son while in police custody. The letter was treated as a writ-petition under Article 32 of the Constitution. As noticed by Brother Verma J., an inquiry was got conducted by this Court through the District Judge Sundergarh who, after recording the evidence, submitted his inquiry report containing the finding that the deceased Suman Behera had died on account of multiple injuries inflicted on him while in police custody. Considering, that it was alleged to be a case of custodial death, at the hands of those who are supposed to protect the life and liberty of the citizen, and which if established was enough to lower the flag of civilization to fly half-mast, the report of the District Judge was scrutinized and analysed by us with the assistance of Mr. M. S. Ganesh, appearing amicus curiae for the Supreme Court Legal Aid Committee and Mr. Altaf Ahmad, the learned Additional Solicitor General carefully.
31. Verma J., while dealing with the first question i.e. whether it was a case of custodial death, has referred to the evidence and the circumstances of the case as also the stand taken by the State about the manner in which injuries were caused and has come to the conclusion that the case put up by the police of the alleged escape of Suman Behera from police custody and his sustaining the injuries in a train accident was not acceptable. I respectfully agree. A strenuous effort was made by the learned Additional Solicitor General by reference to the injuries on the head and the face of the deceased to urge that those injuries could not be possible by the alleged police torture and the finding recorded by the District Judge in his report to the contrary was erroneous. It was urged on behalf of the State that the medical evidence did establish that the injuries had been caused to the deceased by lathi blows but it was asserted that the nature of injuries on the face and left temporal region could not have been caused by the lathis and, therefore, the death had occurred in the manner suggested by the police in a train accident and that it was not caused by the police while the

deceased was in their custody. In this connection, it would suffice to notice that the Doctor, who conducted the post-mortem examination, excluded the possibility of the injuries to Suman Behera being caused in a train accident. The injuries on the face and the left temporal region were found to be post-mortem injuries while the rest were ante-mortem. This aspect of the medical evidence would go to show that after inflicting other injuries, which resulted in the death of Suman Behera, the police with a view to cover up their crime threw the body on the rail-track and the injuries on the face and left temporal region were received by the deceased after he had died. This aspect further exposes not only the barbaric attitude of the police but also its crude attempt to fabricate false clues and create false evidence with a view to screen its offence. The falsity of the claim of escape stands also exposed by the report from the Regional Forensic Science Laboratory dated 11.3.1988 (Annexure R-8) which mentions that the two pieces of rope sent for examination to it, did not tally in respect of physical appearance, thereby belying the police case that the deceased escaped from the police custody by chewing the rope. The theory of escape has, thus, been rightly disbelieved and I agree with the view of Brother Verma J. that the death of Suman Behera was caused while he was in custody of the police by police torture. A custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of Law. It is not our concern at this stage, however, to determine as to which police officer or officers were responsible for the torture and ultimately the death of Suman Behera. That is a matter which shall have to be decided by the competent Court. I respectfully agree with the directions given to the State by Brother Verma, J. in this behalf.

32. On basis of the above conclusion, we have now to examine whether to seek the right of redressal under Article 32 of the Constitution, which is without prejudice to any other action with respect to the same matter which may be lawfully available, extends merely to a declaration that there has been contravention and infringement of the guaranteed fundamental rights and rest content at that by relegating the party to seek relief through civil and criminal proceedings or can it go further and grant redress also by the only practicable form of redress-by awarding monetary damages for the infraction of the right to life.
33. It is axiomatic that convicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State, to ensure that there is no infringement of the

indefeasible rights of a citizen to life, except in accordance with law while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law. I agree with Brother Verma, J. That the defence of "sovereign immunity" in such cases is not available to the State and in fairness to Mr. Altaf Ahmed it may be recorded that he raised no such defence either.

34. Adverting to the grant of relief to the heirs of a victim of custodial death for the infraction or invasion of his rights guaranteed under Article 21 of the Constitution of India, it is not always enough to relegate him to the ordinary remedy of a civil suit to claim damages for the tortious act of the State as that remedy in private law indeed is available to the aggrieved party. The citizen complaining of the infringement of the indefeasible right under Article 21 of the Constitution cannot be told that for the established violation of the fundamental right to life, he cannot get any relief under the public law by the Courts exercising writ jurisdiction. The primary source of the public law proceedings stems from the prerogative writs and the courts have, therefore, to evolve 'new tools' to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law. While concluding his first Hamlyn Lecture in 1949 under the title 'Freedom under the Law' Lord Denning in his own style warned :

No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do: and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning freedom in the new age. They must be replaced by new and up to date machinery, by declarations, injunctions and actions for negligence.... This is not the task for Parliament.... the Courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare State; but abused they lead to a totalitarian State. None such must ever be allowed in this country.

35. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much as protector and guarantor of the indefeasible rights of the citizens. The Courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations.
36. The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the Court moulds the relief by granting 'compensation' in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrong doer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a Court of competent jurisdiction or/ and prosecute the offender under the penal law.
37. This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights to the citizen, notwithstanding the rights of the citizen to the remedy by way of a civil suit or criminal proceedings. The State, of course has the right to be indemnified by and take such action as may

be available to it against the wrongdoer in accordance with law – through appropriate proceedings. Of course, relief in exercise of the power under Article 32 or 226 would be granted only once it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the Court in the facts and circumstances of the case, is possible. The decisions of this Court in the line of cases starting with *Rudul Sah Vs. State of Bihar and Another* (1983 (3) SCR 508) granted monetary relief to the victims for deprivation of their fundamental rights in proceedings through petitions filed under Article 32 or 226 of the Constitution of India, notwithstanding the rights available under the civil law to the aggrieved party where the Courts found that grant of such relief was warranted. It is a sound policy to punish the wrongdoer and it is in that spirit that the Courts have moulded the relief by granting compensation to the victims in exercise of their writ jurisdiction. In doing so the Courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole with a view to ensure that public bodies or officials do not act unlawfully and do perform their public duties properly particularly where the fundamental rights of a citizen under Article 21 is concerned. Law is in the process of development and the process necessitates developing separate public law procedures as also public law principles. It may be necessary to identify the situations to which separate proceedings and principles apply and the courts have to act firmly but with certain amount of circumspection and self restraint, lest proceedings under Article 32 or 226 are misused as a disguised substitute for civil action in private law. Some of those situations have been identified by this Court in the cases referred to by Brother Verma, J.

38. In the facts of the present case on the findings already recorded, the mode of redress which commends appropriate is to make an order of monetary award in favour of the petitioner for the custodial death of her son by ordering payment of compensation by way of exemplary damages. For the reasons recorded by Brother Verma, J., I agree that the State of Orissa should pay a sum of Rs. 1,50,000/- to the petitioner and a sum of Rs. 10000/- by way of costs to the Supreme Court Legal Aid Committee. I concur with the view expressed by Brother Verma, J, and the directions given by him in the judgement in all respects.

Supreme Court of India
JT 1994 (6) SC 478

Arvinder Singh Bagga

vs

State of Uttar Pradesh and Others

S. Mohan, S.B. Majmudar, JJ.

1. Pursuant to our order dated November 16, 1993, the District Judge of Bareilly has submitted his report. Mr. R. S. Sodhi, learned counsel for the petitioner and Mr. A. S. Pundir, learned counsel for the State of Uttar Pradesh perused the reports. Mr. R. S. Sodhi would submit that the erring police officers should be prosecuted and compensation should be given to such of those who have been illegally detained and suffered humiliation at the hands of the police.
2. Learned counsel for the State, though was present on an earlier occasion, did not choose to appear in spite of the matter having been passed over twice.
3. We have carefully perused the report. We appreciate the good work done by the learned District Judge. He had held a thorough inquiry by examining several witnesses to arrive at the truth. In our considered opinion the report is a fair one and deserves to be accepted. It is accordingly accepted.
4. The report in no uncertain terms indicts the police. It inter alia states :

On a careful consideration of all the evidence on record in the light of the surrounding circumstances I accept the claim of Nidhi that she was tortured by the police. On 24.7.93 she was pressurised by J.C. Upadhyay S.H.O., Sukhpal Singh, S.S.I. and Narendrapal Singh S.I. and threatened and commanded to implicate her husband and his family in a case of abduction and forcible marriage thereafter. She was threatened with physical violence to her husband and to herself in case of her default and when she refused her family members were brought in to pressurise her into implicating them. On 25th July 1993 she was jolted out of sleep by Sukhpal Singh S.S.I. and made to stand for a long time. She was abused and jostled and threatened by J. C. Upadhyay, Sukhpal Singh and Narendrapal Singh with injury to her body if she did not write down the dictated note. Sukhpal Singh SSI even assaulted her on her leg with danda and poked it in her stomach. She did not yield to the pressure. Then, on 26.7.1993 she was given filthy abuses and threatened by J. C. Upadhyay and Sukhpal Singh for writing a dictated note. She was pushed and jostled by them both. Sukhpal Singh S.S.I. even assaulted her on her leg and made threatening gestures aiming danda on her head.

Ultimately they both succeeded in making her write a note dictated by them whose contents were those which were incorporated by the investigating officer in 161 Cr. P.C. Thereafter on 27th July she was purported to be taken by K.C. Tyagi to the Court for the recording of her statement under Section 164 Cr. P.C. but was taken b J. C. Upadhyay, S.H.O. to Chauki Chauraha Police Outpost and kept there and brought to the police station and kept there. She was despatched from there to Nari Niketan only at 5 p.m. When A.C.J.M. II had passed orders for Nidhi being kept at Nari Niketan Bareilly K. C. Tyagi I.O. was under obligation to take her from Court to Nari Niketan straightway without any delay whatsoever but she was brought back to the police station and lodged there and only afterwards she was despatched from there for Nari Niketan. Then on 29.7.93 while being taken to the Court for the recording of her statement under Section 164 Cr.P.C. Nidhi was brought from Nari Niketan to the police station and there J. C. Upadhyay S.H.O. commenced her to speak that which he had asked her to speak and if she did not make her statement accordingly and went with Charanjit Singh then she would not be spared by him and he would ensure that she underwent miserable life time. He further told her that if she cultivated enmity with the police its consequences was only too obvious. So the torture extended upto 29.7.93. Torture is not merely physical, there may be mental torture and psychological torture calculated to create fright and submission to the demands or commands. When the threats proceed from a person in Authority and that too by a police officer the mental torture caused by it is even more grave.

5. This clearly brings out not only highhandedness of the police but also uncivilized behaviour on their part. It is difficult to understand why Sukhpal Singh, S.S.I. assaulted Nidhi on her leg with Danda and poked it in her stomach. Where was the need to threaten her? As rightly pointed out in the report that torture is not merely physical but may even consist of mental and psychological torture calculated to create fright to make her submit to the demands of the police?

6. A further reading of the report shows :

- (i) fabrication;
- (ii) illegal arrest;
- (iii) without personal knowledge or credible information that the arrested persons were involved in a cognizable offence; and
- (iv) illegality of verbal order of arrest not contemplated under Section 55 Cr.P.C.

This again is a blatant abuse of law.

7. The report clearly holds Narendrapal Singh S.I. of indulging in illegal arrest and detention in arresting Charanjit Singh Bagga and Rajinder Singh Bagga. Further, both of them were tortured as they were given danda blows at police station on 23rd July,

1993. The report blames J.C. Upadhyay, S.H.O. and K.C. Tyagi, I.O. for the wrongful detention of Nidhi. It concludes :

The detention of a married woman in custody who is not an accused on the pretext of her being a victim of abduction and rape which never was to her knowledge and to the knowledge of the police officers concerned aforesaid is itself a great mental torture for her which cannot be compensated later but here we have found that she was tortured otherwise also by threats of violence to her and to her husband and his family and was given physical violence calculated to instil fear in her mind and compel her to yield and to abandon her marriage with Charanjit Singh Bagga which had been duly performed in Arya Samaj Bhoor and which had been duly registered in the office of Registrar of Hindu Marriages under the U.P. Hindu Marriage Registration Rules, 1973 framed by the Governor in exercise of the powers conferred by Section 8 of the Hindu Marriage Act, 1955 (Act No. XXV of 1955). She was made to write a statement as commanded by J.C. Upadhyay S.H.O. and Sukhpal Singh SSI on 26.7.93 which was reproduced by the I.O. in the case diary as her statement under section 161 Cr.P.C. The physical and mental torture was given to Nidhi on 24th July, 1993 and 25th July, 1993 by J.C. Upadhyay S.H.O., Sukhpal Singh SSI and Narendrapal Singh S.I. but on 26.7.93 it was done by only J.C. Upadhyay S.H.O. and Sukhpal Singh SSI and there was no participation of K. C. Tyagi I.O. in the torture and harassment dated 24.7.93, 25.7.93 and 26.7.93.

8. On a perusal of all the above, we are really pained to note that such things should happen in a country which is still governed by the rule of law. We cannot but express our strong displeasure and disapproval of the conduct of the concerned police officers. Therefore, we issue the following directions :
 - (i) The State of Uttar Pradesh will take immediate steps to launch prosecution against all the police officers involved in this sordid affair.
 - (ii) The State shall pay a compensation of Rs. 10,000 to Nidhi, Rs. 10,000/- to Charanjit Singh Bagga and Rs. 5,000/- to each of the other persons who were illegally detained and humiliated for no fault of theirs. Time for making payment will be three months from the date of this judgement. Upon such payment it will be open to the State to recover personally the amount of compensation from the concerned police officers.
9. Writ petition shall stand disposed of in view of the above terms.

Andhra Pradesh High Court
1994 Cri. LJ 1469
Prof. S. Seshaiah
vs
State of Andhra Pradesh and Another

M.N. Rao and N.D. Patnaik, JJ.

1. A person was held in police custody without any charge against him for several days. Immediately thereafter two habeas corpus petitions were filed before the Madras High Court and Andhra Pradesh High Court (instant petition) respectively by some social workers on the basis of newspaper reports. According to police he was not in their custody as alleged but about 20 days after the alleged incident of illegal detention, a case of theft was registered against him, he was produced before a Magistrate and was remanded to judicial custody.
2. Held that the facts of the instant case revealed that in order to cover up the illegal detention the police had registered a case of theft against him by obtaining a false complaint. The case was registered much after two writ petitions were filed. The detenu was all the while in police custody and could not have committed theft. Normally, the Court would not interfere when the detenu is in judicial custody. But since the arrest and subsequent filing of criminal case against the detenu was only mala fide in order to cover up the illegal detention, the proceedings could be quashed by the High Court, and it could issue the writ of habeas corpus. His prosecution for theft case being an abuse of the process of Court was liable to be quashed. The State of Andhra Pradesh was directed to pay him compensation of Rs. 5,000/- within two months since he was illegally deprived of his personal liberty.

Gauhati High Court
1995 Cri. LJ 347
Nagatangkhui
vs
State of Nagaland and Others

W.A. Shishak, J.

ORDER

1. The petitioner herein is the father of one Thotmaya aged about 19 years who died while in custody in Sub-jail, Dimapur on 13.9.92.
2. The Petitioner resides with his family at Diphupar, Dimapur. The deceased was the eldest son of the petitioner.
3. The said son of the petitioner was missing from his home since 30.8.92. The petitioner tried to find out the whereabouts of the son. It was on 2.9.92, the petitioner came to know that his son was lodged in Sub-jail, Dimapur. After obtaining permission from a local Magistrate at Dimapur, the petitioner met his Son on 2.9.92. It is averred in this petition that on 2.9.92 when the petitioner met his son in Sub-jail, Dimapur he was in good health and the son did not complain of any problem. The petitioner was however, requested by his son to see that he was bailed out. He was also informed by his son that no ground of detention was disclosed to him. On 12.9.92 at about 11 a.m. the petitioner went to Sub-jail to give his son some clothing, soap and food etc. It was a Sunday. Without permission from Magistrate, the petitioner was not allowed to meet his son that day. While the petitioner was still lingering at the Jail Gate, he over-heard some undertrial prisoners who saw him standing at the Gate saying that his son was in a very serious condition and might not survive. Being alarmed, the petitioner approached the Jailor to allow him to meet his son. He was, however, told that if it was a case of sickness, the petitioner should meet the compounder. The petitioner met the compounder and requested him to let him know if his son was sick. The compounder denied that his son was sick. The compounder went to the Sub-jail and demanded to know as to who had alleged that the petitioner's son was ill. The petitioner told the compounder that he was informed of the serious condition of his son by the two persons who were still sitting near the Jail Gate. At that time the compounder stated that he had already conducted the morning check on all the

prisoners and there was no sign of any sickness of any of the prisoners including the petitioner's son.

4. On 13.9.92, the petitioner received a chit bearing his son's name delivered by an unknown persons The chit was written on the letter head of Respondent 3, the Senior Superintendent of Jails Sub-jail Dimauro. On the said chit, the name of the petitioner and the name of his son were written, but no information as such was given. On receipt of the said chit, the petitioner rushed to Sub-jail and on arrival he was told that his son had died and his body had been taken to the Civil Hospital, Dimapur. From Sub-jail, the petitioner rushed to Civil Hospital and he found fresh-gaping wounds and other injuries on the body of his son. Some photographs were taken of the dead body of his son. Some photographs were taken of the dead body of his son. The petitioner was convinced that it was an unnatural death caused due to injuries inflicted on the body. Autopsy was done by the Assistant Surgeon which was counter-signed by the Civil Surgeon. A copy of the Post Mortem Examination was obtained by the petitioner on 12.10.92. The body was said to have been despatched on 13.9.92 and the post mortem was actually done at the death house on 14.9.92 at 10.45 a.m. The following injuries were found on the body of the deceased :

- (i) *Multiple dried blisters of various sizes (1/4" x 3/4") on the face.*
- (ii) *A lacerated wound on the back (1" x 1").*
- (iii) *9 nos. of dried blisters on the left arm.*
- (iv) *A lacerated wound of 1/4" x 1/4" on the left shoulder towards the frontal part i.e. supra clavicular region.*
- (v) *An old infected wound of 1 1/2" x 1" on the left shoulder towards the back side.
 - (a) *One old bruise of about 2" x 1/2" on the left leg.*
 - (b) *One bruise of 3/4" on the left thigh.**

It is also stated that a lacerated wound on the left shoulder towards the back side was also found. The Doctor is of the opinion that the death of the deceased was caused due to cardiac respiratory failure. It is further averred that the petitioner in fact saw several injuries on different parts of the body of his son. The petitioner further states that before the death of his son, no such injuries were on his body.

5. The petitioner further made enquiry from the local police as to how his son came to be arrested. This he did after obtaining a copy of the accused forwarding report made by the Police to the Judicial Magistrate dated 30th August, 1992. It is stated in this forwarding report that Thotmaya was arrested under Section 41 of Cr. P. C. as he is a

- drug addict and suspected to be involved in many crimes. The petitioner states that his son was not a drug addict.
6. The petitioner submitted a representation to the Governor of Nagaland requesting the Governor to give a direction to enquire into the circumstances leading to the death of his son inasmuch as it was a death in State custody and in suspicious circumstances.
 7. It may be stated that no case was registered against any person regarding the death of the son of the petitioner. No enquiry whatsoever was made by the Government of Nagaland in spite of request made in this regard. The chit delivered to the petitioner has been filed in this case and I have perused it. I have also seen the accused forwarding report dated 30th August, 1992. It is stated that the accused 'be forwarded to Judicial custody for drug-de-addiction treatment'. At this stage it may be stated that there is nothing to show in the counter filed on behalf of the Government that there was a finding that petitioner's son was a drug addict. There is also no finding by a competent medical officer in this regard. Even assuming that the deceased was a drug addict, there is no medical opinion that one would have died in the circumstances narrated in the present case. In the affidavit filed on behalf of respondent 2, the injuries detected in the post mortem examination are nowhere denied. It may also be stated that nowhere it is stated in the forwarding report that the son of the petitioner in any way exhibited sign of being an addict. Since the petitioner has denied in para 7 of the writ petition that his son was an addict, it is necessary that Government affidavit should have come out with materials to support the forwarding report of the police that the deceased was a drug addict. The two affidavits filed on behalf of the Government are by the Home Commissioner (respondent 1) and by I. G. Prisons (respondent 2). Very strangely indeed no affidavit has been filed by and on behalf of respondent 3. Senior Superintendent of Jails, Sub-jail, Dimapur under whose direct custody the son of the petitioner died.
 8. It is contended on behalf of the petitioner that despite representation made to the Governor of Nagaland which fact has not been denied in the affidavits filed on behalf of respondents 1 and 2 no ex-gratia payment was made to the petitioner for the death of his son in custody. It is submitted that the State has shown a very negative attitude to the loss of life of the son of the petitioner. This attitude of the Government of Nagaland, according to the learned counsel, is an insult to the Constitution of India which states that the State shall protect the life and property of every citizen of this country.

9. Mr. I. Jamir, learned Senior Government Advocate appearing on behalf of respondents states that in spite of his several requests, respondent 3, the Senior Superintendent of Jails, Sub-jail, Dimapur did not care to furnish materials concerning the present case. According to him, he has written as many as three (3) letters to respondent 3 requesting him to meet the allegations made by the petitioner regarding the unnatural death of his son. The learned Senior Government Advocate expresses his helplessness in the present case inasmuch as he receives no assistance from respondent 3. According to him, this is the second time that such death in jail has taken place in Nagaland. It is stated at the Bar that this Court had decided a case of similar nature in Civil Rule 101(K) 91 in a petition filed by one Smt. Geeta Sangma. We have read the said judgement together. Learned Senior Government Advocate does not deny that there are absolutely no other materials to show that the deceased was an addict except that it is mentioned in the forwarding report of police vide Annexure-3 as mentioned earlier.
10. As stated above, affidavits have been filed by the Home Commissioner and the I. G. Prisons whose Offices are located in the State Capital of Kohima. They have no personal knowledge in the nature of such a case where death actually took place inside the jail at Dimapur under the direct administration and supervision of respondent 3, the Senior Superintendent of Jail, Sub-jail, Dimapur. In this view of the matter, affidavits filed by respondent 1 and 2 are not of much consequence inasmuch as they have no personal knowledge regarding facts and circumstances leading to the death of the deceased. At the same time, I am surprised that sources of information did not understand why the higher authorities viz., the Home Commissioner and I. G. Prisons could not have asked the respondent 3, Sr. Superintendent of Jails to file detailed affidavit instead of they volunteering themselves to file affidavits on behalf of the State. I am not saying that respondents 1 and 2 cannot file affidavit at all. What I am saying in that their affidavits would be based on information derived only from respondent 3 who is directly concerned with the administration of the Sub-jail at Dimapur. It appears that the State is not prepared to come out with the facts of the case. It appears, it is because of this negative attitude of the State of Nagaland and respondent 3 whose affidavit is absolutely necessary in this case has not filed affidavit because it appears to me, he does not want to tell the true story. Or could it be that it was respondent 3 himself who was instrumental in the destruction of the life of the deceased? Respondent 3 is a very high ranking and responsible officer of the Government of Nagaland. In my opinion, he cannot avoid responsibility in such a case

where death of a human person is involved. In such a situation I am constrained to say that even very high ranking officers of the Government of Nagaland refuse to comply with the basic principles of administration of justice.

11. A time has come when jail administration has to be streamlined. After all inmates of the jail are human persons created in the image of God like any other persons in the world, except for the fact that they are detained in jail in connection with some allegations brought against them. Despite the fact that they are in jail, they do not cease to be human persons. They do not cease to be citizens of this democratic country of India. The only difference is that once convicted, they will have to suffer for the offence they have committed. We cannot think beyond that. In this view of the matter I must emphasise that we have no right whatsoever to de-humanise the prisoners in any manner. They can only be dealt with in accordance with the provisions of law for the time being in force in the country. Constitutional mandate as regards protection of life and property as enshrined under Article 21 of the Constitution of India is sacred and such mandate must be carried out by officials in high places very conscientiously and religiously.
 12. Learned Senior Government Advocate submits that in view of financial constraints with which the Government is faced at the moment, this Court may not fix a huge amount of compensation in the present case. Ms. C. Jajo, learned counsel for the petitioner refers me to 1991(2) GLJ 16 : (1992 Cri. LJ 154) (Gauhati) and submits that this case is similar to this. In the case referred to above, death of the persons was not proved. The deceased was picked up by Army and later he was found missing inspite of the fact that death in the hands of Army was disputed because of the circumstances described in the case, this Court awarded compensation of Rs. 2 Lakhs. Paras 16 and 17 are relevant while considering the amount of compensation payable to the petitioner (p. 158 of Cri. LJ) :
- 16. It has already been stated that the cause of the death is disputed. Whatever was the cause of death we are not expressing our opinion about it as it would prejudice the investigation of the case. But, admittedly Dhruba Jyoti died when he was in the custody of the Army. Dhruba Jyoti suffered injuries. He must have suffered continuous pain. At the time of his death, Dhruba Jyoti was a student of Degree Course and was aged 22. Both the parents are alive. The parents of the deceased have been suffering from mental agony. A case has been registered under Section 302 read with Section 34, IPC, as already stated on the facts and in the circumstances of the case we are of the view that ex-gratia payment (payment without legal consideration) or some monetary payment in the nature of a palliative would be admissible in such a case. Therefore, if the payment of*

Rs.2,00,000/- is ordered to be paid to the parents of the deceased Dhruba Jyoti, it would meet the ends of justice.

17. *For the foregoing reasons, it is ordered and directed that the case shall be referred immediately to the Central Bureau of Investigation for a thorough and detailed inquiry by it. Copy of the report shall be submitted to this Court for follow up action, if need be. It is further directed that the Union of India shall pay a sum of Rs. 2,00,000/- (Rupees two Lakhs) to the parents of the deceased.*
13. Needless to say that the petitioner, his wife and other children have gone through great mental agony and pain because of the loss of a loved one in the family. No amount of money will adequately compensate for the loss of life. Resurrection of life is not within the power of man. It is possible only with God, the Creator. The life of the son of the petitioner was cut short in very unfortunate circumstances. I have no reason to doubt that the son of the petitioner died of the injuries inflicted on his body as is evident from the medical report. The only way to console the petitioner and other members of the family is to grant compensation.
14. In the result, this petition is allowed. The respondents (The State of Nagaland) are directed to pay Rs. 2,00,000/- (Rupees two lakhs) as compensation for the loss of life of the son of the petitioner while in State custody. The respondents are directed to make payment within three (3) months from today.
15. It is open to the State to make necessary investigation and to find out the real culprits responsible for the death of the son of the petitioner and to fix responsibility including recovery of the compensation amount from such persons who are found responsible for the death of the son of the petitioner.
16. With the above observation and direction, the petition is disposed of. I make no order as to costs.
17. Order accordingly.

Supreme Court of India
1995 (SU4) SCC 450

In Re:death of Sawinder Singh Grover

Kuldip Singh, N.M. Kasliwal, P.B. Sawant, JJ

We have perused the report of the learned Additional District Judge, Delhi. In the conclusions he has summed up the report as under :

- (i) Shri Nanday's deposition contained in para 8 of his affidavit filed before Hon'ble Supreme Court regarding the circumstances leading to the death of Sawinder Singh does not appear to be truthful. It was certainly not a suicidal jump by Sawinder Singh, as propounded in the affidavit of Shri Nanday.
- (ii) It is not possible to say precisely what went on inside room leading to the incident. There is strong suspicion of some misfeasance including torture on the part of Shri Narang and Shri Jaswant Singh whose accounts in this regard are unworthy of credit.
- (iii) The Officers of the Directorate had wrongfully confined Kanhiya Singh, Waryam Singh, Ram Saran and Surinder Singh in the office of the Directorate after the incident till their departure at about 4.15 a.m.

It is not disputed that the matter has not as yet been finally investigated. The learned Attorney-General assisting us in this case states that he does not accept the findings of the report and he reserves his right to challenge the same at the appropriate stage. We are of the view that the facts and circumstances which have now come to light create a *prima facie* case for investigation and prosecution. We, therefore, direct that all the persons named in the report of the learned Additional District Judge and others who are accused as a result of the investigation, be prosecuted for the appropriate offences under the law by the Central Bureau of Investigation. We direct the CBI to ensure that an FIR is registered on the facts as emanate from our order and the report of the learned Additional District Judge. A copy of the report along with all the annexures be sent to the Central Bureau of Investigation. As an interim measure by way of ex gratia payment, we direct that a sum of Rs 2,00,000 (two lakhs) shall be paid by the Union of India/Directorate of Enforcement to the widow of the deceased-Sawinder Singh. In the event a suit being filed for compensation, appropriate compensation may be determined in accordance with law after hearing the parties. The contentions of the learned Attorney-General which he

wishes to place before us at this stage, should be reserved by him for an appropriate stage. In the event a decree to be passed, the sum of Rs 2,00,000 to be paid ex gratia, shall not be taken into account. The payment of rupees two lakhs shall be made within three months from today. The amount shall be deposited in the Registry of this Court and the widow of deceased-Sawinder Singh shall be at liberty to withdraw the entire amount on the identification to the satisfaction of the Registrar (Admn.). Any observation made by us in this order will not affect the investigation, prosecution and the trial. Notice is disposed of.

**Supreme Court of India
1995 Cri. LJ 2920**

Smt. Kewal Pati

vs

State of Uttar Pradesh and Others

R.M. Sahai, S.B. Majumdar, JJ.

1. This petition was entertained on a letter sent by the wife of the deceased Ramjit Upadyaya who was killed by a co-accused while serving out his sentence under Section 302 I.P.C. in Central Jail, Varanasi. The petitioner and her children have claimed compensation both in law on compassionate grounds. Reports were obtained from the Inspector General of Prisons, U.P. and the Superintendent, Central Jail, Varanasi. They confirm that Ramjit Upadhyaya was killed by co-accused. A counter-affidavit was also filed by Deputy Jailor, Central Jail, Varanasi, Admitting that Ramjit Upadhyaya was killed by co-accused, Happu, against whom case under Section 303 has been registered. Affidavit was filed on behalf of the Government as well stating that there was no provision in the U.P. Jail Manual for grant of compensation to the family of the deceased convict.
2. Ramjit Upadhyaya was a convict and was working as a Nambardar in the jail. He was strict in maintaining discipline amongst the co-accused. It was due to his strictness in his behaviour as Nambardar that he was attacked and killed by Happu – a co-accused. Even though Ramjit Upadhyaya was a convict and was serving his sentence yet the authorities were not absolved of their responsibility to ensure his life and safety in the jail. A prisoner does not cease to have his constitutional right except to the extent he has been deprived of it in accordance with law (See *Francis Coralie Mullin Vs. The administrator Union Territory of Delhi & Ors., and A. K. Roy Vs. Union of India*). Therefore, he was entitled to protection. Since killing took place when he was in jail, it resulted in deprivation of his life contrary to law. He is survived by his wife and three children. His untimely death has deprived the petitioner and her children of his company and affection. Since it has taken place while he was serving his sentence due to failure of the authorities to protect him, we are of opinion that they are entitled to be compensated.

3. In the result this petition is allowed by directing that the State of U.P. shall deposit a sum of Rs. 1,00,000/- within three months from today, with the registrar of this Court. A sum of Rs. 50,000/- out of this amount shall be deposited in fixed deposit in any nationalised bank and the interest of it shall be paid to the wife and the children. The remaining among shall be paid to the wife by the Registrar after being satisfied about the identification of the petitioner. The amount in deposit shall be paid to the wife on her option after all the children become major. In case of petitioner's death prior to the children becoming major, the amount shall be divided equally between the surviving children.
4. Petition allowed.

**Supreme Court of India
1997 (7) SCC 725**

**Postsangbam Ningol Thokchom (Smt) and Another
vs
General Officer Commanding and Others**

J.S. Verma, S.P. Bharucha, JJ

1. The appellants are the mothers of Thokchom Lokendra Singh and Kangujam Loken Singh respectively. The said boys, each about 20 years' old, along with a third, Kangujam Iboyaima Singh, were picked up by the Army in Imphal on 23-9-1980. On 26-9-1980, Kangujam Iboyaima Singh was released, but the said boys were not. On 9-4-1981, the appellants filed habeas corpus writ petitions before the Gauhati High Court. The writ petitions were dismissed by a learned Single Judge on the strength of the averment of the respondents that the said boys had left their custody. Appeals were filed before a Division Bench of the High Court, which also, ultimately, came to be dismissed in view of the respondents' statement.
2. Special leave to appeal against the orders of the Division Bench was granted. The respondents reiterated in this Court the stand that the said boys had been released after interrogation, but without having been first handed over to the police. On 24-4-1990, this Court directed the District Judge, Imphal (West), to conduct an inquiry into the circumstances relating to the disappearance of the said boys. The District Judge was directed to permit the parties concerned to adduce evidence, documentary and oral, and to cross-examine the witnesses of the other side. He was also directed to record the statement of the third boy, Kangujam Iboyaima Singh, who had been released.
3. The District Judge submitted a detailed report on 6-10-1990. His conclusion was that there was no cogent evidence to show that the said boys had been released. He, therefore, found that they had not yet been released from the custody of the first and second respondents.
4. The case before us is squarely covered by the decision of this Court in *Nilabati Behera v. State of Orissa* [(1993) 2 SCC 746 : 1993 SCC (Cri) 527] the facts whereof were similar to those before us. This Court held that there was an obligation upon it, conferred by

Article 32 of the Constitution, to forge new tools necessary for doing complete justice and enforcing the fundamental rights guaranteed by the Constitution. This enabled it to award monetary compensation in appropriate cases where that was the only mode of redress available. The remedy in public law was more readily available when invoked by the have-nots, who were not possessed of the wherewithal for enforcement of their rights in private law, but the exercise was to be tempered with judicial restraint to avoid circumvention of private law remedies, where more appropriate. The Court awarded compensation in the amount of Rs. 1,50,000 to the petitioner in that case, and clarified the award thus : (SCC p. 765, para 25)

- 25. We clarify that the award of this compensation, apart from the direction for adjustment of the amount as indicated, will not affect any other liability of the respondents or any other person flowing from the custodial death of petitioner's son Suman Behera. We also expect that the State of Orissa would take the necessary further action in this behalf, to ascertain and fix the responsibility of the individuals responsible for the custodial death of Suman Behera, and also take all available appropriate actions against each of them, including their prosecution for the offence committed thereby.*
5. After the receipt of the District Judge's report mentioned hereinabove, this Court, on 2-8-1991, directed the Union of India to deposit in the names of each of the two appellants in the State Bank of India, Imphal, the amount of Rs. 1,25,000, the interest whereon was to be paid periodically to them. This has been done.
 6. Having regard to the District Judge's finding aforesaid, learned counsel for the respondents does not now contend that the said boys had been released from custody. All that remains to be done, therefore, is to determine, in terms of the law laid down in Nilabati Behera case [(1993) 2 SCC 746 : 1993 SCC (Cri) 527] the quantum of compensation to be paid to the two appellants. In our view, each of the two appellants should be compensated in the sum of Rs. 1,25,000. The two amounts of Rs. 1,25,000 already deposited with the State Bank of India, Imphal, by the Union of India pursuant to the interim order of this Court dated 2-8-1991, shall, accordingly, be paid over by the said Bank to the two appellants after they have given to its Manager satisfactory proof of their identity.

**Supreme Court of India
1998 (9) SCC 351**

Malkiat Singh

vs

State of Uttar Pradesh

G.T. Nanavati, V.N. Khare, JJ

1. This is a habeas corpus petition filed by the father of one Talvinder Singh. The allegation of the petitioner is that since 12-7-1991 Talvinder Singh has been kept in illegal custody by the police officers of District Pilibhit, State of U.P. It is now unnecessary to state other facts and allegations as on the basis of the report filed by the Additional Chief Judicial Magistrate, Pilibhit, pursuant to the order passed by this Court on 9-3-1992, it can be stated with reasonable certainty that Talvinder Singh was killed in an alleged encounter which took place between the police and four Sikh youths on 13-7-1991 at Phagunal Chat in the jurisdiction of P. S. Bilsanda. From the charge-sheet filed by the CBI against some police officers in respect of deaths of 10 other Sikh youths, it appears that while deceased Talvinder Singh along with other Sikh youths was travelling in a bus, he was made to get down from it and was taken into custody by the police. What happened thereafter and the manner in which the encounter took place is neither explained by the police nor has been stated by the CBI or the ACJM, Pilibhit, who conducted the enquiry.

2. In view of the report of ACJM this Court on 7-5-1996 passed the following order:

Mr. R. S. Sodhi the learned counsel for the petitioner, states that though the learned ACJM found on the basis of photographs that the petitioner's son Talvinder Singh is one of the persons who died in the incident involving firing by the U.P. Police, the CBI has not accepted the said finding regarding the death of Talvinder Singh. It is obvious that if he is found dead, the writ petition be only confined to the question of the entitlement of the petitioner to compensation. If the said Talvinder Singh is alive then he be produced by the police.

Issue notice.

3. It is now an accepted position that Talvinder Singh died in the incident which took place on 13-7-1991. All attempts to find his body have proved futile. But from the photograph identified by the father and the grandfather of Talvinder Singh, it is established that he is dead, because the police had taken photographs of all those who

were killed in those two encounters. Therefore, the only question which now survives in this petition is what amount of compensation should be paid to the petitioner to compensate him for the death of his son.

4. In a similar case i.e. in Writ Petition No. 632 of 1992 this Court awarded Rs. 5 lakhs as compensation. We think that the ends of justice would be met if the respondent-State is directed to pay Rs. 5 lakhs to the petitioner by way of compensation for the death of Talvinder Singh. The State shall pay this amount within 8 weeks. The learned counsel for the State states that the State will make out a draft in the name of the petitioner and will deposit the same with the Registrar of this Court. The Registrar shall hand over the draft to the petitioner after proper identification by Mr. R. S. Sodhi, learned counsel for the petitioner. The writ petition is disposed of accordingly.

**Supreme Court of India
1999 (6) SCC 754**

Kaushalya and Another

vs

State of Punjab and Others

G.T. Nanavati, S.C. Agarwal, JJ

1. This writ petition under Article 32 of the Constitution of India has been filed by the mother and brother of one Amrik Singh who had been arrested by the police and was found dead in police lock-up at Police Post Sadhrana on the morning of 11-5-1995. The said death was shown as a case of suicide. The case of the petitioners is that deceased Amrik Singh had actually been tortured by the police while he was in custody and his death was as a result of the injuries inflicted on him while he was in police custody. In view of the seriousness of the allegations that have been made by the petitioners, this Court by order dated 21-8-1995 directed the Central Bureau of Investigation (for short "the CBI") to cause an enquiry to be made in the circumstances relating to the death of Amrik Singh in police lock-up. In pursuance of the said directions, CBI has conducted an enquiry and a report has been submitted by Shri Kewal Singh, SP, CBI on 28-6-1996. We have perused the said report. It shows that prima facie, on the basis of the material collected by CBI, the death of Amrik Singh was not due to suicide but was on account of beating while he was in police custody. It is, therefore, directed that CBI will proceed with the prosecution of the persons against whom a prima facie case has been found during the enquiry. The officer concerned in CBI may also move the Government of Punjab for taking suitable action against the officers referred to in the said report.
2. Having regard to the facts and circumstances of the case, we are satisfied that this is a fit case in which Petitioner 1, the mother of deceased Amrik Singh should be suitably compensated for the death of Amrik Singh while in police custody. We, therefore, direct the respondent State to pay a sum of Rs. 2 lakhs to Petitioner 1, Smt. Kaushalya by way of such compensation. The said amount shall be paid within one month. The report of CBI may be kept in a sealed cover. The writ petitions are disposed of accordingly.

Jharkhand High Court
2001 Cri. LJ 3573

Mrs. Meena Singh, Petitioner
vs
State of Bihar and others, Respondents.

Deoki Nandan Prasad, J.

ORDER

This application has been filed under Article 226 of the Constitution of India by the sole petitioner, who is widow of late Sudhir Singh alias Bhoma for an appropriate writ/order/direction upon the respondents for compensation as the husband of the petitioner was murdered while he was in jail custody.

...

11. In the case of Smt. Kewalpati v. State of U.P. reported in 1995 (3) SCC 660 : (1995 AIR SCW 2236) it was held by the Apex Court at page 2237 of AIR SCW :

Ramjit Upadhyaya was a convict and was working as a Nambardar in the jail. He was strict in maintaining discipline amongst the co-accused. It was due to this strictness in his behaviour as Nambardar that he was attacked and killed by Happu, a co-accused. Even though Ramjit Upadhyaya was a convict and was serving his sentence yet the authorities were not absolved of their responsibility to ensure his life and safety in the jail. A prisoner does not cease to have his fundamental right except to the extent he has been deprived of it in accordance with law. (See Francis Coralie Mullin v. Administrator, Union Territory of Delhi and A.K. Roy v. Union of India). Therefore, he was entitled to protection. Since the killing took place when he was in jail, it resulted in deprivation of his life contrary to law. He is survived by his wife and three children. His untimely death has deprived the petitioner and her children of his company and affection. Since it has taken place while he was serving his sentence due to failure of the authorities to protect him, we are of the opinion that they are entitled to be compensated.

...

13. As noticed above, the deceased Sudhir Singh died in the jail custody, when the jail authority was fully responsible for his safety and security and apparently this responsibility could not be exercised with any care. Moreover, National Human Rights

Commission, by taking cognizance of the case, also held jail authority responsible for such laches and negligence resulting death of the under trial prisoner and awarded a compensation of Rs. two lakhs.

14. It is the prime duty of the Jail authority being custodian to provide security and safety to the life of prisoners while in jail custody, even though he is criminal or accused in criminal case. It was the responsibility of the jail authority to save the life of the deceased after he was taken into custody, but unequivocally serious injuries caused to the deceased Sudhir Singh while in the jail premises as a result of which he died. It is, *prima facie*, evident that due to negligence on the part of the jail authority, such violence took place which resulted in the death of under trial prisoner within the jail premises. It is, therefore, a fit case where the petitioner, who is widow, having two minor daughters, need to be compensated. It is, therefore, ordered that the petitioner shall be paid compensation of Rs. three lakhs of which Rs. two lakhs already awarded by the National Human Rights Commission shall be adjusted. Therefore, it is ordered that the petitioner shall be paid compensation of Rs. one lakh only in this case. The State Government is directed to pay compensation of Rs. one lakh to the petitioner of which Rs. 50,000/- shall be paid to the petitioner immediately and the balance of Rs. 50,000/- be deposited in a nationalised Bank in the name of the petitioner under Fixed Deposit for a period of five years. The said compensation must be paid within the period of five months from today.

With the above observation, this application is disposed of.

Ordered accordingly.

Bombay High Court
2004 ALL MR (Cri) 636

Prem Bangar Swamy
vs
State of Maharashtra & Others

H.L. Gokhale, S.S. Parkar, JJ.

1. The petitioner herein is a resident of Chennai and on the date of filing of this petitioner i.e. 22/8/2003 she was in custody of Yerawada Central Prison, Pune. The petitioner places on record a very sorry state of affairs in as much as it is pointed out therein that inspite of her acquittal in NDPS Special Case No. 16 of 1991 by the Special Court in Mumbai and in spite of that order having been confirmed in appeal, by dismissing the appeal filed by Respondent No. 3 – Narcotics Control Bureau, which appeal bearing No. 484 of 1995 was dismissed by the High Court on 13.12.2000, the petitioner continued to be retained in custody. This petition filed under Article 226 of the Constitution, therefore, invokes articles 14, 19, 21 and 22 of the Constitution and seeks to challenge this illegal detention. This prayer clause (a) of this petition, In fact, Ms. Kaushik, the learned counsel appearing for the petitioner, informs on a query from the court, that she happened to visit Yerawada Central Prison, Pune in another legal aid matter when the petitioner met her and informed her about her plight which led to the filing of this petition.
2. The petitioner came up before an earlier Division Bench 25.8.2003 when having noted this state of affairs, the Division Bench directed that the petitioner be released immediately from custody. The petition came up before another Division Bench on 10.9.2003 when it was noted that inspite of the earlier order passed on 25.8.2003 the petitioner had not been released. the Division Bench was required to pass another order on that date and ultimately the petitioner was released on 13.9.2003. In this order, passed on 10.9.2003, the Division Bench also directed the learned Public Prosecutor to take instructions and to find out whether any other similarly situated prisoners are still languishing in jail.
3. The relevant facts leading to this petition are that the petitioner was arrested on 29.10.1990 by Respondent No. 3 – Narcotics Control Bureau when she had boarded a flight to Zambia from Mumbai. The Respondent No. 3 had received an information

that some narcotics were being carried on that flight. The petitioner was off-loaded. A certain baggage which was at the Airport was checked wherein heroin of the quantity of 1.4 kgs was detected. It was the case of the prosecution that the baggage belonged to the petitioner. However, the prosecution failed to establish the charge to the hilt and the petitioner was acquitted by the Judgement and Order dated 23.11.1993 in NDPS Special Case No. 16 of 1991 of the offences for which she was charged, namely, those under Section 8(c) read with Section 21, Section 28 read with Section 23 of the NDPS Act and Section 135 (1) (a) read with Section 135 (1) (ii) of the Customs. Act.

4. All through out this period i.e. from the date of her arrest on 29.10.1990 until the judgement and her release, the petitioner was in custody. Thereafter she returned to her home town Chennai to join her family. The Narcotics Control Bureau filed an appeal bearing No. 484 of 1995 against this Judgement. As is often done, after the appeal was admitted, a warrant was issued against the petitioner. She was arrested by the Narcotics Bureau in Chennai on 13.8.1998 and brought before the Court of Sessions on 21/8/1998. Now, in all such appeals against acquittal normally the accused, who are already acquitted in trial are required to give surety to assure their presence when the appeal is heard finally and they are released on bail. However, in the present case the petitioner did not apply for bail and, therefore, there was no occasion for her being released on giving an appropriate surety bond. She, therefore, continued to remain in custody during pendency of the appeal.
5. When the appeal reached for final hearing, an Advocate from the Legal Aid Committee was provided to represent the petitioner since she was not in a position to engage any Advocate on her own. As stated above, the appeal was heard and came to be decided on 13.12.2000 by another Division Bench. At the end of para 12 of the Judgement, the Division Bench held that there were serious discrepancies in recording of the statement of the accused. This was because the petitioner only knew Tamil and the court was not satisfied with the recording of her statement and interpretation and explanation thereof to her. The court noted that the linkage between the baggage and the petitioner was not established in the trial court and as a result it found no merit in the appeal and the appeal came to be dismissed. At the end of para 14, the court held, "Therefore the defects pointed out by the court and acquitting the accused fully is justified" and then passed the following operative order in para 15:

In the result we find no merit in the appeal. Appeal is therefore dismissed. The order of acquittal rendered by the court below is justified and confirmed.

6. Paragraphs 5 and 6 of this petition record the subsequent developments. It is stated therein that although the appeal was dismissed as stated above, the order of the Hon'ble High Court was not communicated to the petitioner. It is further stated that the respondents had failed to record the details of the petitioner's whereabouts in the court records. Grievance is made with respect to respondent no.3 i.e. Narcotics Control Bureau that the respondent no.3 does not co-ordinate with the authorities of the State Government and, therefore, the person continued to languish in jail for a long period. In paragraph 6 of the petition a general inquiry is sought regarding the number of persons who are in custody after their appeals have been disposed of and orders for their release are not passed by the concerned authorities. In this behalf an inquiry is sought from respondent no.5 through prayer clause(c) to give details such as the names of the accused, their appeal numbers, period of incarceration undergone, whereabouts of the person and the date of release, if any. Apart from making this general inquiry, it is submitted that for no fault of hers grave injustice has been done to the petitioner and she has been made to suffer a wrongful and continued illegal detention. Her self esteem has suffered and she has lost reputation. She has lost valuable years of her life in jail. She has, therefore, sought compensation of Rs.5 lacs through the prayer clause(b). In prayer clause(d) a suitable procedure is sought to inform the accused persons in jail about the judgements and orders passed in their cases.

.....

12. Thus, from what is seen above, as far as record of the appeal was concerned, it was clearly mentioned on the paper-book that the original accused no. 1 was in jail. The cause list of the High Court also clearly mentions that the original accused no. 1 was in jail. In as much as the appeal was against acquittal all that the High Court was expected to decide was whether the appeal was to be entertained or not and accordingly having found no merit, the then Division Bench dismissed the appeal and held that the order of acquittal was justified and confirmed. The High Court administration immediately sent the writ to the Sessions Court according. Thus as far as the High Court administration is concerned, it is difficult to say that there was any error on their part.

13. However, as far as the administration of the Sessions Court, Mumbai, is concerned it has clearly come on record that when the writ of the High Court was received in December, 2000, if they were only to refer to the relevant register, they would have

found that the person concerned was in custody. We were shown the register and we have noted that there are endorsements therein clearly recording that the person concerned was taken in custody in appeal. It has clearly come on the affidavit of Mr. Bhailume as well as Mrs Patange that the petitioner was taken in custody in the then pending appeal on 21.8.1998 and the Prison Authorities were informed by the Sessions Court that the petitioner was to be kept in jail as an under trial prisoner. Thus, in December, 2000 itself the officers of the Sessions Court ought to have moved and informed the Jail Authorities to release the detenu, but they did not inform the jail authorities accordingly. A copy of the judgement of the High Court was received by the Sessions Court on 23.8.2001. That time also the Sessions Court did not inform the jail authorities to release the petitioner.

14. The Session Court was provided one more opportunity when a letter was received as stated above on 16.6.2001 from the detenu mentioning specific sections of the NDPS Act and her case number. The letter clearly mentions that she has been acquitted in trial, she has been further taken in custody in appeal and, therefore, her matter be heard at the earliest. As stated above, in spite of clear reference to the Sessions Case number and the sections of the NDPS Act, the then Asstt. Registrar Mr. V.S. Narvekar has sent a letter on 5th July, 2001 stating that her Sessions Case No. 16/91 was assigned to Court No. 24 and was sent for trial. If Mr. V.S. Narvekar was to look into the letter sent by the detenu carefully he would have clearly understood that it was a NDPS Case. The letter has clearly stated that the detenu was acquitted and had been arrested in appeal. So surely he would have understood that the trial was over and that her appeal was pending as per the understanding. At that point of time an opportunity was available for the Sessions Court to move but nothing was done as expected. As stated above, there was one more opportunity when the jail authorities wrote to the Sessions Court on 31.10.2002 informing that the detenu was pressing hard to produce her before the court. The letter of the jail authorities referred to the case number and Sessions Court's earlier reply dated 5.7.2001 bearing their outward no. 14213. On this letter of the jail authorities we find an endorsement by one Mr. S.S. Waydande submitted to the Hon'ble court concerned. No efforts are obviously made to look into the letter in all seriousness. Ultimately it is only when the petition was filed in the High Court and that too after two orders passed by this Court that the detenu came to be released. Thus, *prima facie*, the submissions of Ms. Kaushik appearing for the petitioner has to be accepted that right from the date of the order passed on 13.12.2000 by this Court until the release of the petitioner on 13.9.2003 there is practically no explanation or no defence on the part of the authorities of the State as

to why the petitioner was kept in detention. Petitioner's detention from 13.12.2000 to 13.9.2003, which is clearly 2 years and 9 months, is without any authority of law and is illegal. There is no doubt that the State will have to compensate the petitioner for this illegal detention.

15. Ms. Kaushik submitted that even during the period i.e. when the appeal was admitted and the petitioner was taken in custody, that time also normally all such accused are released on bail on their giving appropriate surety. In the present case, however, unfortunately it so appears that the petitioner did not apply for any bail at all. In our view although some appropriate direction with respect to the orders under Section 390 of the Code of Criminal Procedure will have to be passed, as of now it is difficult to say that this earlier period of remaining in custody amounted to any illegal detention. The petitioner had every right to be released. However, she did not avail of it by making any application. It is undoubtedly because of her ignorance of law or her educational deficiencies and various other defects. An appropriate directions for the benefit of such detenu will therefore have to be given but until then as of now the authorities of the State cannot be held responsible for the detention during this earlier period.
16. As far as the family circumstances and loss of earning of the petitioner, we had asked the learned counsel for the petitioner to put it on affidavit. The petitioner has affirmed an affidavit of 15.12.2003. She has stated therein that she is born on 17th May, 1947 in Chennai and was educated in Tamil medium upto 10th standard. Mrs. Pai, the learned APP, points out that from the record of the earlier proceedings it is seen that petitioner has informed tht she had studied upto 5th standard in Tamil. In this affidavit the petitioner has stated that she got married to an Advocate by name Shri Bangaraswami in 1970 and she has a son from this marriage born on 9.6.1978. Her husband died in the year 1988 and thereafter she joined one Club known as Raja Recreation Centre and earned approximately Rs.2,500/- per month and looked after her son. She has been arrested in the Sessions "Case on 29.10.1990. Thereafter she was released on 23.11.1993 on her acquittal. She has not provided any particulars about her occupation thereafter. She was rearrested on 13.8.1998 in Chennai and she was in custody until her release on 13.9.2003 under the orders of this court. Thus, when the petitioner continued to remain in illegal detention from 13.12.2000 onwards, her son was about 22 years of age. It is for 2 years and 9 months thereafter that she has remained in illegal detention. She has further stated that at the time of her arrest earlier in 1990 her son was about 12 years of age and could not complete her schooling. He is presently working as a daily-wage earning electrician and she is dependent on him.

17. Mrs. Pai, the learned APP appearing for the State, brought it to our notice that at the time of earlier proceedings under the NDPS Act the petitioner had stated that she was a house wife. She was, therefore, not very sure as to whether the petitioner did earn any such amount as claimed by the petitioner sometimes much earlier until her first arrest in 1990.
18. Ms. Kaushik, the learned counsel appearing for the petitioner, drew our attention to various judgements passed by the Apex Court as well as by different Division Benches of this Court. Firstly, she referred to a judgement in the case of Rudal Sah Vs. State of Bihar and anr. reported in 1983 Cri. L. J. 1644. In this judgement where the petitioner had been detained illegally for over 14 years, the Supreme Court held that petitioner may, if so advised, file a suit to recover damages from the State Government which should be the remedy to be availed of after leading full and proper evidence. At the same time Supreme Court also held that the State must repair the damage done by its officers to the petitioner's right. It was an interim measure that the court awarded Rs.30,000/- as stated in paragraph 11 of that judgement and also observed that this would not preclude the petitioner from bringing a suit to recover appropriate damages from the State and its erring officials. As against the aforesaid decision, much later in the case of Mohd. Zahid Vs. Govt. of NCT of Delhi reported in (1998) 5 SCC 419 for an illegal continued detention of two days the Apex Court directed the Delhi Government to pay a sum of Rs.50,000/- as compensation.
19. Ms.Kaushik then referred to the leading judgement in the case of D.K. Basu Vs. State of West Bengal which has laid down various rights of the prisoners and has also provided for compensation in case of such wrongful detention. In paragraph 42A, the judgement referred to Article 9(5) of the International Covenant on Civil and Political Rights, 1966 ((ICCPR), which provides that "anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation." The Court noted that Government of India at the time of its ratification of the International Covenant on Civil and Political Rights had made a specific reservation to the effect that the Indian legal system does not recognize a right to compensation for victims of unlawful arrest or detention and thus did not become a party to the Covenant. The court, however, noted that this reservation had now lost its relevance in view of the law laid down by the Apex Court in a number of cases awarding compensation it referred to the various judgements in that behalf. Thus, it is clear that the court has judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life. In paragraph 55 of that judgement the Apex

Court summed up the various propositions in that behalf. The court laid down that this claim for compensation was based on the principle of strict liability and that in the assessment of the compensation the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender. This compensation is also without prejudice to any other action like civil suit for damages and ultimately the quantum of compensation will depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf.

20. Ms.Kaushik referred to two judgements of this court also. Firstly one in the case of Chandrabhan Rama Dhengle Vs. Indirabhai Chandrabhan Dhengle and ors. reported in 1998 (1) Mh.L.J. 234: [1999 ALL MR (Cri) 134] wherein in the event of illegal detention for a period of 63 days the State Government was directed to pay Rs.50,000/- and in another unreported judgement in the case of Arif Moinuddin Shaikh Vs. The Lt. Secretary, State of Maharashtra and ors. in Criminal Contempt Petition No. 17 of 2002 decided on 14.1.2003 (unreported of Parkar and Smt. Tahllramani, JJ.). This was a case of the illegal detention of four days and compensation of Rs.10,000/- was awarded.
21. In the circumstances, there are three following questions which we have to determine:
 - i) What should be the appropriate compensation by way of an interim measure until appropriate suit is filed in the present case?
 - ii) Whether there should be any direction to the Principal Judge, City Civil and Sessions Court, Gr. Bombay to take appropriate action against the officials concerned and to recover a part of the compensation amount from them, if held guilty?
 - iii) Whether any further guide-lines with respect to Section 390 of the Code of Criminal Procedure are required?
22. Now as far as the first question is concerned, the petitioner has stated on her affidavit that earlier sometimes prior to her first arrest she was earning an amount of Rs.2,500/- per month. By the time she was put into this illegal detention from December, 2000 to September, 2003 may be her son was around 22 years of age but she had to look after him in a city like Chennai. We have to note that her husband was an Advocate and had expired in the year 1988. Some minimum standard of living has to be assumed for such a lady with one child. Her statement, therefore, that in the year 1990 she was earning Rs.2,500/- per month cannot be brushed aside. Her contribution to her family consisting of herself and her son cannot be considered to be of a monetary value of less than Rs.2,500/- per month, in any case assuming she was doing household

duties. The household duties also have some value and they cannot be ignored. On this footing for this period of 2 years and 9 months the actual loss would be in the range of Rs.82,500/- . What is further to be noted is that she has been put to illegal detention. This has been done not by authorities of the Government but by the authorities of the Court which are dispensing justice and it is their administration which has functioned absolutely in a callous manner to say the least. The Sessions Court had received the writ of the High Court in December, 2000. In August, 2001 the Sessions Court had received the Judgement of the High Court. Thereafter a letter written by the petitioner through jail was received in June, 2001 and it was replied in the most bureaucratic manner on 5.7.2001. On the top of it, once again in October, 2002 when the Superintendent of Yerawada Central Prison, Pune sent a letter to the Sessions Court, no reply was sent. This has resulted into deprivation of her liberty for a period of not less than 2 years and 9 months. This is not a small period. May be that the petitioner is a person belonging to a lower middle class family but she has got to be adequately compensated for the loss she has suffered.

23. We asked Mrs. Pai, the learned APP, as to what should be an appropriate amount. She has, however, expressed a difficulty in making a positive statement and left it to the Court to decide the appropriate amount. Ms. Kaushik is undoubtedly pressing for an amount of Rs.5 lacs. However, considering the totality of the circumstances, noting that this an interim measure and that this is not a punitive compensation, in our view an amount of Rs.2,00,000/- would be an appropriate amount to be paid by the State Government by way of compensation as of now. This will be our order as far as the first question is concerned. The Government of Maharashtra is, therefore, directed to pay a sum of Rs.2,00,000/- to the petitioner within two months and in any case by end of February, 2004. The cheque of this payment will be handed over to the Superintendent of Yerawada Central Prison, Pune and he will in turn write a letter to the petitioner to attend at the jail in Yerawada for her identification and then hand over the cheque to her.
24. As far as the dereliction in duties on the part of the officers of the Sessions Court is concerned, we have mentioned above the names of the persons concerned. The Principal Judge of the City Civil and Sessions Court, Mumbai will hold an inquiry in this affair and with respect to the misconduct, if any on the part of the officers concerned. This will be with reference to the receipt of the writ of the High Court in December, 2000 and the inaction thereafter, the receipt of the judgement of the High Court in August, 2001 and the inaction thereafter, receipt of the letter of the petitioner in

June, 2001 and the callous reply to that letter on 5.7.2001 and lastly the receipt of the subsequent letter of the Superintendent, Yerawada Central Prison, Pune dated 31.10.2002 which the Sessions Court did not find it appropriate even to reply. We are told that one of the officers concerned, one Mr. Makandar has passed away in the meanwhile. Obviously, no inquiry will be held against him. However, the Principal Judge will cause an inquiry to be held against all the officers concerned including those who are retired and if necessary pass appropriate order which may have an effect on their pension. All these observations do not mean that in our view the officers concerned are guilty. We have placed our *prima facie* observations on record. The Principal Judge will initially cause an appropriate preliminary inquiry to be held by a judge of his Court under the relevant service rules and on receiving the report will direct full fledged inquiry to be held against the officers concerned. It will be open to the State Government if it is so inclined to represent to the Principal Judge that in the event any officers are held guilty appropriate amount from the aforesaid amount of Rs.2,00,000/- be recovered from them. On the State Government making such representation it will be for the Principal Judge to pass appropriate order.

25. (i) Then we come to the last question with respect to the appropriate directions under Section 390 of the Code of Criminal Procedure. This Section reads as follows:

390, Arrest of accused in appeal from acquittal. *When an appeal is presented under Section 378, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate court, and the court before which he is brought may commit him to prison pending the disposal of the appeal or admit him to bail.*

Now as the Section reads, in an appeal from acquittal when an accused is arrested and brought before the subordinate court it is for the accused to apply for bail. It is quite possible that out of lack of adequate knowledge or financial difficulties or various reasons that inspite of an acquittal in his favour an accused may not apply for bail. Some such thing appears to have happened in the present case. In our view in all such matters where an accused is produced before the subordinate court after his re-arrest the Judge concerned ought to inform the accused that he has a right to apply for bail. Thereafter it will be for the accused to make the appropriate application.

- (ii) We are told that the consequence of any such bail application or even non-presentation thereof is reported by the Judge concerned to the High Court subsequently. Thus the communication reaches the High Court as to whether the

accused has been granted bail or the same has been refused. In our view, once such communication is received from the subordinate court the Administration of the High Court must find out as to whether the accused has been granted bail or has been denied it and whether he is continued in custody. In all such matters it would be desirable that the High Court Administration places the paper of the concerned appeal before the appropriate court with a note that after the arrest of the accused subsequent to the admission of the appeal against the acquittal, accused has been taken in custody. On nothing this development it will be for the concerned court thereafter to pass appropriate order. That will be one more opportunity to see to it that unnecessary retaining the accused in custody inspite of acquittal by the trial court is avoided and the person concerned can be released on a bond.

- (iii) These two directions will take care of such situation which has arisen in the present matter. This is only to see to it that there is no further occurrence of such situation which will most unfortunate to say the least.
- 26. (i) We further direct that a copy of the writ containing operative part of the order passed by the High Court ought to be sent to the person in custody wherever he or she has not engaged and advocate of their own and are represented by a court appointed advocate. This to be done forthwith when the writ is sent down to the concerned subordinate court.
(ii) Similarly in all cases where the person is in custody a copy of the judgement will also be sent to him / her free of cost wherever such a person is not represented by an advocate of his or her choice. The copy of the judgement will be sent at an outer side within three months from the date it is received by the office.
- 27. As far as our querry as to whether any such other persons are in custody in appeals against acquittal, the Inspector General of Police has filed an affidavit stating that no such persons are in custody.
- 28. In our view the aforesaid order is only an attempt to mitigate the unfortunate suffering of the petitioner and to avoid such situation in future. The petition is disposed of in the aforesaid terms. The state will pay the cost of Rs.10,000/- for this writ petition.

Supreme Court of India
AIR, 2000 SC 2083

State of AP
vs
Challa Ramkrisha Reddy

D.P. Wadhwa, S.S. Ahmad, JJ

S. Saghir Ahmad, J. Challa Chinnappa Reddy and his son Challa Ramkrishna Reddy were involved in Criminal Case No. 18/1997 of Owk Police Station in Baganapalle Taluk of Kurnool District. They were arrested on 25th of April, 1977 and on being remanded to judicial custody on 26th of April, 1977, they were lodged in Cell No.7 of Sub-jail, Koilkuntla. In the night between 5th and 6th of May, 1977, at about 3.30 A.M., some persons entered the premises of Sub-jail and hurled bombs into Cell No.7 as a result of which Challa Chinnappa Reddy sustained grievous injuries and died subsequently in Government hospital, Kurnool. His son Challa Ramakrishna Reddy who was also lodged in Cell No.7, however, escaped with some injuries. Challa Ramakrishna Reddy and his four other brothers as also his mother filed a suit against the State of Andhra Pradesh claiming a sum of Rs.10 lacs as damages on account of the negligence of the defendant which had resulted in the death of Challa Chinnappa Reddy. The suit was contested by the State of Andhra Pradesh on two principal grounds, namely, that the suit was barred by limitation and that no damages could be awarded in respect of sovereign functions as the establishment and maintenance of jail was part of the sovereign functions of the State and, therefore, even if there was any negligence on the part of the Officers of the State, the State would not be liable in damages as it was immune from any legal action in respect of its sovereign acts. Both the contentions were accepted by the trial court and the suit was dismissed. On appeal, the suit was decreed by the High Court for a sum of Rs.1,44,000/- with interest at the rate of 6 per cent per annum from the date of the suit till realisation. It is this judgement which is challenged in this appeal. Ms. K.Amreshwari, learned Senior Counsel appearing on behalf of the State of Andhra Pradesh has contended that the suit was barred by time as the period of limitation, as provided by Article 72 of the Limitation Act, 1963, was only one year and since the act

complained of took place in the night intervening 5th and 6th of May, 1977, the suit which was instituted on 9th of June, 1980, was barred by time. Learned counsel appearing on behalf of the respondents has, on the other hand, contended that the period of limitation would be governed by Article 113 of the Limitation Act, 1963 which prescribed a period

of three years from the date on which the right to sue accrued. It is contended that Article 113 was the residuary Article and since the nature of the present suit was not covered by any other Article of the Limitation Act, it would be governed by the residuary Article, namely, Article 113 and, therefore, the suit, as held by the High Court, was within limitation. The other question which was argued by the learned counsel for the parties with all the vehemence at their command was the question relating to the immunity of the State from legal action in respect of their sovereign acts. It was contended by the learned counsel for the appellant that the prisons all over the country are established and maintained either by the Central Government or by the State Government as part of their sovereign functions in maintaining law and order in the country and, therefore, the suit for compensation was not maintainable. Learned counsel for the respondents, on the contrary, has contended that the theory of immunity, professed by the appellant in respect of sovereign acts, has since been exploded by several decisions of this Court and damages have been awarded against the State even in respect of custodial deaths. We will first take up the question of limitation. Article 72 of the Limitation Act, 1963 is quoted below:-

*"Description of suit Period of Time from which limitation period begins to run _____
For compensation for One
year When the act or doing or for omitting omission takes to do an act alleged place.
to be in pursuance of any enactment in force for the time being in the territories to
which this Act extends. _____"*

The above Article corresponds to Article 2 of the Limitation Act, 1908 which is quoted below:-

*"
For compensation
for Ninety days When the act or doing or for omitting omission takes to do an act
alleged place. to be in pursuance of any enactment in force for the time being in India."*

"

Article 113 of the Limitation Act, 1963, upon which reliance has been placed by the respondents, is quoted below:-

*"Description of suit Period of Time from which limitation period begins to run _____
Any suit for which no Three
When the right period of limitation years. to sue accrues. is provided elsewhere in this
Schedule."*

"

These Articles, namely, Article 72 and 113 are applicable to different situations. In order to attract Article 72, it is necessary that the suit must be for compensation for doing or for omitting to do an act in pursuance of any enactment in force at the relevant time. That

is to say, the doing of an act or omission to do an act for which compensation is claimed must be the act or omission which is required by the statute to be done. If the act or omission complained of is not alleged to be in pursuance of the statutory authority, this Article would not apply. This Article would be attracted to meet the situation where the public officer or public authority or, for that matter, a private person does an act under power conferred or deemed to be conferred by an Act of the Legislature by which injury is caused to another person who invokes the jurisdiction of the court to claim compensation for that act. Thus, where a public officer acting bona fide under or in pursuance of an Act of the Legislature commits a "tort", the action complained of would be governed by this Article which, however, would not protect a public officer acting mala fide under colour of his office. The Article, as worded, does not speak of "bona fide" or "mala fide" but it is obvious that the shorter period of limitation, provided by this Article, cannot be claimed in respect of an act which was malicious in nature and which the public officer or authority could not have committed in the belief that the act was justifiable under any enactment.

In *State of Punjab vs. M/s Modern Cultivators*, 1964 (8) SCR 273: AIR 1965 SC 17, Hidayatullah, J. (as he then was) while approving the earlier decisions in *Mohammad Sadat Ali Khan vs. Administrator, Corporation of City of Lahore*, ILR (1945) Lahore 523 (FB): AIR 1945 Lahore 324 and *Secretary of State vs. Lodna Colliery Col. Ltd.*, ILR 15 Patna 510: AIR 1936 Patna 513, observed as under:-

"(25) This subject was elaborately discussed in ILR (1945) Lah 523: (AIR 1945 Lah 324) (FB) where all ruling on the subject were noticed. Mahajan, J. (as he then was) pointed out that "the act or omission must be those which are honestly believed to be justified by a statute."

The same opinion was expressed by Courtney Terrell C.J. in *Secretary of State v. Lodna Colliery Co. Ltd.*, ILR 15 Pat 510: (AIR 1936 Pat 513) in these words:-

"The object of the article is the protection of public officials, who, while bona fide purporting to act in the exercise of a statutory power, have exceeded that power and have committed a tortious act; it resembles in this respect the English Public Authorities Protection Act.

If the act complained of is within the terms of the statute, no protection is needed, for the plaintiff has suffered no legal wrong. The protection is needed when an actionable wrong has been committed and to secure the protection there must be in the first place a bona fide belief by the official that the act complained of was justified by the statute, secondly the act must have been performed under colour of a statutory duty, and thirdly, the act must be in itself a tort in order to give rise to the cause of action. It is against such actions for tort that the statute gives protection."

(26) These cases have rightly decided that Art.2 cannot apply to cases where the act or omission complained of is not alleged to be in pursuance of statutory authority."

In *Jailal vs. The Punjab State & Anr.*, AIR 1967 Delhi 118, it was held by the Delhi High Court that protection under Article 72 could be claimed only when the act was done under the colour of statutory duty but if the person acted with the full knowledge that it was not done under the authority of law, he could not claim the benefit of the shorter period of limitation prescribed under this Article.

In *Jaques & Ors. vs. Narendra Lal Das*, AIR 1936 Calcutta 653, it was held that this Article would not protect the public officer acting mala fide under the colour of his office. To the same effect is the decision of the Punjab High Court in *The State of Punjab & Ors. vs. Lalchand Sabharwal*, AIR 1975 Punjab 294: 77 Punjab LR 396.

In *Punjab Cotton Press Co. Ltd. vs. Secretary of State* AIR 1927 PC 72, where the canal authorities cut the bank of a canal to avoid accident to the adjoining railway track and not to the canal and plaintiff's adjacent mills were damaged, it was held that Article 2 was not applicable as the act alleged was not done in pursuance of any enactment. A Full Bench of the Allahabad High Court in *Pt. Shiam Lal vs. Abdul Raof* AIR 1935 Allahabad 538 held that if a police officer concocts and reports a false story, he is not protected by Article 2 of the Limitation Act, which would apply only where a person honestly believing that he is acting under some enactment does an act in respect of which compensation is claimed. But where the officer pretends that he is so acting and knows that he should not act, Article 2 would not apply. Keeping these principles in view, let us examine the facts of this case. On being lodged in jail, the deceased Challa Chinnappa Reddy and Challa Ramkrishna Reddy (P.W.1) both informed the Inspector of Police that there was a conspiracy to kill them and their lives were in danger. They sent a representation to that effect to the Collector and the Home Minister. On 5th of May, 1977 they told the Circle Inspector that they had positive information that an attack on their lives would be made on that very night. But the Circle Inspector did not treat the matter seriously and said that no incident would happen inside the jail and that they need not worry. In spite of the representation made by the deceased and Challa Ramkrishna Reddy, adequate protection was not provided to them and extra guards were not put on duty. The deceased, therefore, asked his followers to sleep that night near the jail itself. As pointed out earlier, that night, which incidentally was the night between 5th and 6th of May, 1977, a bomb was hurled in Cell No.7 where the deceased and Challa Ramkrishna Reddy (P.W.1) were lodged and as a result of the bomb explosion, Challa Chinnappa Reddy died but before his death, his dying declaration was recorded by the Judicial Magistrate in which it was stated by the deceased that they had received information that a conspiracy was hatched to kill them in the jail itself and that the Sub-Inspector of Police (who was examined as D.W.1 in the trial court) was a party

to that conspiracy. The Magistrate also recorded the statement of Challa Ramkrishna Reddy who stated that though the deceased and he himself had requested the police to provide protection to them as their lives were in danger, their requests were not heeded to. The High Court while examining the evidence on record came to the following conclusion:- "It is thus clear that though 9 members of the police party must stay in the sub-jail premises during the night, only two were there on that night. The witness did not produce his General Diary maintained in the Police Station to establish that 9 members of the guardian party were staying in the Sub-jail on that night. The learned Magistrate who visited the jail immediately after receiving the information and on learning of the incident, stated in his report, Ex.A-9, submitted to the Addl. District & Sessions Judge, Kurnool, that only two Constables were guarding the jail that night. He opined "I am inclined to think that the alleged explosion in Cell No.7 is on the first-floor, and that the culprits put up a ladder, tied with a rope to the wooden parapet, went up to the first-floor and threw the bomb into Cell No.7. He also reported that while going away, when they were challenged by three persons sleeping outside the jail (kept there by the deceased and P.W.1 as an additional precaution) they threw bombs at them, killing one of them and injuring the other two. It is also evident from Ex.A-14 that both the said Constables were suspended on 23.5.1977. The report of the learned Magistrate and his notes inspection (Ex.A-9) clearly show that the Police Constables guarding the jail were not vigilant, and the P.C.483, whose duty it was to guard the cell, was probably sleeping at that time. The learned Magistrate has observed in his report "if P.C. 483 was more vigilant, perhaps the untoward incident would not have occurred..." The very manner in which the culprits gained entry into the jail shows that it could not have happened but for the negligence on the part of the police to guard the jail property and to ensure the safety of prisoners, as required by Rule 48 of the Madras Rules aforesaid. It may be noted that Kurnool District is one of the districts in Rayalaseema area of the State, notorious for factions and blood-feuds. Use of bombs is not a rare occurrence in that area. In such a situation, and more so when a specific request was made for additional precautions, the failure not only to provide additional precautions, but the failure to provide even the normal guard duty cannot but be termed as gross negligence. It is an omission to perform the statutory responsibility placed upon them by Rule 48 of the Madras Prisons Rules. It is a failure to take reasonable care. On the issue two we disagree with the learned trial Judge." It would thus be seen from the above that the deceased as also Challa Ramkrishna Reddy who apprehended danger to their lives, complained to the police and requested for adequate police guards being deployed at the jail, but their requests were not heeded to and true to their apprehension, a bomb was thrown at them which caused the death of Challa Chinnappa

Reddy and injuries to Challa Ramkrishna Reddy (P.W.1). In this process, one of the three persons, who was sleeping near the jail, was also killed. The Police Sub-Inspector was also in conspiracy and it was for this reason that in spite of their requests, adequate security guards were not provided. Even the normal strength of the guards who should be on duty at night was not provided and only two Constables, instead of nine, were put on duty. Since the Sub-Inspector of Police himself was in conspiracy, the act in not providing adequate security at the jail cannot be treated to be an act or omission in pursuance of a statutory duty, namely, Rule 48 of the Madras Prison Rules, referred to by the High Court. Moreover, the action was wholly mala fide and, therefore, there was no question of the provisions of Article 72 being invoked to defeat the claim of the respondents as the protection of shorter period of limitation, contemplated by that Article, is available only in respect of bona fide acts. In our opinion, the High Court in the circumstances of this case, was justified in not applying the provisions of Article 72 and invoking the provisions of Article 113 (the residuary Article) to hold that the suit was within limitation. We may now consider the next question relating to the immunity of the State Government in respect of its sovereign acts. The trial court relying upon the decision of this Court in *Kasturi Lal Ralia Ram Jain vs. State of U.P.*, AIR 1965 SC 1039: 1965 (1) SCR 375, dismissed the suit on the ground that establishment and maintenance of jail being a part of the sovereign activity of the Government, a suit for damages would not lie as the State was immune from being proceeded against in a court of law on that account. The High Court also relied upon the decision in Kasturi Lal's case (*supra*) but it did not dismiss the appeal on that ground. It went a step further and considered the provisions contained in Article 21 of the Constitution and came to the conclusion that since the Right to Life was part of the Fundamental Rights of a person and that person cannot be deprived of his life and liberty except in accordance with the procedure established by law, the suit was liable to be decreed as the officers of the State in not providing adequate security to the deceased, who was lodged with his son in the jail, had acted negligently. Immunity of State for its sovereign acts is claimed on the basis of the old English Maxim that the King can do no wrong. But even in England, the law relating to immunity has undergone a change with the enactment of Crown Proceedings Act, 1947. Considering the effect of this Act, it is stated in Rattan Lal's "Law of Torts" (23rd Edition) as under:- "The Act provides that the Crown shall be subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject (1) in respect of torts committed by its servants or agents, provided that the act or omission of the servant or agent would, apart from the Act, have given rise to a cause of action in tort against that servant or agent or against his estate; (2) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; (3) in respect of any breach of the duties attaching at common law to the

ownership, occupation, possession or control of property. Liability in tort also extends to breach by the Crown of a statutory duty. It is also no defence for the Crown that the tort was committed by its servants in the course of performing or purporting to perform functions entrusted to them by any rule of the common law or by statute. The law as to indemnity and contribution as between joint tort-feasors shall be enforceable by or against the Crown and the Law Reform (Contributory Negligence) Act, 1945 binds the Crown. Although the Crown Proceedings Act preserves the immunity of the Sovereign in person and contains savings in respect of the Crown's prerogative and statutory powers, the effect of the Act in other respects, speaking generally, is to abolish the immunity of the Crown in tort and to equate the Crown with a private citizen in matters of tortious liability.¹¹¹ Thus, the Crown in England does not now enjoy absolute immunity and may be held vicariously liable for the tortious acts of its officers and servants. The Maxim that King can do no wrong or that the Crown is not answerable in tort has no place in Indian jurisprudence where the power vests, not in the Crown, but in the people who elect their representatives to run the Government, which has to act in accordance with the provisions of the Constitution and would be answerable to the people for any violation thereof. Right to Life is one of the basic human rights. It is guaranteed to every person by Article 21 of the Constitution and not even the State has the authority to violate that Right. A prisoner, be he a convict or under-trial or a detenu, does not cease to be a human being. Even when lodged in the jail, he continues to enjoy all his Fundamental Rights including the Right to Life guaranteed to him under the Constitution. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights. "Prison" has been defined in Section 3(1) of the Prisons Act, 1894 as any jail or place used permanently or temporarily under the general or special orders of State Government for the detention of prisoners. Section 3 contemplates three kinds of prisoners. Sub-clause (2) of Section 3 defines "criminal prisoner" as a prisoner duly committed to custody under the writ, warrant or order of any court or authority exercising criminal jurisdiction or by order of a court martial. "Convicted criminal prisoner" has been defined in Section 3(3) as a prisoner under sentence of a court or court martial and includes a person detained in prison under the provisions of Chapter VIII of the Code of Criminal Procedure, 1882 or under the Prisoners Act, 1871. The corresponding provision in the new Code of Criminal Procedure is not being indicated as it is not necessary for purposes of this case. "Civil prisoner" has been defined in Section 3(4) as a prisoner who is not a "criminal prisoner". Thus, according to the definition under the Prisoners Act, there is a convict, there is an under-trial and there is a civil prisoner who may be a detenu under preventive detention law. None of the three categories of prisoners lose their Fundamental Rights on being placed inside a prison. The restriction placed on their right

to movement is the result of their conviction or involvement in crime. Thus, a person (prisoner) is deprived of his personal liberty in accordance with the procedure established by law which, as pointed out in *Maneka Gandhi vs. Union of India*, (1978) 1 SCC 248: 1978 (2) SCR 621: AIR 1978 SC 597, must be reasonable, fair and just. The rights of prisoners, including their Fundamental Rights have been culled out by this Court in a large number of decisions, all of which may not be referred to here. In *State of Maharashtra vs. Prabhakar Pandurang Sanzgiri*, AIR 1966 SC 424: 1966 (1) SCR 702, it was held that conditions of detention cannot be extended to deprivation of other Fundamental Rights and the detenu, who had written a book in 'Marathi', could not be prohibited from sending the book outside the jail for its publication.

In *D.Bhuvan Mohan Patnaik vs. State of Andhra Pradesh*, AIR 1974 SC 2092 = (1975) 3 SCC 185 = 1975 (2) SCR 24, it was laid down that convicts are not denuded of all the Fundamental Rights they possess. Chandrachud, J. (as he then was) held :

"The security of one's person against an arbitrary encroachment by the police is basic to a free society and prisoners cannot be thrown at the mercy of policemen as if it were a part of an unwritten law of crimes. Such intrusions are against the very essence of a scheme of ordered liberty." [See: (1975) 3 SCC Page 188 Para 9]

In *Charles Shobraj vs. Superintendent, Central Jail, Tihar* AIR 1978 SC 1514, Krishna Iyer, J. observed as under :

"True, confronted with cruel conditions of confinement, the court has an expanded role. True, the right to life is more than mere animal existence, or vegetable subsistence. True, the worth of the human person and dignity and divinity of every individual inform articles 19 and 21 even in a prison setting. True constitutional provisions and municipal laws must be interpreted in the light of the normative laws of nations, wherever possible and a prisoner does not forfeit his part III rights." (See: AIR 1978 Page 1517 Para 14)

In *Francis Coralie Mullin vs. The Administrator, Union Territory of Delhi*, (1981) 1 SCC 608: AIR 1981 SC 746: 1981 (2) SCR 516, the Court held that Right to Life means the right to live with basic human dignity. In this case, the petitioner, who was a British national and was detained in the Central Jail, Tihar, had approached this Court through a petition of habeas corpus in which it was stated that she experienced considerable difficulty in having interview with her lawyer and the members of her family. She stated that her daughter, who was 5 years of age, and her sister who was looking after the daughter, were permitted to have interview with her only once in a month. Considering the petition, Bhagwati, J. (as he then was) observed at Page 753 in Para 8 as under :

"The same consequence would follow even if this problem is considered from the point of view of the right to personal liberty enshrined in Article 21, for the right to have interviews with members of the family and friends is clearly part of personal liberty guaranteed under that Article. The expression 'personal liberty' occurring in Article 21 has been given a broad and liberal interpretation in *Maneka Gandhi's* case (AIR 1978 SC 597) (supra) and it has been held in that case that the expression 'personal liberty' used in that Article is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and it also includes rights which "have been raised to the status of distinct Fundamental Rights and given additional protection under Article 19". There can therefore be no doubt that 'personal liberty' would include the right to socialise with members of the family and friends subject, of course, to any valid prison regulations and under Arts. 14 and 21, such prison regulations must be reasonable and non-arbitrary. If any prison regulation or procedure laid down by it regulating the right to have interviews with members of the family and friends is arbitrary or unreasonable, it would be liable to be struck down as invalid as being violative of Articles 14 and 21." (See also: *Sunil Batra (I) vs. Delhi Administration*, AIR 1978 SC 1675: (1978) 4 SCC 494: 1979 (1) SCR 392; *Sunil Batra (II) vs. Delhi Administration*, AIR 1980 SC 1579: (1980) 3 SCC 488: 1980 (2) SCR 557). Thus, the Fundamental Rights, which also include basic human rights, continue to be available to a prisoner and those rights cannot be defeated by pleading the old and archaic defence of immunity in respect of sovereign acts which has been rejected several times by this Court. In *N. Nagendra Rao & Co. vs. State of A.P.*, AIR 1994 SC 2663: (1994) 6 SCC 205, it was observed:- "But there the immunity ends. No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of State as a juristic person, propounded in Nineteenth Century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other juristic legal entity. Any watertight compartmentalisation of the functions of the State as "sovereign and non-sovereign" or "governmental or non-governmental" is not sound. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common

man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligently. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a welfare State is not shaken. Even in America where this doctrine of sovereignty found its place either because of the 'financial instability of the infant American States rather than to the stability of the doctrine theoretical foundation', or because of 'logical and practical ground', or that 'there could be no legal right as against the State which made the law gradually gave way to the movement from, 'State irresponsibility to State responsibility.' In welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives, has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity." The whole question was again examined by this Court in *Common Cause, A Registered Society vs. Union of India & Ors.*, (1999) 6 SCC 667: AIR 1999 SC 2979, in which the entire history relating to the institution of suits by or against the State or, to be precise, against Government of India, beginning from the time of East India Company right up to the stage of Constitution, was considered and the theory of immunity was rejected. In this process of judicial advancement, Kasturi Lal's case (*supra*) has paled into insignificance and is no longer of any binding value. This Court, through a stream of cases, has already awarded compensation to the persons who suffered personal injuries at the hands of the officers of the Government including Police Officers & personnel for their tortious act. Though most of these cases were decided under Public law domain, it would not make any difference as in the instant case, two vital factors, namely, police negligence as also the Sub-Inspector being in conspiracy are established as a fact. Moreover, these decisions, as for example, *Nilabti Behera vs. State of Orissa*, (1993) 2 SCC 746: 1993 (2) SCR 581: AIR 1993 SC 1960; *In Re: Death of Sawinder Singh Grower*, (1995) Supp. (4) SCC 450: JT 1992 (6) SC 271: 1992 (3) Scale 34; and *D.K. Basu vs. State of West Bengal*, (1997) 1 SCC 416: AIR 1997 SC 610, would indicate that so far as Fundamental Rights and human rights or human dignity are concerned, the law has marched ahead like a Pegasus but the Government attitude continues to be conservative and it tries to defend its action or the tortious action of its officers by raising the plea of immunity for sovereign acts or acts of State, which must fail. For the reasons stated above, we do not find any merit in this appeal which is dismissed.

**Supreme Court
1991 (2) SCC 373**

**State of Maharashtra and Others
vs
Ravikant S. Patil**

S. Ratnavel Pandian, K. Jayachandra Reddy, JJ.

1. This appeal has been filed by the State of Maharashtra against an order of the High Court of Bombay directing Shri Prakash Chavan, Inspector of Police, Faujdar Chavadi Police Station, Sholapur, the fourth respondent before the High Court, to pay an amount of Rs. 10,000/- by way of compensation to the respondent herein, an undertrial prisoner, on the ground that the said police officer was guilty of violation of fundamental right of an undertrial prisoner under Article 21 of the Constitution of India. It further directed that an entry should be made in his service record. The facts that give rise to this appeal are as follows.
2. One Ganesh Kolekar was murdered on 2nd August, 1989. During the investigation, the police suspected that the respondent herein was a party to the said murder. He was arrested in Karnataka State and was brought to Sholapur in the early hours of 17th August, 1989. A local paper called Tarun Bharat published from Sholapur, carried in its issue of 17th August, 1989 a news item which stated that the respondent, an undertrial prisoner, would be taken in a procession or a parade from Faujdar Chavadi Police Station through the main squares of the city for the purpose of investigation. On 17th August, 1989, the respondent herein was handcuffed and both his arms were tied by a rope and he was taken through the streets and the same is not in dispute. The respondent herein filed a writ petition seeking a censure of the police officer and to award damages. A Division Bench of the High Court of Bombay having exonerated the Superintendent of Police and other respondents, held that the 4th respondent Shri Prakash Chavan, Inspector of Police, who is one of the appellants before us, has subjected the undertrial prisoner to an unwarranted humiliation and indignity which cannot be done to any citizen of India and accordingly directed him to pay the compensation and he was also censured as mentioned above.
3. It is submitted before us that the respondent had a long criminal record and that the murder of Ganesh Kolekar was as a result of enmity between the two gangs and

the respondent belonged to one gang and the situation required that he should be taken after being handcuffed. The High Court elaborately dealt with this aspect and held that the explanation given by the Inspector of Police is wholly unacceptable. On behalf of the respondent, reliance is placed on some of the decisions of this Court on the aspect of handcuffing and violation of Article 21 of the Constitution of India. In *Sunil Batra and Anr. v. Delhi Administration and Ors.*, a Constitution Bench of this Court held that "the convicts are not wholly denuded of their fundamental rights. Prisoners are entitled to all constitutional rights unless their liberty has been constitutionally curtailed." In *Prem Shankar Shukla v. Delhi Administration*, this Court observed that "To be consistent with Articles 14 and 19 handcuffs must be the last refuge as there are other ways for ensuring security. No prisoner shall be handcuffed or fettered routinely or merely for the convenience of the custodian or escort." In *Sunil Gupta and Ors. v. State of Madhya Pradesh and Ors. (1980) 3 SCC 119*, this Court again reiterated following the principles laid down in *Sunil Batra's* case and other cases held that handcuffing is an act against all norms of decency and amounts to violation of principles underlying Article 21. This Court also directed the State Government to take appropriate action against the erring officials for having unjustly and unreasonably handcuffed the arrested persons.

4. Having gone through the entire record we are unable to disagree with some of the findings of the High Court regarding the handcuffing and we do not propose to interfere with the order directing the payment of compensation. But we think that Shri Prakash Chavan, Inspector of Police, 2nd appellant herein, cannot be made personally liable. He has acted only as an official and even assuming that he has exceeded his limits and thus erred in taking the undertrial prisoners handcuffed, still we do not think that he can be made personally liable. In *Rudal Sah v. State of Bihar and Anr.*, this Court directed the State to pay compensation to the person illegally detained. The High Court also having noted this decision observed that the court can order payment of compensation either by the State or persons acting on behalf of the State. Having so observed, the High Court, however, held Shri Prakash Chavan, Inspector of Police personally liable and directed him to pay the compensation. We are of the view that in the instant case also a similar order as one passed in *Rudal Sah's* case, will meet the ends of justice. Then the High Court has also directed that an entry should be made in his service record to the effect that he was guilty of violation of fundamental right of an undertrial prisoner. So far this direction is concerned, it is submitted that such an adverse entry cannot straightway be made without giving the Inspector of Police, 2nd

appellant herein, an opportunity of being heard. We find considerable force in this submission and accordingly we modify the order of the High Court as follows.

5. The compensation of Rs. 10,000/- as awarded by the High Court shall be paid by the State of Maharashtra. The concerned authorities may, if they think it necessary, hold an enquiry and then decide whether any further action has to be taken against Shri Prakash Chavan, Inspector of Police. Subject to the above directions, this appeal is disposed of.

Conclusion

The rules of compensatory jurisprudence applicable to prisoners have not been codified by the Indian legislature. Considering that many cases of abuses in prisons go unreported it is a necessity to ensure just and fair treatment of prisoners to expressly include the right to compensation in either Prisoners Act, 1894 or the jail manuals of every State. Imparting justice by the means of compensation can be successful only if the prisoners are specifically made aware of their right to claim compensation. Though compensation is not completely sufficient to avoid prisoners getting abused, it is a means to provide partial solace to the victims and their heirs.

FAIR PROCEDURE

Introduction

On 29th November, 1985 the General Assembly, United Nations, with a view to safeguard the justness of the judicial procedure subject to a prisoner, adopted the resolution 40/39 titled, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. Under the heading Access to Justice and Fair Treatment, the resolution states that:

- “4. *Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.*
5. *Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.*
6. *The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:*
 - (a) *Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;*
 - (b) *Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused;"smriti minocha" <minocha.smriti@gmail.com>, and consistent with the relevant national criminal justice system;*
 - (c) *Providing proper assistance to victims throughout the legal process;*
 - (d) *Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;"smriti minocha" <minocha.smriti@gmail.com>,*
 - (e) *Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.*
7. *Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims."*

The Constitution of India recognizes these principles of natural justice and they have been incorporated in Part III. These principles are generally applicable to

every citizen of India, including prisoners. The Indian judiciary has delivered various landmark judgements on fair procedure and principles of natural justice, particularly acknowledging them as applicable to prisoners also. The case laws presented in this chapter have laid down the doctrine of fair procedure for prisoners in India.

In *Abdul Azeez vs. State of Mysore* (1975 Cri. LJ 335) the Karnataka high Court held that in cases where the accused refuses legal aid and is not represented by an advocate, the Court ought to, in the interest of justice, either question the witness himself, or appoint a competent counsel to assist the Court. The Court remitted the matter for retrial in accordance with its directions.

In *Shivappa's* case (AIR 1995 SC 980) the Supreme Court held that the Magistrate's recording confessional statements of accused should strictly comply with the rules and ensure that the confessions are voluntary. In this case, the conviction was set aside as the Magistrate had failed to disclose to the accused that he was Magistrate, had failed to find out whether the accused had been influenced by anyone, failed to question the accused as to why he wished to make the confession and failed to assure the accused that he would not be sent back to police custody if he did not make the confessional statement.

In *Saraswati's* case (1993 Mah. LJ 1529), the prosecution suppressed material to show that the offence was committed by the accused whilst suffering from mental illness. The Bombay High Court held that, "the duty of the prosecution does not end merely in expounding the prosecution evidence and trying to establish that the ingredients of the law are satisfied but if there is corresponding material that has emerged in the course of investigation that would otherwise justify the case being brought under one of the exceptions, the prosecution cannot be pardoned for having kept the material back from the Court".

In the *State of Maharashtra vs. B.K. Subbarao* (1993 Cri. LJ 2984), the Bombay High Court held that 'it is an elementary requirement of criminal law that when an accused is produced before a Court by the investigating authority who genuinely insists that serious offences relating to documents have been committed and who is certainly entitled to justify the allegations, that the judicial authority which under the scheme of the Constitution of this country is the only safeguard for the liberty and fair encouragement of the citizen's rights, must as a solemn legal duty scan and scrutinize the correctness of the charges on the basis of the material that is placed before it.' In this case, a senior member of the Armed Forces was sought to be prosecuted for offences under the Official Secrets and the Atomic Energy

Establishment Act without requisite sanction for prosecution and without disclosing the document to the trial Court. The High Court held that such a procedure could not be condoned when it came to the extent of a serious prosecution of a citizen on charges of such gravity and acquitted the accused.

In *Jayendra Vishnu Thakur vs. State of Maharashtra and Anr.* (2009 (7) SCC 104(1)), the Supreme Court held that an accused would not be presumed to have waived his right and that procedural principles like estoppel and waiver would not be attracted where an order is passed without jurisdiction, as it would then be a nullity, because of which the order cannot be brought into effect for invoking the procedural principles mentioned above.

In the matter of *Dadu @ Tulsidas vs. State of Maharashtra* (AIR 2000 SC 3203), the validity of Section 32A of the Narcotic Drugs and Psychotropic Substances Act, 1985 was questioned by the convicts, who thought that it was arbitrary, discriminatory and violative of Articles 14 and 21 on the Constitution of India. The Supreme Court held that the provision is unconstitutional to the extent that it takes away the right of the court to suspend the sentence of a convict under the Act. The sentence, however, can be suspended by the appellate court only and strictly to the conditions stipulated in Section 37 of the Act.

In *Deepak Bajaj vs. State of Maharashtra and Anr.* (AIR 2009 SC 628), the Supreme Court stated that if the detention order of a person is illegal then in no way shall he be compelled to go to jail as it is an exercise in futility.

The Supreme Court, in *Mohd. Farooq Abdul Gafur and Anr. vs. State of Maharashtra AND State of Maharashtra vs. Mohd. Zuber Kasam Sheikh and Ors.* (2009 (12) SCR 1093), went into the very basic tenets of India's sentencing system. The Court looked at the *Bachan Singh* verdict, which, according to it, favours a "fair and equitable" sentencing system over an "efficient and deterrent" sentencing philosophy in the context of the Death Penalty. Based on the case's facts, the Court held that a co-accused's confessional statement can be used as substantive evidence against an accused as per Section 15 of TADA.

High Court of Karnataka

1975 Cri. LJ 335

Abdul Azeez

vs

The State of Mysore

C. Honniah, M.S. Nesargi, JJ.

1. The appellant In Cr. A. No. 456 of 1973 has been sentenced to death after having been found guilty of offences punishable under Sections 302 and 303 of the Indian Penal Code, by the Sessions Judge, Kolar, in Sessions Case No. 10 of 1973.
2. The prosecution case was that by 27-1-1973 the accused was undergoing sentence of imprisonment for life passed on him by this Court in Cr. A. No. 269 of 1960, and by 10.00 A. M. on that day viz.. 27-1-1973, he speared Kurubara Narayanappa and cut on his neck with a chopper, in front of Vasudev Rolling Mills, Kalaipeth, Kolar, and committed his murder.
3. The accused pleaded not guilty.
4. He refused legal assistance when the same was offered to him by the learned Sessions Judge. He insisted that he would defend his own case. The learned Sessions Judge permitted him to do be. In this Court also he insisted that he would himself argue his case. We permitted him to do so. But, however, we appointed Sri M. V. Deva Raju, Advocate, as amicus curiae to assist the Court and he assisted us in a commendable manner.
5. In the view that we are going to take, we do not consider it necessary to narrate the whole case here.
6. The record shows that there are nine eye-witnesses viz., P. Ws. 14 to 22 and two witnesses P. Ws. 23 and 24 who went to the spot immediately after the incident, took major part in disarming the accused and getting him arrested at the spot. Either any of these witnesses or other witnesses have not been cross-examined by the accused. The order-sheet discloses that even though the Sessions Judge asked the accused to cross-examine the witnesses as and when they were examined in chief, the accused did not cross-examine them, and the trial proceeded in that manner. The learned Sessions Judge was aware that one of the charges was under Section 303 of the Indian

Penal Code and if the charge was to be held proved, sentence of death had to be compulsorily passed as per the provisions of law.

7. The learned Sessions Judge has, in the circumstances narrated above, observed as follows in paragraph 13 of his judgment:

"It is unfortunate that when legal aid was offered to him by the Court on behalf of the State, he refused to avail of the same. On the other hand, he gave in writing stating that there is no necessity to engage counsel to defend him as he is the Advocate of his case in the Court (vide Ex. C-I). In such a situation it is the duty of the Presiding Judge to safeguard the interests of the accused. However, I could not play the role of a defence counsel. The accused kept mum while he was asked several times by the Court to cross-examine the prosecution witnesses."

The Sessions Judge has accepted the evidence of the nine eye-witnesses and P. Ws. 23 and 24 and the other witnesses. While relying on their evidence, he has taken into consideration non-cross-examination of these witnesses in favour of the prosecution.

9. Cr. A. No. 269 of 1960 arose out of Sessions Case No. 1 of 1960. The Sessions Judge had acquitted this very accused of the charge of murder. The State preferred Cr. A. No. 269 of 1960. The accused had refused legal assistance both in the Sessions Court and in this Court. In this context this Court observed in its judgment as follows:

"It is unfortunate that the respondent refused to avail of the legal assistance offered by the Court on behalf of the State, during the trial of the case. In this Court also, he refused our offer of legal assistance. He had chosen to conduct his own case both in the trial Court as well as in this Court. He is no doubt an intelligent person and has presented his case reasonably well. But an accused conducting his own case is always confronted with certain difficulties which are inherent in the very nature of things and those difficulties are necessarily aggravated when he is not well versed in law and procedure. In such a situation, it is the duty of the Presiding Judge or Judges to safeguard the legitimate interests of the accused. Sometimes, it may even become necessary for him to question the witnesses somewhat elaborately to elicit the relevant facts. But a Judge placed in such a situation must guard against the danger of his identifying with the defence by unconsciously playing the role of the defence counsel. He must constantly bear in mind his true role."

10. We respectfully agree with the learned Judges. Our opinion is that the above principles aptly apply to the present facts and circumstances.
11. The Sessions Judge has not adopted the procedure indicated in the observation excerpted above. Even though the accused persisted in refusing legal assistance, the Sessions Judge ought to have, in the interests of justice, either, himself tested

the evidence of the witnesses by putting questions in order to get the relevant facts elaborately elicited or appointed a competent counsel to defend the accused and thereby assist the Court in doing justice in the matter.

12. For the reasons narrated in the preceding paragraphs, the case has to be remitted to the Sessions Court for retrial. Now that the case has to be retried by the Sessions Judge, we consider it necessary to point out another error that has crept in and has to be set right.
13. In the first instance only a charge under Section 302, of the Indian Penal Code was framed and the trial proceeded. After all the witnesses were examined to prove the charge, the Public Prosecutor filed an application under Section 540 of the Code of Criminal Procedure (old) praying for permission to examine three witnesses not named in the charge-sheet. Permission was granted by the Sessions Judge and a next date for continuing the trial was fixed. On that date, the Public Prosecutor filed a memo for framing of a charge under Section 303 of the Indian Penal Code in proof of which the said three witnesses were to be examined. The learned Sessions Judge framed charge under Section 303 of the Indian Penal Code after observing the requirements of law and then the said three witnesses were examined.
14. The above said procedure adopted by the learned Sessions Judge is not, in our opinion, correct. The appropriate procedure to be adopted was to frame charges both under Sections 302 and 303 of the Indian Penal Code at the beginning of the trial itself.
15. In view of the foregoing reasons, we allow the appeal and reject the reference. We set aside the conviction and sentence passed on the appellant by the Sessions Judge, Kolar, in Sessions Case No. 10 of 1973, and remit the case for fresh disposal according to law. He is directed to bear in mind the observations made in the body of this judgment.

**Supreme Court of India
AIR 1995 (SC) 980**

**Shivappa
vs
State of Karnataka**

A.S.Anand, M.K.Mukherjee, JJ

1. This appeal, by special leave, has been filed by Shivappa s/o Bundappa who was Accused 2 in the trial court and Appellant 2 in the High Court and is directed against the order of the High Court of Karnataka dated 21-9-1990 upholding his conviction and sentence for the offence under Section 302 IPC. The appellant along with Smt Sudha (A-1) and four others were tried for various offences in connection with the murder of Suresh Singh on 4-12-1986 at about 3.00 a.m.
2. According to the prosecution case Smt Sudha (A-1) was working as a nurse in the primary health centre at Ullagaddi Khanapur. She was married to the deceased Suresh Singh. The deceased used to live at Belgaum but used to visit his wife, A-1, at Ullagaddi Khanapur, where she was working, quite often. The appellant Shivappa was working as a health guide at the primary health centre at Ullagaddi Khanapur. The husband of Sudha was addicted to drinking and there used to be frequent quarrels between the couple. In order to raise money for buying liquor, the deceased used to sell household articles, if he could not get cash from his wife. The deceased also suspected his wife to be having illicit relations with Ramchanda Hanamant Pujari (A-4) who was working as a basic health worker and with Dr Ashok Madhukar (A-6), who was working as a Medical Officer at the primary health centre Ullagaddi Khanapur at the relevant time. The deceased, after consuming liquor, shortly before the day of occurrence went to the house of A-4 and accusing him of having illicit relations with his wife (A-1) abused him. He thereafter went to the house of A-6 and abused him also in the presence of some of his patients accusing him that he was having illicit relations with his wife. On account of these accusations, the relations between the deceased, A-1, A-4 and A-6 had become strained. These three accused along with the appellant, A-3 and A-5 used to meet and discuss the behaviour of the deceased. It is alleged that on 10-10-1985, the appellant along with A-4, A-5 and A-6 met in the Gotur Inspection Bungalow and hatched a conspiracy to do away with the deceased by causing his murder. It was

planned that the murder would be committed during the night and the dead body would be thrown on Poona-Bangalore Road to give it the complexion of an accident. It was also decided that A-1 would thereafter file a complaint with the police saying that her husband had died in a motor accident and when the dead body would be brought for postmortem examination before the Medical Officer, A-6, he would certify that the death had been caused by an accident. On 2-12-1985, the appellant along with A-1, A-4 and A-5 worked out the plan for committing the murder of the deceased. On 3-12-1985 the deceased came to visit his wife, A-1 at Ullagaddi Khanapur. As per the plan in the early hours of the morning of 4-12-1985, A-3 went to the house of A-1 and asked her to come for a delivery case. A-1 along with her husband (deceased) and A-3 went towards Henchinal and on the way the appellant, along with A-4 and A-5 met them. A-4 informed A-1 and A-3 that the patient had already delivered the baby and they could go back to their house. Thereupon, the appellant along with A-1, A-3, A-4, A-5 and the deceased proceeded towards Ullagaddi Khanapur. When they had reached near the footpath leading from Henchinal cross to Ullagaddi Khanapur, the deceased was caught hold of by A-1 to A-5. A rope was tied round the neck of the deceased and his wife A-1 pulled the rope thereby causing the death of the deceased. As per the original plan, the dead body was brought and laid on Poona-Bangalore Road. To lend authenticity to the story of an accident, A-1 went to the house of PW 2, located nearby, to bring water telling him about the accident of her husband.

Thereafter, she prepared the complaint Exh. 79 P-52 and went to the police station at 7.15 a.m. and lodged the report with PW 18, the In-charge of the police station. An FIR in crime Case No. 221/85 for the offence punishable under Sections 279/304-A IPC and Section 89 of the Motor Vehicles Act was registered on the basis of the said complaint. The dead body was sent for postmortem examination to A-6. However, A-6 informed PW 18 that the case being a complicated one, the postmortem examination may be got done through some other doctor. Consequently, a requisition was made to the Medical Officer, Primary Health Centre, Daddi to get the postmortem of the dead body conducted. The investigating officer during the course of investigation recorded the statements of various witnesses. After the receipt of the postmortem report, which disclosed that the death had not been caused as a result of injuries received in any road accident, the viscera of the deceased was sent for chemical examination to Bangalore. After the receipt of the postmortem report an offence under Section 302 IPC was registered. It was during further investigation that A-1 volunteered to show the place where offence had been committed and later on the appellant

volunteered to show the place where the rope had been burnt. Both A-1 and the appellant also volunteered to make confessional statements. The investigating officer PW 25 sent a request report to the Judicial Magistrate, 1st Class, Hukkeri to record the confessional statements of A-1 and the appellant. The appellant was produced before the Magistrate on 21-7-1986 and the Magistrate adjourned the recording of the statement till 22-7-1986, so that the appellant could reflect in the meantime. The appellant was remanded to the sub-jail after the Magistrate had recorded preliminary statement of the appellant after asking him various questions. The confessional statement of the appellant was thereafter recorded by the Magistrate PW 17 on 22-7-1986. Six weeks later appellant retracted the same by addressing a communication Ex. D-1 to the Magistrate.

3. The confessional statement of the appellant, recorded under Section 164 CrPC by PW 17 on 22-7-1986, was the only piece of evidence on which the trial court relied upon and convicted the appellant. In the High Court, the submission made on behalf of the appellant that the confessional statement recorded by PW 17 was neither voluntary nor true and trustworthy was repelled.
4. The High Court found that the confessional statement, even though retracted at a later stage, was voluntary and true and held that the trial court had rightly relied upon the same. Consequently, the conviction and sentence of the appellant for the offence under Section 302 IPC was upheld. Hence this appeal.
5. We have heard learned counsel for the parties.
6. The only piece of evidence relied upon against the appellant is the confessional statement recorded by PW 17 on 22-7-1986. A confession, if voluntary and truthfully made is an "efficacious proof of guilt". It is an important piece of evidence and therefore it would be necessary to examine whether or not the confession made by the appellant was voluntary, true and trustworthy. The statutory provisions dealing with the recording of confessions and statements by the Metropolitan Magistrate and Judicial 80 Magistrates are contained in Section 164 CrPC and the rules framed by the High Court containing guidelines for recording of confessions. Unless the Court is satisfied that the confession is voluntary in nature, it cannot be acted upon and no further enquiry as to whether it is true and trustworthy need be made.
7. From the plain language of Section 164 CrPC and the rules and guidelines framed by the High Court regarding the recording of confessional statements of an accused under Section 164 CrPC, it is manifest that the said provisions emphasis an inquiry

by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused under Section 164 CrPC.

8. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same. Full and adequate compliance not merely in form but in essence with the provisions of Section 164 CrPC and the rules framed by the High Court is imperative and its non-compliance goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the mind of an accused. In case the Magistrate discovers on such enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the time of reflection, he is completely out of police influence. An accused should particularly be asked the reason why he wants to make a statement which would surely go against his self-interest in course of the trial, even if he contrives subsequently to retract the confession. Besides administering the caution, warning specifically provided for in the first part of sub-section (2) of Section 164 namely, that the accused is not bound to make a statement and that if he makes one it may be used against him as evidence in relation to his complicity in the offence at the trial, that is to follow, he should also, in plain language, be assured of protection from any sort of apprehended torture or pressure from such extraneous agents as the police or the like in case he declines to make a statement and be given the assurance that even if he declined to make the confession, he shall not be remanded to police custody.
9. The Magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must appreciate his function in that behalf as one of a judicial officer and he must apply his judicial mind to ascertain and satisfy his conscience that the statement the accused makes is not on account of any extraneous influence on him. That indeed is the essence of a 'voluntary' statement within the meaning of the 81 provisions of Section 164 CrPC and the rules framed by the High Court for the guidance of the subordinate courts. Moreover, the Magistrate

must not only be satisfied as to the voluntary character of the statement, he should also make and leave such material on the record in proof of the compliance with the imperative requirements of the statutory provisions, as would satisfy the court that sits in judgment in the case, that the confessional statement was made by the accused voluntarily and the statutory provisions were strictly complied with.

10. From a perusal of the evidence of PW 17, Shri Shivappa, Additional Munsif Magistrate, we find that though he had administered the caution to the appellant that he was not bound to make a statement and that if he did make a statement that may be used against him as evidence but PW 17 did not disclose to the appellant that he was a Magistrate and that the confession was being recorded by him in that capacity nor made any enquiry to find out whether he had been influenced by anyone to make the confession. PW 17 stated during his deposition in court: "I have not stated to the accused that I am a Magistrate" and further admitted: "I have not asked the accused as to whether the police have induced them (Chithavani) to give the statement." The Magistrate, PW 17 also admitted that "at the time of recording the statement of the accused no police or police officials were in the open court. I cannot tell as to whether the police or police officials were present in the vicinity of the court". From the memorandum prepared by the Munsif Magistrate, PW 17 as also from his deposition recorded in court it is further revealed that the Magistrate did, not lend any assurance to the appellant that he would not be sent back to the police custody in case he did not make the confessional statement. Circle Police Inspector Shivappa Shanwar, PW 25 admitted that the sub-jail, the office of the Circle Police Inspector and the police station are situated in the same premises. No contemporaneous record has been placed on the record to show that the appellant had actually been kept in the sub-jail, as ordered by the Magistrate on 21-7-1986 and that he was out of the zone of influence by the police keeping in view the location of the sub-jail and the police station. The prosecution did not lead any evidence to show that any jail authority actually produced the appellant on 22-7-1986 before the Magistrate. That apart, neither on 21-7-1986 nor on 22-7-1986 did the Munsif Magistrate, PW 17 question the appellant as, to why he wanted to make the confession or as to what had prompted him to make the confession. It appears to us quite obvious that the Munsif Magistrate, PW 17 did not make any serious attempt to ascertain the voluntary character of -the confessional statement. The, failure of the Magistrate to make a real endeavour to ascertain the voluntary character of the confession, impels us to hold that the evidence on the record does not establish that the confessional statement

of the appellant recorded under Section 164 CrPC was voluntary. The cryptic manner of holding the enquiry to ascertain the voluntary nature of the confession has left much to be desired and has detracted materially from the evidentiary value of the confessional statement. It would, thus, neither be prudent nor safe to act upon the confessional statement of the 82 appellant. Under these circumstances, the confessional statement was required to be ruled out of consideration to determine the guilt of the appellant. Both the trial court and the High Court, which convicted the appellant only on the basis of the so-called confessional statement of the appellant, fell in complete error in placing reliance upon that statement and convicting the appellant on the basis thereof. Since, the confessional statement of the appellant is the only piece of evidence relied upon by the prosecution to connect the appellant with the crime, his conviction cannot be sustained.

11. This appeal, consequently, succeeds and is allowed. The conviction and sentence of the appellant are set aside. The appellant is directed to be released from custody forthwith unless required in any other case.

High Court of Bombay
1993 Mah. LJ 1529

Saraswati Mahadeo Jadyal
vs
State of Maharashtra

S. P. Kurdokar and M.F. Saldanha, JJ.

1. **M.F. Saldanha, J.** The Courts while dealing with cases of persons suffering from mental ailments of a sufficiently serious gravity and therefore qualifying for the immunity conferred by Section 84 of the Indian Penal Code, medico-legal framework. Where the accused happens to be a woman and a person coming from the poorest strata of society, the obligation on the Court get accentuated. The law undoubtedly exonerates from punishment an accused who is legally insane and who therefore was not in a position to know the consequences of his or her acts at the time of the commission of the offence. The Criminal Procedure Code prescribes the manner in which persons of unsound mind are required to be dealt with and in general requires the Court to commit such a person to a Mental Hospital for appropriate treatment. A Court before whom a defence of insanity succeeds cannot merely acquit the accused but will of necessity have to direct that the person should be taken care of adequately in a mental hospital. It is one of the requirements of Section 335 of the Code of Criminal Procedure that the Court is required to give a finding as to whether the act complained of was committed by the accused or not, the obvious reason for this being that it would have a bearing on the future course of action. In cases where the accused has displayed violent tendencies, homicidal tendencies, sexual attacks or sexual depravity etc. these aspects are predominant for the purpose of ascertaining as to whether at all it would be safe to release such a person from the Mental Hospital even if the patient responds completely to the treatment. The danger to society at large in the event of a relapse is a predominant consideration for the Court deciding the matter and in this view, it would be appropriate after recording the aforesaid finding, to direct that the authorities in charge of the Mental Hospital shall assess the past history and record of the patient and shall very carefully, after long term observation, record a composite finding as to whether there is any possibility of the patient's reverting to the old condition, whether under provocation or for any other reason.

2. One of the factors which will have to be taken into consideration while dealing with cases of accused persons who, as in the present case have virtually nobody in this world to assist or take care of them or provide for them, or in the cases of patients who are so situated that they will be ill-treated or ostracised by their people and driven to beggary if they are to be released merely because of the earlier displayed insanity, is the obvious question as to whether release from jail would put the accused in a worse situation. The Court will be required to issue appropriate directions to the Doctors and other authorities concerned to decide as to whether in the given or particular set of circumstances, the patient would have a relapse. In such a situation, it would be appropriate for the authorities to keep the patient in the Mental Hospital itself as the release would be both inappropriate and undesirable. First, however, the facts.
3. This appeal presents a set of extremely distressing facts but it also raises certain aspects of some importance vis-a-vis Section 84 of the Indian Penal Code. The appellant before us, Saraswati Mahadeo Jadyal is a resident of a little village by name Bhadkambwadi, in Ratnagiri District. She comes from an extremely poor strata and was married to a labourer who, as the record indicates, was not only in dire straits but was also an alcohol addict. The prosecution alleges that the accused had given birth to a male child about a week prior to 18.8.1987. It is alleged that on the night of that day, the accused strangulated that infant and thereafter went to a lonely place and left the body there. Next morning, some of the villagers found the body and being a very small place, it was recognised as that of the child of the accused. She was questioned about it and she is alleged to have admitted to PW6 Laxmibai who is also a local midwife and to PW 7 Savitri Ramchandra Jadyal who is her sister-in-law, that she had strangled the child because the husband was not only spending all his money on drink but that he was not giving her any money for the household expenses and care of the child. It appeared from her version that out of severe desperation she had strangled her own child and thrown it away. The police were informed and they placed her under arrest.
4. We need to record here that it is at this stage that the special features of this case required to be noted. In the course of the investigation and obviously on the basis of the statements made by witnesses, the police found out that the accused had a history of mental ailment. It was also found out that on an earlier occasion she had not only assaulted but killed her own child and that she had been committed to the

mental hospital by the learned Magistrate. She had spent about 14 months in the institution after which she had been discharged. The record indicates that the police sent the accused for treatment to the mental hospital once again and that the Doctors did in fact find that she was suffering from schizophrenia. Without bothering much about this aspect of the matter, the police however completed the investigation and put the accused up for trial on a charge under Sections 302 and 201 of the Indian Penal Code. At the trial, in the course of the defence, references did come out before the Court to the effect that the accused was a mentally disturbed person and the basic plea of legal insanity was canvassed on her behalf. In order to substantiate this plea, the defence examined Dr. Badrinarayan Kulkarni as a defence witness. The Doctor is the medical officer from the Mental Hospital, Ratnagiri, and he produced the record in relation to the treatment given to the accused. The learned Trial Judge rejected the defence and held that the prosecution had established beyond all doubt that the accused had committed the murder of the infant child and that she had also tried to destroy the evidence in respect of the crime and consequently convicted her under both charges. She was awarded a sentence of rigorous imprisonment for life under the first count and no separate sentence under the second one. It is against the conviction and sentence that the present appeal has been directed.

5. As indicated by us earlier, the facts of this case are not only' depressing but are Virtually pathetic. The appellant is a very poor person and Mr. Snetye, has been appointed as State counsel to argue the appeal on her behalf. He has taken us through the prosecution evidence which we shall refer to very briefly because in our considered view much of it is not of any consequence. This is essentially a case of circumstantial evidence. PW1. Dr. Mrs. Gokhale had examined the accused on 19.8.1987 i.e. the day after the incident and she has clearly opined that the physical examination of the accused did indicate she had delivered a child approximately 7 or 8 days earlier to that PW2 is the doctor who had done the postmortem and he has clearly indicated that the cause of death of the infant child was due to strangulation and that the child met with a homicidal death. There is on record the evidence of the other villagers who had found the body and who had informed the police as also the panchas etc. which is not of much importance. PW6 Laxmibai is the local midwife and she has stated in her evidence that she had assisted the accused at the time of the delivery of a male child. She also states that when the body was discovered that she asked the accused about the incident and that she confessed to her that the husband was not only an alcohol addict

but that he was not providing even the barest minimum necessities for the child and that consequently she was left with no option except to finish it off and to leave it at a lonely place. PW7 Savitrabai is the sister-in-law and she has also deposed on similar lines stating that the accused admitted to her that out of abject poverty conditions and desperation, in which she was placed because of the husband's conduct that she had finished off the child. A perusal of the record as it is, establishes that the deceased infant had met with a homicidal death as also that it was in fact the male child delivered by the accused and furthermore that she has admitted in no uncertain terms to have finished off the child. She has also admitted to PWs 6 and 7 that she had left the body of the child at a lonely place and under these circumstances, the conviction under Sections 302 and 201 of the Indian Penal Code would normally have to be confirmed.

6. Mr. Shetye, learned counsel appearing on behalf of the appellant has relied very heavily on the defence evidence of Dr. Kulkarni.. This evidence is of some significance because it indicates that the accused had" been admitted to the mental hospital on 16.1.1983 and that she was discharged on 23.2.1984, after a lapse of about 14 months. The record indicates that she had killed her child on the previous occasion and that the learned Magistrate after satisfying himself from the material placed before him that the accused was a person of unsound mind, had committed the accused to the mental hospital for treatment. Dr. Kulkarni has indicated that on the present occasion the accused was admitted in the mental hospital in September, 1987 i.e. in the month following the present incident and that she was discharged on 9.2.1988. On the basis of the case papers he states that she was kept under observation till 8th October, 1987 and that she was found suffering from schizophrenia. What is of importance is the fact that in the course of his examination-in-chief itself the Doctor has deposed as follows:

"After delivery a condition known as post partum psychosis occurs. This means insanity produced after delivery which would be due to changes in the brain and body. Unsoundness of mind may prevail in pregnancy if pregnancy is not wanted by the lady. The Superintendent attends outdoor patients"

7. The case papers are also on record and on a perusal of the case papers we find that the accused had apparently told the doctors at all times that it was her husband who had killed the child. Mr. Shetye submits that the record in fact indicate that the statements of the husband and other family members had been recorded but that they were

not examined. Mr. Shetye advanced an argument that where in the course of investigation it is disclosed that the accused person is suffering from a mental ailment which in law would allow the accused to claim the benefit of the exceptions provided by the Indian Penal Code, that is the duty of the prosecution to place all the material of these factors before the Court. In support of his contention, Mr. Shetye has relied on a Division Bench Judgement of the Andhra Pradesh High Court reported in 1985 Cri. LJ 1824 in the case of *Manchi Parvaiah Vs. State of Andhra Pradesh* : A Division Bench of the High Court in that case had occasion to examine a series of judgements which are set out below and to place reliance on them in respect of the proposition that it was equally the duty of the prosecution to place before the Court the material that came out in support of the fact that the accused was perhaps of unsound mind and would therefore be covered by the exception. The decisions in question are as follows:

1985 I Andb LT 16 (1985) 1 Crimes 467, Cri. Appeal No 123 of 1983, O/- 7.3.1985,
Andhra Pradesh-Harold Correa Vs. State of AP.

- 1983 Cri. L.J. 619 (Kant)
- 1983 Cri. L.J. 1385 (Orissa)
- 1979 Cri. L.J. 403 (Bom.)
- 1972 Cri. L.J. 1523 = AIR 1972 SC 2443
- 1969 Cri. L.J. 259 = AIR 1969 SC 15
- 1968 Cri. L.J. 1156 = AIR 1968 Delhi 177
- 1964 Cri. L.J. 472 = AIR 1964 SC 1563
- 1960 Cri. L.J. 73 = AIR 1960 Ker. -24

8. Elaborating on the submission canvassed by him Mr. Shetye, thereafter drew our attention to another Division Bench judgement of the Karnataka High Court, reported in 1983 Cri. LJ 619 in the case of *Sanna Eranna Vs. State of Karnataka*. This was a case where the accused had a previous history of insanity and in these circumstances, the learned Judges relying on the provisions of Section 101 of the Evidence Act, held that the burden shifts to the prosecution to establish negatively that the accused was not of unsound mind when he committed the offence. The Court had occasion in this instance to consider the case law as laid down in the following decisions:

- 1974 Cri. L.J. 305 = AIR 1974 SC 216
- 1972 Cri. L.J. 1523 = AIR 1972 SC 2443
- 1971 Cri. L.J. 1523 = AIR 1972 SC 2443

- 1971 All. L.J. 654 = AIR 1971 SC 178
 - 1971 All. L.J. 1251
 - 1966 Cri. L.J. 63 = 1966 SC 1
 - 1964(2) Cri. L.J. 472 = AIR 1964 SC 1563
9. As regards the duty cast on the prosecution to place before the Court all such material that it comes across in the course of investigation which may support the view that there is a doubt with regard to the sanity of the person when he committed the act, Mr. Shetye placed reliance on a Division Bench Judgment of the Kerala High Court, reported in 1986 Cri. LJ page 271 in the case of *Kuttappan Vs. State of Kerala*. The Division Bench upheld this proposition after examining the case law as enunciated in the following decisions :
- 1972 Cri. L.J. 1523 = AIR 1972 SC 2443
 - 1971 Cri. L.J. 654 = AIR 1971 SC 778
 - 1966 Cri. L.J. 63 = AIR 1966 SC 1
 - 1964(2) Cri. L.J. 472 = AIR 1964 SC 1563
 - 1961(2) Cri. L.J. 43 = AIR 1961 SC 998
10. In sum and substance therefore what was contended by Mr. Shetye was that even if in the present case the defence has not in terms discharged its burden to establish that the accused was perhaps insane or in other words incapable of knowing the consequences of her acts at the time of the commission of the incident, that nevertheless if the prosecuting authorities did come across a record of insanity and if the record also indicated that this condition prevailed even after the date when the alleged offence had been committed that it was essential for the prosecuting authorities to have placed all that material before the Court, so that a fair assessment could have been done for the purpose of establishing as to whether at all the accused can be said to have been of sound mind on the date when she committed the offence.
11. As against this argument, the learned A.P.P. has canvassed the well settled proposition of law that when an exception is pleaded the onus of establishing that the accused is covered by that exception shifts to the defence. He contended that there has not been any substantial challenge to the prosecution evidence and that even the defence evidence merely states that the accused was in the mental hospital between 1983 to 1984 and that she was in the hospital for about a year under similar circumstances after the commission of the offence. Mr. Mirza, the learned A.P.P. emphasizes the point that "if the exception is to be invoked under Section 84 of the Indian Penal Code, that

- it is a requirement of law that the accused must establish legal insanity on the date when the offence was committed, if at all she is to get the benefit of the exception and the defence has not succeeded in establishing that factor in the present appeal.
12. A Division Bench of this Court in the decision reported in 1979 Mh.LJ 157 1979 Cri. LJ page 403 in the case of *Keshaorao Bhiosanji Navala Vs. State of Maharashtra* considered the pleas of unsoundness of mind and held that having regard to the requirement of law this burden must be discharged completely by the accused and in the absence of the defence succeeding in that exercise, that the plea was liable to be rejected. The Division Bench did refer to a situation whereby the accused may have behaved strangely or in a very unusual eccentric or inhuman manner but that this would not be sufficient for invocation' of the exception. The Supreme Court in the case of *Dahyabhai Chhaganbhai Thakkar Vs. State of Gujarat*, reported in AIR 1964 SC page 1563, occasion to consider the ingredients of Section 84 of the Indian Penal Code and to hold that even though the burden lay on the defence, where an exception was pleaded, that the Court would come to the assistance of the accused if a reasonable doubt was cast from the record regarding the state of mind of the accused at the time when the offence was committed. In these circumstances, Mr. Mirza submitted that the medical history of the present appellant would not justify the conclusion that she was of unsound mind on the date when the offence was committed and he relied on the fact that the evidence itself indicates that she was capable of responding to treatment. Even though she had spent over a year in the mental hospital in the year 1983, the Doctors after treating her and after keeping her under observation were satisfied that she was completely cured which is one of the necessary requirements for discharge and it was only in these circumstances that she was released. The learned A.P.P. emphasizes that it may be that the accused had a relapse after the commission of the offence but that her confession to PWs 6 and 7 very clearly indicated that she was capable of distinguishing between right and wrong. Her statement indicated that she knew that it meant to take life and under these circumstances, the conviction was valid and fully justified.
13. The issue canvassed before us as indicated at the commencement of this judgement does not centre point the applicability of Section 84 alone. Even as far as that is concerned, we do need to record that having regard to the medical history of this particular accused as has been brought on record by Dr. Kulkarni, who was examined as defence witness indicates that she was mentally unsound and was sufficiently serious to have not only been

committed to the mental hospital but to have been retained there for over a year. We have reproduced earlier the salient part of the evidence of Dr. Kulkarni wherein he has very clearly indicated that post partum psychosis which occurs after delivery is due to changes in the brain and in the body. We need to add to this factor the other evidence that has come on record namely the poverty condition in which the accused was placed adding possibly the aspects of hunger and desperation and the horrifying behaviour of the accused who was addicted to alcohol and was also given to violence. It is in these circumstances that to our mind the exception under Section 84 in the present case would be justified. The learned Trial Judge has not unfortunately given sufficient thought to the aspect of the matter and in our considered view after taking into account all the factors both legal and medical, the accused would be entitled to claim the benefit of that exception.

14. The added circumstances in favour of the accused is the plea canvassed with regard to her behaviour, by her learned counsel, namely the fact that it was the definite duty of the prosecuting authorities to have placed before the Court all material relevant to her medical history in relation to the insanity and to have afforded her the appropriate treatment for this and to have placed all those records in relation to the treatment afforded to the accused at the post-offence stage before the Trial Court. The right to a fair trial necessarily implies that this vital material be placed before the Trial Court and the present case in a classic instance where for want of that material having been brought before the Court, almost by default, the accused was wrongly convicted. It was fortunate that the learned counsel tried to salvage the position by leading defence evidence but in our considered view the prosecution has failed in its duty as far as the aforesaid principles are concerned in having Withheld from the Trial Court this material of crucial importance. We have already discussed the case law in this regard and it must be held that the duty of the prosecution does not end merely in expounding the prosecution evidence and trying to establish that the ingredients of the law are satisfied but if there is corresponding material that has emerged in the course of Investigation that would otherwise justify the case being brought under one of exceptions, the prosecution cannot be pardoned for having kept that material back from the Court. As indicated by us earlier, this case has thrown up these rather unusual features which in our considered view do Inquire to be decided in favour of the appellant. Having regard to this situation the appeal is liable to be allowed. The conviction and sentence awarded to the appellant by the Trial Court are set.

15. This is a case in which the conviction awarded to the accused-appellant is set aside, principally and only on the ground of the mental infirmity from which she is suffering. We have taken cognizance of her condition in life, the strata of society from where she comes and the position in which she would be placed as a result of the conviction being set aside. We have also taken serious note of the fact that this is the second occasion on which she has restored to violence resulting in the death of her own child. Her learned counsel Mr. Shetye has advanced an impassioned plea that the Court should totally disregard the evidence which alleges that the accused had killed her infant. We are unable to discard that evidence because it is sufficient and reliable and it is principally because of that evidence that this is a case in which it is necessary for us to pass special directions which are essential in the interest of not only the appellant but also of society at large. It is directed that the conviction is set aside. The appellant shall however be detained in an appropriate mental hospital, she shall be kept under observation and after all necessary treatment as her condition does require, her case history shall be taken into account and above all the authorities concerned, will seriously examine the question as to whether even if the appellant accused shows signs of recovery, whether she would be in a position to be accepted and to live safely in the society from which she hails or whether as unfortunately happened, there would be a relapse. Unless the authorities are more than satisfied that the condition of the appellant has reached such a stage that she could permanently and safely be accepted back in- the society, she shall continue to be retained in the mental hospital and looked after there.
16. Before parting with this appeal we need to observe that the facts of this case are undoubtedly unique but they have focused attention on a very important issue namely the after care of a criminal who comes out of jail which subject has hitherto gone almost totally by default. Undoubtedly, in the case of mentally ill persons, the Criminal procedure Code has made some provision; but Courts and Society, will have to seriously address themselves to this question in numerous other instances also. This issue has been a matter of much concern to sociologists because the released criminal comes out of jail not only with a stigma but with several other undesirable handicaps particularly the influences and associations to which the person has been exposed while in jail. Over a period of time circumstances have changed in the outside world of which the individual once was part, the family or the background from which he had come out or even in the case of persons who unfortunately possess neither of these, the question of re-acceptance poses major hurdles. 'It would, therefore, be

worthwhile for the Government to seriously look into this question, as experience has unfortunately shown that the process of dispensing justice ends at the Courts and bypass consideration of the aspect of rehabilitation which society is supposed to provide, often times leaving the criminal in a position where he is thrown back straight into a life of further crime. We, therefore, recommend that serious thought be given to these, all important questions. The Registrar shall forward a copy of this judgement to the Law Secretary, State of Maharashtra, the Union Law Secretary and to the Secretary, Bar Council of India, New Delhi, as also to the Secretary, Law Commission so that serious thought be afforded to this issue, and appropriate provision be made thereof.

**Bombay High Court
1993 Cri LJ 2984**

**State of Maharashtra
vs
Dr. B.K. Subbarao and another**

M.F. Saldanha, J.

1. This petition/criminal revision application, presented by the State of Maharashtra, is directed against a judgment and order of the learned Additional Sessions Judge, Greater Bombay, dated 26.4.1991. Through this petition, the State of Maharashtra has assailed the correctness of the order of the learned Additional Sessions Judge whereby the respondent, whom I shall refer to as "the Accused", has been discharged of certain offences punishable under the Official Secrets Act, 1923 and the Atomic Energy Act, 1962 a few facts that are relevant for the decision of this criminal revision application are alone being recounted by me. I need to prefix this judgment with the observations that this particular litigation has been preceded by a score of petitions addressed to the different Courts before which the prosecution was pending, to the High Court and, on more than one occasion, to the Supreme Court. The matter has been vigorously contested and it has been the contention of the Accused that the reason for this contest is because the Prosecution was motivated and that the viciousness with which the proceedings continued right up to the present stage was because of an element of personal vendetta. I shall have occasion to make my observations with regard to these aspects of the case in the course of the judgment because they are relevant. Normally, there would have been no reference to this aspect at the initial stage of the judgment, but there appears a degree of justification in this charge and it is for this reason that it is being referred to by me.
2. Coming first to the background and the relevant facts. The accused before me, Dr. B. K. Subbarao, is a senior member of the Armed Forces having joined the Indian Navy on 15.7.1962 as a Sub-Lieutenant and having finally parted company with the Navy on 27.10.1987 when he opted for premature retirement, at which time he was holding the rank of a Captain. There are references on record to indicate that the accused followed up a brilliant academic career with an even more distinguished service record in the course of which his talents and expertise and proficiency in the field of computers and sophisticated fields of communication were commended and it was

for this reason that he came to be associated with certain prestigious and important assignments. The accused opted for premature retirement, as indicated by me, and it appears from the record that he was thereafter doing certain assignments for CEAT Tyres India Ltd. and some other commercial organisations. On the night of 30th May, 1988, the accused was leaving for New York by an Air India flight when it is alleged that the Customs Officers at the Airport decided to check his baggage. It is further alleged that in the course of the baggage check, certain documents are alleged to have been found in his possession and these documents are supposed to have had certain notings on them that they were secret documents. According to the Prosecution a Panchnama was drawn up and the Inspector of Police, Sahar Airport Police Station, was requested to take over the matter because the Customs Authorities, *prima facie*, felt that the accused ought not to have been in possession of these documents and that, consequently, the situation was actionable. The Police Authorities placed the accused under arrest, and in the course of the investigations they are alleged to have searched the respondent-Accused and it is their case that several other documents of an equally confidential nature were found in the course of that search. The investigating officer thereupon obtained certain authorisation that were necessary from Central Government, completed the investigations and submitted a charge-sheet before the local Magistrate. The investigating officer also took note of the fact that the special statutes under which the accused had been charged required a special procedure to be adopted and he, therefore, in compliance with the procedure, filed a complaint before the learned Magistrate. The learned Magistrate proceeded on the basis of the complaint and the charge-sheet that had been filed was tagged to the complaint, but admittedly it on the basis of the complaint filed by the investigation Officer, Mr. Sawant, that the Court took cognizance of the offences. Since it was pointed out to the learned Magistrate that the charges against the accused were under the Official Secrets Act and the Atomic Energy Act and involved several secret and confidential documents and aspects, the proceedings were held *in camera* and the learned Magistrate thereafter committed the case to the Court of Session.

3. The accused, when he was produced before the learned Magistrate on 31.5.1988 itself, made an application that he should be released on bail and it also appears that thereafter the Accused filed a detailed application before the Court on 13.6.1988 in which he contended that the authorities who had arrested him have wrongly proceeded against him on the assumption that he had committed infringements of the Official Secrets Act and the Atomic Energy Act; whereas, according to him whatever documents he is alleged to have been carrying, at their face value, could never justify

such a charge. I need to mention one extremely curious aspect of this litigation which is that the documents, which I shall describe presently and which form the subject-matter of the charges, do bear a description which at first blush would give the impression that they are of an extremely secret and confidential nature connected with the Armed Forces and the Atomic Energy installations and that, consequently, ipso facto they would be covered by these two statutes. It is unfortunate that in the course of the litigation which started on 31.5.1988 and after a lapse of three years and four months has still not been concluded that the Prosecution repeatedly get away by describing to the Court the titles of these documents and creating the unmistakable impression on every single Court that these were, in fact, secret documents, any disclosure or possession of which would be dangerous and prejudicial to the interest of the State and, furthermore, that if these documents fell into the hands of foreign agents or spies that the security of the State/country would have been endangered. It is, undoubtedly, easy to make these statements, but in a prosecution of the present type where a very distinguished and very senior member of the Armed Forces was placed on trial and where allegations of a very grave nature were levelled against him and were relentlessly pursued before every forum before which the case came, that the learned Judges at least of the subordinate Court ought to have been afforded the opportunity by the Prosecution to carefully scrutinize the original documents, in the light of what has been repeated by the accused possibly more than hundred times in the course of these proceedings, that the accusations against him required serious judicial examination and not mere acceptance on the basis of descriptive allegations. To my mind, had this been done, the course of this litigation would have been different. It is, therefore, a matter of deep regret that this exercise had not been gone through because it is an elementary requirement of criminal law that when an accused is produced before a Court by the Investigating Authority who genuinely insists that serious offences relating to documents have been committed and who is certainly entitled to justify the allegations; that the judicial authority which under the scheme of the Constitution of this country is the only safeguard for the liberty and fair enforcement for the citizen's rights, must as a solemn legal duty scan and scrutinize the correctness of the charges on the basis of the material that is placed before it. Shockingly enough, neither the documents nor copies thereof were produced before the trial Court when the charges were framed. The ground given was that they were secret documents for which reason no copies were made and the originals were kept in a sealed cover, in which condition they continue to remain. That the Prosecution has got away with this is some achievement.

....

16. For purposes of appreciating the validity or otherwise of the submissions that have been raised in the course of the arguments before me, it is equally essential for me to advert to certain provisions of the two statutes under which the present prosecution has charged the accused. The first of these is the Official Secrets Act, 1923. This is an Act that was placed on the statute book for purposes of dealing with cases relating to official secrets. A perusal of the provisions of the Act will indicate that it is essentially concerned with security of the country and for this purpose, therefore, lays down stringent provisions in relation to all matters that come within the compass of the definition of the Official Secrets Act. That the Act also takes into account the possession of documents or material that may be associated with matters of defence or other secrets of the State is self-evident and the Act also makes a very clear mention of the fact that if a person obtains such material for a purpose prejudicial to safety or interest of the State, or if a person discloses such material to persons or agents in such manner as the safety, interest or security of the State may be prejudiced, the law will deal with him very stringently as provided for in this Act. A general reference to the scheme of the Act has been adverted to by me for the reason that the gravamen of the charge against the Accused in this proceeding relates to his having allegedly obtained and allegedly having been found in possession of material that could and would conform to the definition of official secrets. This alone is insufficient for a charge under the Official Secrets Act because the law requires that such acts must necessarily be accompanied by attempts at disclosing or disseminating such material to unauthorised persons who, in the Act, have been referred to as "foreign agents". In short, it is very essential for the safety and security of any country that stringent provision be made in respect of any act or attempt that may endanger the safety or interest of the country. What follows, therefore, is that the basic ingredients for any charge under the Official Secrets Act is that the investigation must disclose from very cogent fact placed before the Court that the purpose for which the secret material was obtained or retained or carried or disposed of was directed or prompted by an objective that was prejudicial to the safety and interest of the State. In addition, where the charge is that such material was intended to be misused, this last aspect has to be borne out from material elicited in the course of investigation. Even in a criminal proceeding of the present type where the consequences to a person charged under the Official Secrets Act are extremely grave, it is condition precedent that a scrutiny of the totality of the material placed before the Court must justify all the aforesaid ingredients.

17. The second statute under which the present Accused stands charged is the Atomic Energy Act, 1962. This Act is basically concerned with different aspect of the production, development, use and disposal of atomic energy. There are, however, areas of secrecy and confidentiality that are related to this field and there are also places that come within the definition of restricted areas and the same Act, therefore, does contain some provisions in respect of entry to such places and the Act also makes provision for punishment in respect of disclosure of restricted information. Section 18 of the Atomic Energy Act, which deals with these restrictions, does not and cannot lay down abstract propositions and Section 18, therefore, limits the offences to three categories of cases, all of which concern the existing or proposed plant or process. In other words, therefore, the objective of Section 18 is in order to maintain confidentiality in respect of those existing plants and processes which the country has in use or proposes to put into use. To my mind, an analysis of Section 18 of the Atomic Energy Act is necessary while examining the charge that has been framed against the Accused in this case as also while examining all other inter related issues that I am required to decide in these proceedings because the short question before the Court is as to whether from the material thrown up by the Investigating Authority an offence within the meaning of Section 18 of the Atomic Energy Act can be spelt out. I have adverted to this aspect of the necessary ingredients of a charge under the two statutes because the Prosecution has contended on the basis of a broad generalization that without so much as looking at the documents that are the subject-matter of the offences in this case, merely from their description, that the Court should not only assume that all necessary ingredients for the framing of the charge have been satisfied but, furthermore, as has happened in the course of the last over three years, that the gravity of the charges must also be taken to have been assessed.
18. The essential dispute is centred around the charges that have been framed against the present Accused on the 24th/27th June, 1989 and the 5th and alternative charge that was grafted on 6th August, 1990. Since everything hinges on the five charges that are before the Court, I am reproducing all the five charges in this judgment as it is essential.

"FIRSTLY: That you, abovenamed accused, joined Indian Navy in 1963 and was promoted as Acting Captain on 21st June, 1985 and you were selected during the course of your employment in Indian Navy to study the feasibility of nuclear power, propelled submarine vessel along with a team of Officers from BARC (Bhabha Atomic Research Centre) and that you joined the said project in 1976 and was associated with them till 1983 and that in 1984, you were placed an officer in charge of 'Defence

Technology Adaptation Centre' vide Naval Headquarter's letter No. EE/1460 dt. 25-4-84 and that you proceeded on premature retirement with effect from 27-10-87 i.e. till then you have been in the course of employment of Indian Navy, which is part of the Ministry of Defence and during the course of this, you have been in communication with foreign agents within or without India and for a purpose prejudicial to the safety or interest of the State you obtained and collected top secret and secret official documents and informations in the form of (1) 90 MWT Nuclear Submarine Propulsion Plant Design (Salient features and design software), a top secret document, (2) Multi Point Satelite Links in Navnet (System Design) a confidential document, (3) Copy No. 5 of Project Report on Nuclear Propulsion for Marine Application, prepared under the guidance of Director, BARC by the Reactor feasibility section and the Naval Group pertaining to Government of India, Ministry of Defence, a Secret document, (4) Weapon Control, Radar and Display System for 'Leander' Type Frigates of the India Navy, another classified document and (5) various drawings of PEP Power Metrics of BARC, R-5 project and other various classified documents and the information contained in those documents relates to the matters of Defence and work of defence and Naval affairs of the Government of India, and Atomic affairs of the Govt. of India, relating to Ministry of Defence and other classified information which you obtained for the purpose of communicating the same to foreign agents and the same you were taking to USA on 30th May, 1988, when you were about to board Air India Flight No. AI-101, when you were going under ticket No. 0984406215159 and some of the documents abovementioned were seized from your possession vide panchanama dt. 30-5-88 and with the follow-up action, your residential premises mentioned at 35, Shravan, Navy Nagar, Colaba, Bombay were also searched on 31-5-88 and some of the documents recovered from there. The said information which you obtained and collected for the purpose of communicating to foreign agents was a classified information relating to Ministry of Defence, which is calculated to be or intended to be useful to the enemy and the disclosure of which was likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign states and thereby committed an offence punishable under Section 3(1) Part-I of the Official Secrets Act, and within the cognizance of this Court.

SECONDLY : That you during the said time and place attempted to commit the commission of an offence under section 3(1)(c) Part I of the Official Secrets Act by trying to take out classified information out of this country for the purpose of communicating to foreign agents and thereby committed an offence under section 9 of the Official Secrets Act and within the cognizance of this Court.

THIRDLY : You, for the purpose prejudicial to the safety of the State, retained your service Naval Identity Card, an official document, when you had no right to retain it and wilfully failed to comply with the directions issued by the Naval Department of the Govt. of India and by retaining the said Serving Identity Card, you were guilty of an offence punishable under section 6(2)(a) of the Official Secret Act and within the Cognizance of this Court.

FOURTHLY : That by taking with you the information in the form of books mentioned above on 30.5.88 pertaining to Atomic Energy the information which you had obtained illegally and were taking to U.S.A. and the said information according to section 20(7) of Atomic Energy Act was the property of Central Government and the disclosure of which was restrained/restricted, which you tried to disclose by obtaining the said information in the form of books and which have been restricted under sub-section (1) of Section 18 and by doing so, you contravened the order dt. 4-2-75 under sections 18(2) and 19 of Atomic Energy Act passed by the Central Government, and by doing so, you committed an offence punishable under sections 24(1)(d) and 24(2)(d) of the Atomic Energy Act and within the cognizance of this Court.

FIFTHLY & ALTERNATIVELY : That while working as Captain in the Navy and being on deputation with B.A.R.C. during 1976 to 1983 you were dealing with classified subjects and had control over Secret and Top Secret official documents which were likely to assist the enemy or the disclosure of which was likely to affect the sovereignty and integrity of India and wilfully communicated the documents or information to persons other than those to whom you were authorised to communicate and thereby committed an offence punishable under section 5 of Official Secrets Act 1923 and within the cognizance of this Court."

...

Dr. Subbarao's contention essentially hinges around the two-fold legal submission, the first of them being that the order signed by a particular officer of the department is, according to him, not a valid authorisation of the Central Government and the second contention is that the authorisation issued by the concerned officer for offences under Ss. 3 and 6 and 6 of the Official Secrets Act and other cognate offences does not and cannot cover an offence under Section 5 of the Official Secrets Act. I shall, briefly, deal with these contentions that have been raised because the Division Bench itself in its directions had enjoined upon the learned Sessions Judge to record positive findings in relation to these heads and a review of the order of the Sessions Judge would necessarily require an examination of the correctness or otherwise of those findings.

TUESDAY, OCTOBER 8, 1991

19. Coming first to the issue with regard to the validity of the authorisation since, as indicated earlier and observed in the judgment, such valid authorisation is condition precedent for the institution of a valid complaint, it is of some consequence to re-examine this aspect of the case. Mr. Vakil, learned counsel appearing for the prosecution, submitted that the Under Secretary to the Government of India, Ministry of Home Affairs, has, by his order dated 18th August 1988, granted the requisite authorisation for proceeding under the provisions of the Official Secrets Act. Relying

on a copy of the order in question, learned counsel contends that it is beyond question and he has further amplified his submission by pointing out that the concerned officer of the Government has recorded a *prima facie* satisfaction that offences under sections 3 and 6 of the Official Secrets Act have been committed and in the concluding paragraph of the authorisation order Mr. Sawant, the Senior Police Inspector, who is the Investigating Officer in this case, has been authorised to file the complaint before a Court of competent jurisdiction in respect of offences under sections 3 and 6 and "other cognate offences punishable under the said Act." It is in respect of this last aspect that considerable argument has been advanced by the respondent, who is the original accused, in so far as he contends that the clause "other cognate offences" does not and cannot cover an offence under section 5 of the Act. Mr. Vakil has been at pains to justify the prosecution stand and he has even relied on the definition of the term "cognate" from the dictionary in order to submit that the term "cognate" encompasses all other similar offences to those covered by Sections 3 and 6 of the Act and, therefore, according to Mr. Vakil, it was unnecessary for the Under Secretary to spell out which the particular sections ought to be. Mr. Vakil's argument proceeds on the assumption that the Official Secrets Act makes provision for a class of offences and, consequently, when there is authorisation in respect of some sections that the authorisation would cover the remaining sections in so far as they all come within the broad definition of offences under the Official Secrets Act. As against this, Dr. Subbarao has submitted that we have on record orders from judicial authorities of this Court and the Sessions Court drawing a specific distinction between the various forms or types of offences, all of which may be punishable under this statute. He, therefore, submits that even if this authorisation were to be valid in respect of the offences under sections 3 and 6 of the Official Secrets Act, since it has been judicially held that the offence under S. 5 of the Official Secrets Act is an offence of a distinct and different type that it is not covered under the authorisation.

20. One does not require to test the validity of the argument of Mr. Vakil because I propose to accept it, but if one accepts the argument of Mr. Vakil, then necessarily the authorisation has to be restricted to offences that come within the definition of cognate or, in other words, offences of a similar type which by implication necessarily excludes offences under S. 5 of the Official Secrets Act. Furthermore, on an examination of the authorisation order, it is clear that the authority who issued this order did not authorise the filing of complaints in respect of all such offences as may be disclosed under the provisions of the Official Secrets Act. The authority confined the authorisation by referring to specific sections to Sections 3 and 6 of the

Official Secrets Act, and used the words "other cognate offences" which is restrictive to offences similar to those and as indicated by me excludes offences that are not of a similar type.

21. I need to mention at this juncture that the entire prosecution hinges on a certain set of documents, all of which have been confined to a sealed envelope which for some mysterious reasons has never been opened. It has also come on record that because of the nature of those documents, no copies of those documents were prepared. Once again, we have the unfortunate situation of having to examine an authorisation order issued by the Under Secretary of the Home Department, who has authorised the filing of a complaint without so much as looking at the documents which from the gravamen of the prosecution charge. When I use the term "documents", it includes copies thereof which in this case were never made. Again, it is at the highest on the basis of reports or submissions put up or on the basis of the descriptive nature of the documents that the authorisation has been granted. I do not think such a procedure can be condoned when it comes to the extent of a serious prosecution of a citizen of this country and that too a senior retired Naval Officer on charges of such gravity.
22. Another head of challenge which is common to both the authorisation letters is that a reading of the relevant provisions of the Official Secrets Act requires that the appropriate Government, namely, the Central Government, is required to authorise the prosecution. An objection was raised by Dr. Subbarao, relying on the provisions of Art. 77 of the Constitution, that where an action requires sanction of the appropriate Government and if such authorisation is produced, it must *prima facie* disclose that it is that authorisation issued by that officer for and on behalf of the concerned Government. Dr. Subbarao seeks to draw a distinction between the authorisation issued by the officer of the department and between the authorisation of the aforesaid type because he contends that if the authorisation is merely signed by the officer of a particular department that at the highest the Court would be justified in holding that he has granted the authorisation on his behalf or on behalf of the department which he represents. Unless it is made specific in the authorisation that it has been issued for and on behalf of the Government which the officer represents, according to Dr. Subbarao a Court would not be justified in holding that the authorisation has come from the Government. Countering this submission, Mr. Vakil pointed out that if one is to regard the head of the Central Government as the President of India, it would be absurd to expect that every authorisation letter will have to be signed by the President. He submitted that it is for this reason that under the rules of

business, powers are delegated to different officers who, after obtaining the requisite Government approval, accord letters of sanction or authorisation. To this extent, the submission of Mr. Vakil is correct because both the Central Government and the State Government under the rules of business do function and are required to function in this manner. It is, however, necessary to take note of the fact that in all those cases where the officer is exercising the authority of the Government, it is specified in the order that it is done by virtue of the authority so vested in him and, furthermore, that he is acting for and on behalf of the Government concerned. In the absence of these two averments, neither of which is present in the authorisation letters, it would be impossible for me to hold that either of these two authorisation letters passes the test of legal validity.

23. The second letter of authorisation, to which I need call attention, is dated the 16th August, 1988. This letter has been issued in respect of charges under the Automic Energy Act and has been signed by Shri S. K. Bhandarkar, Joint Secretary to the Government of India. In this case, the position is considerably worse. The letter itself states : "This is to convey the authorisation of the department of Atomic Energy of proceed against Capt. B. K. Subbarao". The letter further goes on to state that the necessary consent of the Attorney General of India has been taken as required by the provision of Section 26(2) of the Atomic Energy Act. I shall make my observations with regard to the letter of the learned Attorney General of India separately, but suffice it to say that without having to repeat and reiterate what has been indicated by me above that this letter of authorisation again suffers from the same infirmities which are even more explicit as in the letter from the Ministry of Home Affairs and, consequently, it cannot be relied upon by the prosecution as a valid authorisation under the Atomic Energy Act. Having said so, it may not be necessary for me to deal with the letter of the learned Attorney General, but I propose to make a passing reference to it because, to my mind, it is essential.
24. The provisions that we find under S. 26 of the Atomic Energy Act are unusual provisions in so far as it is rarely under any statute that one comes across a precondition that the authorisation of the Attorney General is necessary. The legislative intent is obvious in so far as it was considered condition precedent that before a person could be prosecuted for an offence under the provisions of this Act that it was necessary that the highest Law Officer of the Government should apply his mind to the record of the case and find out whether a prosecution is justified. The learned Attorney General in this case has reproduced three categories of cases in which action can be taken in

respect of information under this Act. He refers to the D.O. Letter from the authority who has issued the authorisation from the Department of Atomic Energy and to certain enclosures that were forwarded along with that letter. The learned Attorney General uses the term "I am satisfied that this is a fit case in which I should give my consent for the proposed prosecution of Shri. B. K. Subbarao". As the highest Law Officer of the Government, the learned Attorney General obviously looked at the correspondence that was placed before him, but what needs to be mentioned once again is that in a prosecution of the present type, where everything hinges on the nature and character of the documents in question without having forwarded the incrimination documents to the learned Attorney General, it is difficult to see how correct the authorisation letter can be regarded. The reason for it is that, to my mind, it was absolutely essential, particularly for a legal authority who was evaluating a serious question relating to prosecution, to have asked for the offending documents to have been produced before him and to have looked at them before according sanctions. It needs to be mentioned that the present order of consent issued by the learned Attorney General will have to be found fault with, as the procedure adopted in obtaining that order was not the correct procedure and, consequently, it was obviously an order passed on the basis of an incomplete record.

25. In view of what has been pointed out by me above, the irresistible conclusion is that the authorisation for the institution of the present prosecution which, though obtained by the Investigation Officer, does not pass the test of legal scrutiny, consequently, it cannot be said that the prosecution was instituted on the basis of a valid authorisation.

...

26. Coming now to the main issue on which the Division Bench dealt at considerable length and to which point the greater part of the judgment of the learned Additional Sessions Judge is devoted, namely, the fundamental question as to whether sanction under S. 197 of the Code of Criminal Procedure was necessary for the institution of the present prosecution or not.

27. Section 197(2) of the Code of Criminal Procedure reads as follows :-

"197(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government."

It necessarily follows from the wording of this section that it is intended to cover all persons who are referred to in that section. In letter and spirit, therefore, what S.

197(2) of the Code of Criminal Procedure carves out is a special category of persons and this has been done for good reason. It has been held by this Court and by the Supreme Court of India while considering the constitutional validity and vires of S. 13A-I of the Bombay Rent Act that persons belonging to the Armed Forces do belong to a separate class and that such classification is permissible and constitutionally valid. This section, therefore, confers special protection on persons belonging to that class by requiring that no Court shall be permitted to take a cognizance of an offence alleged such a person while acting or purporting to act in exercise of his official duties. While interpreting S. 197(2) of the Code of Criminal Procedure, therefore, one will have to bear in mind the legislative intent that this is a protection conferred for a special purpose and that the Court will not be justified in holding that the protection cannot be availed of by a person belonging to that category unless it is specifically demonstrated that the protection is not available. ... Having ascertained from the description in the record, from learned counsel and from the Investigating Officer about the exact nature and contents of the documents, I am constrained to record that they could never be rightly classified as secret. They are so obsolete, their contents so common place that no third party, leave alone a foreign agent, would either want them nor could they be of any use to them. Curiously enough, one of the offensive documents is Dr. Rao's own Ph.D. thesis submitted to the I.I.T., Bombay. It is appalling that the crusade against a brilliant scientist has been carried to such distressing limits.

28. A perusal of the charge that has been framed against the accused in this case indicates that the charge itself refers to the period when the accused was functioning as a Naval Officer. It is the charge itself which spells out in black and white that the documents in question came in his possession or are alleged to have been received by him "in the course of his duties and assignments" during the period prior to 1987 when he was a Naval Officer. One does not require to go into a debate in the air with regard to these aspects when the prosecution's own case is that the entire set of documents relate entirely and exclusively to the point of time when the accused was a Naval Officer, to the projects and assignments done by him at the time when he was a Naval Officer and the knowledge gathered by him at the time when he was functioning in that capacity. In the light of this background, the remaining submissions advanced by the prosecution will require some sort of detailed examination.

Wednesday, October 9, 1991

29. Going back once again to the heads of charge, I shall briefly deal with the factual aspect that is recounted in each of the five charges. The first charge, which consist of

one continuous sentence which spans at least three pages, start with the statement regarding the accused having joined the Indian Navy in 1963 and recounts briefly his career until his premature retirement on 27.10.1987 and thereafter proceeds to state "till then you have been in the course of employment of the Indian Navy, which is part of the Ministry of Defence and during the course of this you have been in communication with foreign agents". At the end of this laborious narration, we have the operative part of the charge alleging offences under section 3(1) of the Official Secrets Act. In substances, the charge unequivocally states that the accused obtained and collected top secrets and secret official documents and information of the description as set out in the charge. The prosecution, therefore, alleges that the accused was supposed to have been in communication with foreign agents during the time when he was a service officer and that it was for this purpose that he obtained and collected the documents in question. There is a degree of total confusion in the latter part of the charge which alleges that the accused for the same purpose of communicating the aforesaid to foreign agents was taking this material to the U.S.A. On 30.5.1988 when some of the documents are supposed to have been seized from his possession and some others from the residential premises. As indicated by me earlier, the first charge is a rambling charge, though it is not perfectly intelligible. One is required to read it as a whole for the purpose of defining as to what exactly is the offence alleged and what exactly is the charge which the accused was asked to meet. In the course of his arguments, Mr. Vakil did observe that, perhaps, the charge is rather unhappily worded. In my opinion, Mr. Vakil was unduly kind and charitable to whoever was responsible for this, but there can be no two opinions about the fact that the framing of a charge of this type in a serious case was totally unpardonable. I gather from the submissions made before me and from the reference in the record that the draft charge was presented to the Court by the State Counsel and was accepted in that form by the learned Judge. Even if the lawyers concerned were ignorant of the fact that there is a difference between the bio-data of the accused and the drafting of a criminal charge, the learned Sessions Judge ought to have not accepted it in this pathetic form. It is necessary to point this out because everything hinges on the charge for the purpose of deciding the applicability of S. 197 of the Code of Criminal Procedure. It is impermissible in criminal proceedings to present an accused with a charge that is vague or ambiguous because it is well settled law that the rules of natural justice apply to criminal trials in their most vigorous form to the extent that where the liberty of a citizen is involved and he is put on trial, it must be made known to him in specific and certain terms as to what exactly is the allegation.

30. Taking charge 1 at its face value, what is alleged is that the accused committed certain acts which constitute offences during the period when he was a Naval Officer. By necessary implication, therefore, and going by the prosecution's own case the offences were committed and completed at that point of time. It is alleged that an extension of that offences or a continuation of the offences was attempted on 30.5.1988. There is no reference to an attempt to commit an offence, but I shall go by the wording of the charge and the reference to the allegations that the accused was leaving the country on 30.5.1988 with some of the documents. This then is the factual position with regard to the charge No. 1.
31. Coming to the second charge which reads that "You during the said time and place attempted to commit offences under S. 3(1)(c) of the Official Secrets Act "and are alleged to have committed offences under S. 9 of the Official Secrets Act. I take it that the unambiguous reference in charge No. 2 to the words "during the said time and place" denote a reproduction of charge No. 1 and it would therefore, have to follow that everything stated by me in respect of charge No. 1 would hold good as far as charge No. 2 is concerned.
32. Charge No. 3 states that the accused is alleged to have retained his service naval identity card which is an official document, that he had no right to retain it and he wilfully failed to comply with the directions issued by the Naval Department of the Government of India in respect of the return of the identity card. This charge, therefore, once again dates back to the period when the accused was a Naval Officer, at which point of time the identity card was issued to him. It is the prosecution case that as a Naval officer, he was permitted to retain the identity card until such time as that status continued and that the relevant regulations required of him to return the identity card when he was issued a new one or when he ceased to be a Captain. As far as this charge is concerned, there is little ambiguity about the time factor in so far as undisputedly the identity card was issued to the accused when he was a serving Naval Officer and the offences alleged against him was committed, according to the prosecution, at the point of time when he was required to return the identity card in question. I need to refer here to the statements on the basis of which this charge has been framed because the record indicates that this was not the last identity card issued to the accused and it is the prosecution case that he had applied for issuance of another identity card in place of the original identity card and was, consequently, required to return the earlier identity card when the authorities issued the subsequent one to him. Undisputedly, therefore, the prosecution case is that this wrongful act was committed during his service tenure.

33. Charge No. 4 is a counterpart of charge No. 1 except to the extent that this charge relates to the documents that pertained to offences punishable under the Atomic Energy Act. It is the prosecution case that while the accused was a Naval Officer, he had occasion to work for some time on an assignment at the Bhabha Atomic Research Center and that in the course of this assignment, the prosecution alleges, he was entrusted with documents which related to charge No. 4. As indicated by me earlier, taking the prosecution case at its highest and at its face value, the offence that is alleged to have been committed by the accused in relation to this charge, consequently, falls within the period of his service tenure with the prefix that there is a further allegation that an attempt was made to commit an extension of this offence or a continuation of it on 30.5.1988.
34. If at all there existed the slightest shade of doubt or ambiguity, the prosecution has been good enough to remove all of these completely while framing charge No. 5. This charge starts with the wording that "While working as Captain in the Navy and begin on deputation with Bhabha Atomic Research Centre during 1976 to 1983, you were dealing with classified subjects". As far as this charge is concerned, the time period is specified as being between 1976 and 1983 and this charge, therefore, does not even remotely concern with the incident of 30.5.1988. Time factor-wise, therefore, charge No. 5 again confines itself exclusively to the period when the accused was a service officer. I have reproduced the relevant extracts from the five heads of charge because the consideration with regard to the applicability of S. 197 of the Code of Criminal Procedure is a mixed question of fact and law. At the point of time at which we are, namely, at the pre-trial stage, though the accused has made several submissions with regard to the factual position, I would prefer to consider S. 197 of the Code of Criminal Procedure exclusively from the prosecution's own evidence, material and documents. This would, perhaps, be a safer and more correct approach because Mr. Vakil did submit during the course of his arguments that the accused may have complete and valid explanations, but these are really to be taken into consideration in the course of the trial or when they are pleaded before the Court and not in the course of these arguments. Consequently, as far as the factual position was concerned, I have not so much as dealt with anything that has been adduced by the accused or on his behalf, but I have confined myself strictly to the prosecution's own record.
35. The second head of consideration that is required to be done with regard to S. 197 of the Code of Criminal Procedure relates to more difficult consideration, namely, the question as to whether the accused can be said to have acted in the discharge of his official duties when he committed the acts that are alleged against him.

36. Mr. Vakil has supported his submissions by calling attention to certain authorities, the first of which is the decision of the Federal Court in the case of Hori Ram Singh v. Emperor.

Bench of three Judges laid down certain tests that are applicable in resolving this issue. Thought the Court was at that time concerned with Section 270 of the Government of India Act, 1935, the court observed as follows :-

"The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty The section is not intended to apply to acts done purely in a private capacity by a public servant. It must have been ostensibly done by him in his official capacity in execution of his duty, which would not necessarily be the case merely because it was done at a time when he held such office, nor even necessarily because he was engaged in his official business at the time."

The Court in this case was dealing with two charge, the first of them was the offence of embezzlement under S. 409 of the Indian Penal Code and the second related to falsification of accounts under S. 477A of the Indian Penal Code. The Court held that on the facts of this case, the act of embezzlement did not require consent, but the Judges at the same time held that as regards the offence under S. 477A of the Indian Penal Code was concerned, sanction was required because falsification of record had taken place in the course of the official duties performed by the accused. Mr. Vakil relies heavily on the first part of this judgment because it is his submission that the fact that the accused might have been a service officer and that he was a member of the Armed Forces at the relevant time are both irrelevant because the test laid down by the Court is as to whether factually the offences alleged are committed in the course of official duties.

Thursday, October 10, 1991.

37. Their Lordship had essentially held in this case that the facts will have no be dissected for purposes of conclusively establishing as to whether the acts that are complained of were done in the course of official duty or under colour thereof. Even if one were to apply this test to the facts of the present case, it is the allegation of the prosecution itself that the obtaining or retaining or alleged communication to foreign agents was done in the course of official duty and the examination is, therefore, not left to the Court because the charge itself is quite unambiguous. I may mention at this stage that in the course of the arguments which were rather protracted, the learned counsel Mr. Vakil as also Dr. Subbarao had occasion to refer in great detail to different parts of the record, namely, the statements of various witness that have been recorded by the

Investigating Officer and some supportive documents that constitute the backbone of the prosecution case and this material again does not make out any different case on facts. On the other hand, as I will have occasion to observe while dealing with another legal aspect of the proceedings before me, a perusal of the statements indicates that the essential ingredients of all the charges are wrongfully and completely lacking and I am, therefore, rather surprised as to how and on what basis these charges came to be framed merely because of generalized allegations put forward on behalf of the prosecution. Had this been an application for quashing of the proceedings, the accused would have succeeded hands down.

38. The second judgment on which Mr. Vakil, learned counsel appearing for the State, placed reliance was in the case of *Ramayya v. State of Bombay*. The Supreme Court, in this case, while dealing with the construction and scope of S. 197 of the Code of Criminal Procedure, had occasion to observe as follows :-

"If Section 197, Criminal P.C. is construed to narrowly it can never be applied, for of course it is no part of an official's duty to commit an offence and never can be. But it is not the duty which the court have to examine so much as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it. The sanction has content and its language must be given meaning. The Court have to concentrate on the word "offence" in the section. An offence seldom consist of a single act. It is usually composed of several elements and, as a rule, a whole series of acts must be proved before it can be established."

The Supreme Court in this case had taken into account the fact that an offence invariably consist of a series of acts and if the offence in a case would be incomplete without proving the official act, then it will have to be held that the bar under S. 197 of the Code of Criminal Procedure becomes applicable. On the basis of the ratio in this case, Mr. Vakil contended that the facts before this Court in the present prosecution will have to be confined to what transpired in May 1988. Mr. Vakil stated that it was not to the Knowledge of the authorities prior to that point of time that the accused had committed any offences and that only after he was stopped at the airport and the Investigating Officer had occasion to dig into facts of the case and only after the seizure of certain documents that the activities of the accused come to light. Mr. Vakil, therefore, submits that the entire effort on the part of the accused to argue that because certain aspects of the case may date back to the period when he was a service officer that the Court should not lay any credence to those facts because the gravamen of the charge against him was that he was attempting to take out of the country certain classified documents and that this attempt gave rise to an investigation which revealed that it was part of a large and deeper operation. He,

therefore, submitted that neither the point of time when the offending acts were discovered nor the nature of those acts could even remotely be connected with the official duties of the accused and that it was for this reason that the prosecution did not even require to apply for sanction at any time. Dr. Subbarao has also placed equal reliance on this judgment because it is his contention that the judgment very clearly state that the entire set of acts which constitutes the offence must be read as a whole and as the Supreme Court has very clearly observed in Ramayya's case, (1955 Cri LJ 857), if even some of those acts relates to official duties, then Section 197 of the Code of Criminal Procedure would apply. To my mind, a clear reading of the judgment will indicate that a Court is required to apply one simple test for the purpose of arriving at the answer, namely, the question as to whether the acts which constitute the offence with which the accused is charged were or could have at all been possible but for his official position. If these acts could have been committed de hors the official position, then the Prosecution could certainly have argued that S. 197 of the Code of Criminal Procedure will not apply. If, as has happened in the present case, this offences even assuming it has been committed could never taken place but for the official position in which the accused was placed and the acts which he was performing in that capacity, then it will have to be held the bar under S. 197 of the Code of Criminal Procedure would clearly apply.

- 39 Mr. Vakil has relied on another decision of the Supreme Court reported in the case of Arulswami v. State of Madras. The Supreme Court in this case was dealing with a prosecution against the President of a Panchayat Board and the question that arose was whether sanction under S. 197 of the Code of Criminal Procedure was necessary if the act complained of is entirely unconnected with the official duty. Mr. Vakil placed strong reliance on the observations of the Supreme Court wherein Their Lordships stated that it is the quality of the act that is important and if it falls within the scope and range of his official duties, the protection contemplated by S. 197 of the Code of Criminal Procedure will be attracted. The court had further observed that it is only when it is either within the scope of the official duty or in excess of it that the protection is claimable. Mr. Vakil's submission, on the basis of this case, was that as of necessity, the accused was entrusted with and had access to all the documents in respect of which he is charged as of to-day. He contends, however, that the access or entrustment was limited to the performance of the projects or functions in connection with the official duties and the moment these documents were unlawfully retained or taken out of the place from where they ought not to have been removed, that it could never be contended that the action purported to be in connection with the official

duties. To summarize Mr. Vakil's argument, he stated that the accused was permitted the user of this material but not the possession or retention thereof and under no circumstances was he entitled to transmit this material to any third party. As far as the last aspect of the arguments is concerned, I need to observe, as I have done earlier, that I have had occasion to go through the entire set of statements that constitute the gamut of the prosecution case against the accused and the investigation has not revealed any offence with regard to the alleged transmission, the charge against him being according to the prosecution at the highest that if he had left with the documents that are alleged to have been found in his possession that he could have misused them, which is nothing but pure speculation. In any event, we are not concerned with the merits of the matter, but are concerned with applying the test laid down by the Supreme Court, and the ratio of this judgment again boils down to the question of whether the offence was connected or unconnected. That the alleged acts were connected I have already held and as regards the second aspect, namely, the test laid down in this case to the extent of examining the quality of the act, it is again a corollary to the first test because as observed by the Supreme Court in Ramayya's case, (1955 Cri LJ 857) even if in the course of official duties a person commits a breach of the law, he is certainly punishable for it; but all that is provided for in S. 197 of the Code of Criminal Procedure is that by virtue of his special statue he shall not be subjected to prosecution without the designated authority in the Government examining the material and satisfying itself that, in fact, a case for prosecution has been made out. Sanction to prosecute is not an empty formality and the Courts have been repeatedly at pains to drive home to the prosecution that it is virtually a pre-trial scrutiny which is required to be conducted by the designated authority of the Government. This authority is not required merely, as often happens, to issue a sanction order by stating that "Having gone through the submission put before me, I am satisfied" The consequences of such a prosecution being very grave, the law protects all public servants from the commencement of a prosecution in all cases other than those in which the sanctioning authority having judicially evaluated the material before him holds that it is a fit case for prosecution. This principle becomes all the more relevant in this case because a judicious authority, on going through the investigation papers carefully and dispassionately, would never have accorded sanction to prosecute on such material. The sanction point is so elementary that it could not have been overlooked even by a notice, but we have a situation here of two experts who display ignorance of basics and carry on cursedly for 3 1/2 years regardless of consideration for precious judicial time and public funds.

40. The next case relied on by Mr. Vakil is again a decision of the Supreme Court in the case of S.B. Saha v. M.S. Kochar. It was not surprising that both sides placed equally strong reliance on this judgment. Mr. Vakil on behalf of the prosecution relied on this judgment heavily because he submitted that the learned Additional Sessions Judge was incorrect in holding that if the sanction under S. 197 of the Code of Criminal Procedure was required and had not been accorded that it was a virtual end of the prosecution before him. Mr. Vakil submitted that a correct reading of this judgment would indicate that the question regarding sanction under S. 197 of the Code of Criminal Procedure can be considered at any stage of the proceedings. The Supreme Court in this case was concerned with a charge against a Customs Officer who had been entrusted with certain property and had thereafter allegedly misappropriated it. In the course of the trial, the question of sanction was raised. The Supreme Court did uphold the proposition that this question can be raised at any stage of the trial, but the Court, on the facts of that case, came to the conclusion that the offence committed by the accused was in no way connected with his official duties and that, consequently, no sanction was necessary. Relying on this case, Mr. Vakil advanced two arguments, the first of them being that even if the question of sanction has been raised by the accused in this case at a point far remote from the date when cognizance has been taken that it is perfectly permissible for the Court to give its findings on the issue and that as sequitur if the Court were to hold that sanction was necessary that corrective action could be taken at this stage. The second arguments of Mr. Vakil was that the facts in Saha's case (1979 Cri LJ 1367) were identical to the present one in so far as the material which was in the possession of the accused and which which is the subject-matter of the offence relates to the charge that had absolutely nothing to do with and that are in no way linked to his official duties. Drawing a parallel with Saha's case, Mr. Vakil submitted that even in the case before the Supreme Court the accused was a public servant, the property had been entrusted to him in his capacity as a Customs Officer, but in so far as he had acted dishonestly in relation to that property that the Court held that sanction in respect of the last part of the case, namely, the commission of the last part of the offence, was not required. Dr. Subbarao has contended that this is a total misreading of the judgment and that one will have to take both the ingredients, the first of them being the question as to whether the acts complained of were ones linked to one's official duty and the offence that is complained of was intertwined or interconnected exclusively with the performance of official duties, the status of the accused and whether as a public servant that position furnished him with an opportunity or occasion to commit the alleged criminal act. The

applicability of this judgment to the facts of the present case is not disputed and it is, in fact, the very tests that have been laid down in this judgment that I have applied to the facts that have been presented from the record before me. What cannot be disputed in this case is that all the three ingredients enunciated by the Supreme Court, namely, the link in the first place, the status of the accused in the second and more importantly, whether it was that statues and the performance of the official duty that afforded him the opportunity to commit the acts complained of. Applying all the three tests, I have no hesitation in holding that the bar under S. 197 of the Code of Criminal Procedure would apply to the facts of the present case.

41. As regards the stage at which this question can be raised, there can be little dispute about the fact that since sanction under S. 197 of the Code of Criminal Procedure as S. 197 itself states is a precondition for a valid prosecution, if no prior sanction has been obtained it would amount to breach of a mandatory provision of law, the only result of such a situation being that the proceeding would be rendered void. In such a situation, I do not see the wisdom of the arguments that an accused is required to wait until the end of the trial nor the argument that then accused cannot raise legal objection with regard to the maintainability of the proceedings at any stage after the date on which cognizance has been taken. One grievance, and to my mind frivolous one, that was pleaded on behalf of the prosecution was that the accused who has been raising one legal plea after the other in multifarious applications from time to time is alleged to have kept this point as a trump-card up his sleeve and come out with it for the first time almost 40 months after the proceedings commenced. I am rather amazed at this grievance because as I have pointed out to the learned counsel appearing on behalf of the State that it is not for the accused to point out to the prosecuting authority as to what the requirements of law are. It is implicit that the prosecution is required to comply with all legal requirement. In the present case, the accused undisputedly was a retired service officer. There was no ambiguity with regard to this position. The investigation almost entirely concerned itself with various service authorities and aspects and it was, therefore very elementary and fundamental to any prosecuting authority that sanction in such a case is a necessary requirement. Instances of offence being registered against public servants are numerous, both under the Prevention of Corruption Act and under several other laws and it is almost a routine matter that the papers are put up to the appropriate Governmental authority for sanction. The fact that this was not done in the present case, therefore, is not something which the accused was required to point out to the Court. The prosecution cannot get away from its basic duty and to this extent, therefore, the submission that the accused

should have reminded the prosecution what it was supposed to do is thoroughly misconceived and misplaced. The record indicates that at all stages, the State was represented by a senior and experienced Special Public Prosecutor, Mrs. Manjula Rao, and a Senior Counsel from Delhi, Mr. Handa. Regardless of the accused pointing out the sanction question, the fact remains that abnormally large amounts of judicial time have been expended on over a dozen litigations for 40 months on a proceeding that was legally stillborn. This enormous waste is a matter of deep regret but certainly requires investigation.

Friday, October 11, 1991

42. At the commencement of the hearing of this proceeding, learned Advocate Mrs. Usha Purohit advanced a submission that she desires to be heard by the Court and further that she represented an organization by the name of People's Union for Civil Liberties. Mr. Vakil, learned Senior Counsel appearing on behalf of the petitioner-State, objected to the appearance of any third party in these proceedings and he submitted that this was a matter essentially between the prosecution and the accused and, consequently, that no third party had any locus standi to address the Court. Mrs. Usha Purohit pointed out that she had appeared in this matter at the time of the admission and that the record indicates her appearance and, furthermore, that she had filed her Vakalatnama. Regardless of that position, Mr. Vakil still contended that the People's Union for Civil Liberties, as represented by Mrs. Usha Purohit, had no locus standi to intervene in these proceedings. He desired that his objection be noted and he further submitted that the Court should not permit Mrs. Usha Purohit to address the Court as it was not legally permissible.
43. This is a case in which the accused is appearing in person. The record does indicate that at some earlier point of time he was represented by lawyers. He has stated that he was enabled to engage lawyers after a certain stage in the proceedings and he has set out a number of reasons for this. The record of the case shows that my learned brother Shah, J. did take on record the appearance filed by Mrs. Usha Purohit and it, therefore, follows that my learned brother was of the view that she should be permitted to address the Court. Regardless of that position, having regard to the fact that this is a case which involves legal intricacies, to my mind, the interests of justice would require that if an advocate is willing to assist the Court by making submissions on points of law that the Court should not refuse to hear such an advocate. There is no strict issue regarding locus standi involved in this case. As indicated by me, the predominant consideration is a just and fair decision. Towards this purpose, if the

advocate desires to address the Court, to my mind, such permission must be granted and the advocate must be heard as *amicus curiae*. It is for this reason that I have heard Mrs. Usha Purohit after hearing the respondent-accused.

....

45. I need to record that due to the pressure of work and the fact that the day-to-day admissions and part-heard appeals could not be allowed to pile up while the present judgment was dictated, that I set apart one or two hours each afternoon for purposes of completion of this dictation. This afternoon, before the dictation commenced, Mr. Vakil, learned Senior Counsel representing the State, who was not present in Court during the earlier days, requested me to hear him on certain aspects of the case. Normally such intrusions would not have been permitted, but I allowed it is a courtesy to Counsel. First of all, it was his contention that if the petition were to fail, the interim orders regarding the return of the documents, etc., should be kept alive for some time and he further desired that the stay granted by this Court should continue as the State was desirous of going higher in the matter. I did indicate to the learned Counsel that this Court would most certainly consider the aspects regarding the documents, but that the question of continuing the interim orders was something which may not be permissible except for a very limited period of time because no Court would be justified in binding down a person who has been set free from criminal proceedings. The accused being a professional person and the Sessions Court having held in his favour some months back, if that order were to be confirmed, he would be justified in pointing out that there was virtually no sanction for imposing restrictions on his movements thereafter. Unfortunately, the arguments got involved, they got heated and took a turn of the most unpleasant type. A charge was levelled against the Court that if such orders were not passed and the accused were to abscond that "Your Lordship would be responsible for it." It became necessary for me to point out to learned Counsel that not only were such statements intimidatory and impertinent, but that no litigant or Counsel could get away with such accusations if they were seriously urged. An attempt was thereafter made to clarify that what was meant was something else and no disrespect or brow-beating was intended.

46. What aggravated the situation further was a bald statement that at the highest the sanction question was a procedural lapse and that regardless of what order the Court passes the State would "re-arrest" the Accused outside the Court Room immediately after the judgment." This statement was not surprising and was eloquently indicative of the manner in which this proceeding has been conducted from its very inception, that the action wreaks with vengeance and that there is much more to it than meets

the eye. I was required to point out that if anything is done in defiance of the orders passed by this High Court or to frustrate or nullify them or in contempt thereof that this Court would come down with all firmness and take action of as strong a type as was required to deal with everyone of the persons who was responsible for such contemptuous conduct. I had to remind the persons concerned that there exists a Rule of Law in this country, that it is not a police state and the threat to subvert the Judgment was per se contempt. It is true that thereafter some explanations were tendered to once again water down the statement, but it was more unfortunate that it was made in the first instance.

Saturday, October 12, 1991.

47. Before I commenced with the dictation of the judgment to-day, Dr. Subbarao advanced a submission in Court insisting that appropriate orders be passed on his application. His submission was to the effect that while the judgment was part-delivered yesterday, a statement was made by Counsel appearing on behalf of the State that no matter what order is passed by the Court that the Government would re-arrest the accused immediately in so far as sanction is only required at the stage when the complaint has to be filed and, therefore, that the Government would be within its rights to take the accused into custody even pending the grant of such sanction, thereby signifying that it was an empty formality. Dr. Subbarao submitted that this statement constituted contempt in the face of the Court and he insisted that this Court should take suo motu action for contempt. In the interests of propriety and for purposes of upholding the dignity and status of this High court and the Judiciary, I was inclined to issue notice of contempt. At this stage, Mrs. Rao assured me to-day that there was no disrespect intended to the Court and, in any event, that the Government will observe the requisite procedure prescribed by law and that, consequently, this Court should not act on the basis of the application. I do not desire to divert this judgment into another proceeding as the Government and its lawyers have already burdened this Court enough in this case on all the dozen and more earlier occasions. Moreover, Mr. Vakil is one of our very competent and very Senior Counsel who is well respected, a sentiment I share, and therefore the incident may be condoned as a momentary lapse. Also, such action would still not reform the persons who had instructed learned Counsel to make the statement and are the real culprits. It is necessary for me to record that these incidents were most unfortunate and I do not at all approve of them. I did not also approve of the manner in which these statements were made, but regardless of this position, I do not propose to divert from the main issue, though this is not all.

48 I would, in particular, like to record my displeasure at the charge made against this Court that it is only before "this Court" that allegations have been made by the accused and by Mrs. Usha Purohit. This Court, and every Court for that matter, is required as of duty to look seriously into complaints where human rights are transgressed upon, particularly in cases such as this where the accused has been pursued to sadistic levels.

This remark was made in the context of Mrs. Usha Purohit having made a very serious grievance to the effect that when she, as an advocate, was appearing in a proceeding relating to Dr. Subbarao that certain Police Officers had been following her and that she had been threatened of serious consequences if she had anything to do with this case. This statement was once again reiterated by the learned Counsel who offered to put it on affidavit, at which time there was an unnecessary altercation in the Court Room which, to my mind, was avoidable. The dignity, sanctity and decorum of this Court and the proceedings must be maintained by everybody, Counsel included.

49. The learned Additional Sessions Judge has, in the course of his judgment, made a reference to a submission advanced before him which was to the effect that under the provision of S. 216(5) of the Code of Criminal Procedure that the prosecution is entitled to apply for time for obtaining requisite sanction from the appropriate authority and that, consequently, the proceedings should not be concluded, even if it is held that sanction is required. The learned Additional Sessions Judge has relied on the decision in the case of *Ram Kumar v. State of Haryana*, , and recorded the finding that sanction being condition precedent if the sanction being condition precedent if the sanction had not been accorded, as is the situation in the present case, that the proceedings itself was legally stillborn and, therefore, there can be no curative process or procedure permissible and, consequently, proceeded to discharge the accused. Mr. Vakil, learned Senior Counsel representing the State, did not desire to advance any submissions with regard to this aspect of the matter because Mr. Vakil submitted that it is his case that sanction is not required and the view taken by the learned Additional Sessions Judge was incorrect. He submitted that if this Court were to take the view that sanction is required that in his considered opinion, it may not be possible to get over what has been pointed out by the Supreme Court in Ram Kumar's case. Mr. Vakil has very correctly based his argument entirely on the legal position which, to my mind, is exactly as indicated by him. I, however, need to add that, perhaps, the submissions advanced before the learned Additional Sessions Judge on this point may not have even justified because Section 216(5) of the Code of Criminal Procedure would contemplate a situation akin to that which had come up in

several cases before the Court to which I have called reference, where in the course of the trial a submission is advanced that in respect of one of the charges alone sanction may be required. In such a situation, the prosecution could validly continue on the remaining charges and it is only in respect of that charge which requires sanction that the Court may have to wait for sanction. The present case is not one such case, as on an examination of all the charges framed against the accused I am of the view that sanction was condition precedent and, therefore, S. 216(5) of the Code of Criminal Procedure cannot have any application.

50. There is another head of arguments which I shall briefly refer to, but not in much detail because, to my mind, thought some of the points are of some consequences, they do not require any elaborate consideration. Dr. Subbarao submitted with a degree of vehemence that it was not for the first time when he filed the previous petition before the Division Bench that he pointed out the requirements of law relating to sanction, I have already observed in the earlier part of the judgment that it is certainly not for the accused in a criminal trial to point out to the prosecution that it should observe the law of the land. Dr. Subbarao's basic charge under this heard, however, is substantially wider in so far as he advanced the contention that there has been breach of the provisions of Article 21 of the Constitution, according to him, at all stages right from the very inception of the proceeding. It is his grievance that the ingredients of the offences with which he is charged and the specific requirements of law under those statutes and under the Code of Criminal Procedure have been bypassed and that the multifarious applications filed by him in the course of the last over three years were eloquent testimony of the fact that according to him the safeguards embodied in Article 21 of the Constitution has been transgressed at every stage. This is a generalized submission and a sweeping one, but having, in the course of the last over two weeks, taken the trouble to personally check the voluminous record before me, I am constrained to observe that the charge is not unjustified. To my mind, the first procedure that ought to have been adopted in this unusual case was that each of the authorities starting from the authority to whom an application for authorisation was made, to the learned Magistrate before whom the accused was produced, the learned Additional Sessions Judge before whom he was placed on trial, that trouble should have been taken to very carefully analyse the material placed before the Court and the special requirements of the sections under which the accused stood charged. The first of these would require that the documents themselves should be scrutinized by the authority or the Court concerned because it may be that even where the prosecution alleges or feels that certain provisions of law applied that those provisions may not

apply to the documents or the facts of the case. One of the situations in which this could arise is where a document which at a particular point of time may be regarded as confidential, classified or secret may have become absolute by virtue of change of circumstances and it, therefore, would not have been pointed out by the prosecution that possession or retention or use of such a document could not constitute an offence at the time when the person is being charged. Undoubtedly, it is of immense importance that the law should very stringently safeguard any attempt at espionage and that the law should heavily come down on situations where secret or confidential material relating to the armed forces or classified installations of a protected nature is sought to be either leaked out or clandestinely used. A perusal of the Official Secrets Act and the Atomic Energy Act will indicate that it is for this reason that we have in-built provisions incorporated in to those statutes which require a rigorous scrutiny to ascertain whether or not material or documents come within these very limited categories and what one way categories as classified material. It is not that every scrap of paper or every documents relating to those departments and authorities that is to be classified, and even if a classification is put down, such classification may not hold that for all times. Furthermore, having analysed the provisions of these Acts, I need to observe that it is the basic duty of the prosecution to point out to the Court through cogent material as to what precisely do the documents in question contain and how and in what manner in respect of those documents, a disclosure thereof would be a threat to the security of the country. A mere averment by a clerk connected with the establishment, which is mechanically reproduced in a couple of statements, that disclosure of these documents would constitute a threat to the security of the nation, is insufficient because, to my mind, the requirements of law are that the servant or officer concerned must substantiate this conclusion. Where a citizen is put on trial for so grave an offence of this category, one cannot proceed on the basis of loose statements of this type, but it will be absolutely essential if the procedure prescribed by law is to be adhered to that the investigative agency places before the trial Court at the time when it asks for a charge, the material from which these cardinal ingredients of the section can be said to have been completely made out. In the course of the arguments, Counsel for the State has taken me through the statements and documents relied on and on a threadbare examination thereof, I have no hesitation in observing that had this been an application under section 482 of the Code of Criminal Procedure before me, I would have been duty bound to quash the proceedings, being totally devoid of substance and once that could never result in a conviction.

51. The essence of the charges in the present proceeding flows from the fact that matters which are State Secrets and are of a confidential nature should not fall into the hands of "foreign agents". One does not need to go into an elaborate discussion to conclude that indulgence in activities that could come under the broad head of espionage or contact with persons or institutions, which could be said in normal course or could be suspected in normal course to be dealing in such material, can come under this head, where a person is sought to be charged with offences under the Official Secrets Act and the Atomic Energy Act, the elementary requirement is that the prosecution establish contacts with such foreign agents and that these contests were for the purpose of channelising such information or material. From the material that is placed before the Court in the course of the investigation, what is alleged against the present accused is, in the first instance, that he attended a particular party which was hosted by the Consul General for the U.S.A. in Bombay for a visiting high-tech trade delegation, of which he was sent an invitation as an expert in the computer field. Even though the Naval Authorities told him that he should not attend, he is alleged to have attended this party in civilian dress and that he had travelled in a car belonging to the Tata Company. Nothing more is alleged. The next head of offence under this category is that a visiting-card of the American Consul General was found with the accused. The last head of material is that he is alleged to have made a series of phone-calls to one Mr. A. V. B. Millard, who was a Naval Attaché to the American Embassy in Delhi and that the Investigating Officer has been able, from statements, to find out that these phone-calls were made on certain dates from a particular office after the accused had retired. It is also pointed out by the prosecution that he said Mr. A. V. B. Millard left India very shortly, i.e. about three weeks after the date of arrest of the accused. I do not desire to weigh this evidence because the witnesses have not come in the witness-box nor have they have been cross-examined, but the limited purpose of referring to this material is because one of the essential ingredients of the charges against the accused is that the material before the Court must disclose that the purpose for which he acted was related to the transmission of material to a foreign agent and, to my mind, the aforesaid material, even taken at face value, would fall very much short of that basic requirement. It has been the grievance of the accused from time to time that if he were to be placed on trial it could only be done if material existed to justify his detention in custody and if material existed to frame a charge against him. There is a serious handicap in my way regarding this aspect of the case in so far as at different points of time the earlier respective parties have agitated these issues before the Court of Sessions, before this Court and on the occasion, I am told, before

the Supreme Court and different orders have been passed and, consequently, one cannot at this stage go behind those orders.

52. Mrs. Usha Purohit, in the course of her submissions, raised a point of law with regard to the interpretation of S. 13 of the Official Secrets Act, she stated that under the provisions of S. 13(1) of the Official Secrets Act, a provision has been made with regard to the forum before which offences under this Act can be complained of and can be tried. Relying on the clause "specially empowered in this behalf by the appropriate Government", Mrs. Usha Purohit submitted that the section requires that a Court before which such a proceeding can be commenced must be a specially designated Court. She submitted that there are a class of offences for which the law makes provision that it shall be open to the Government to designate the authority before whom the trial shall take place. Under the provisions of the Prevention of Corruption Act and under the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) and several other statutes, the law does make such provision. It is on this basis that Mrs. Usha Purohit advanced the submission that it is only such a specially designated Court that can take cognizance of and try offences under this Act. To this extent, Mrs. Usha Purohit questioned the jurisdiction of the learned Special Judge, Greater Bombay, to have proceeded with the present trial up to the stage of framing of the charges and she submitted that if the requirements of Section 13(1) of the Official Secrets Act have not been complied with, that the proceedings are bad for want of jurisdiction. A plain reading of this section would indicate that this is a correct view and a proper interpretation of the section for the added reason that offences under this Act fall in to a very special category. That the offences are serious is undisputed. That they deal with a type of material that is removed from and different from the type of evidence which would normally come before the Courts is also to be noted. Apparently for this reason, it was left to the choice of the appropriate Government to designate the Court before which such trials should take place. In this view of the matter, the submission will have to be upheld in so far as the inevitable result would be that the proceedings before the Court of Session, which admittedly has not been specially empowered, would be without jurisdiction.
53. In the course of his arguments, Dr. Subbarao advanced a detailed submission with regard to the procedure that is required to be followed in cases instituted on complaint. The provisions of the Official Secrets Act require that a complaint is required to be filed in respect of offences under this act. Such a complaint was, in fact, filed by the Investigating Officer, though he had earlier filed a report in the nature of

a charge-sheet which the learned Magistrate tagged on to the complaint. As indicated by me earlier, however, the learned Magistrate proceeded to take cognizance of the complaint having regard to the provisions of the Official Secrets Act. Dr. Subbarao has attacked the validity of the subsequent procedure on the ground that, according to him, it is a mandatory requirement under the relevant provisions of the Code of Criminal Procedure, namely, Sections 200 and 202 that the complainant and the witnesses must be examined before process is issued. Dr. Subbarao submitted that there can be let-up with regard to this procedure and for this purpose he relied on a decision of the Calcutta High Court in the case of *Shyama Prasanna v. State*, 1976 Cri LJ 1517. In this particular decision, the learned Judges of the Calcutta High Court had taken the view that where there is a legal requirement that a complaint and not a charge-sheet be filed, the public servant filing such a complaint does so in the capacity of a private complainant and not in his capacity of a public servant. The extension of this argument was that if the complainant in the present case was, in fact, acting in a private capacity, then the recording of his statement and the statements of the witnesses could not have been dispensed with. It is Dr. Subbarao's further submission that there is a difference of opinion between the Kerala High Court and this High Court with regard to the issue as to whether the examination of witnesses at this stage is mandatory or not. Whereas the Kerala High Court has taken the view that such examination is mandatory, this High Court has taken the view that it is not so, though Dr. Subbarao pointed out that one of the Division Benches has taken his view which he is canvassing. To my mind, even though Dr. Subbarao submits that this is an issue which goes to the root of the matter. I am not inclined to go into a detailed examination of the submission made and record my findings because the complainant in the present case was undisputedly also a public servant. Since the section does empower the Magistrate to dispense with the requirements of examination of the complainant and of the witnesses in a complaint instituted by a public servant, the argument advanced would virtually involve a lot of legal hair-splitting. Having regard to the fact that there are other more important grounds on which the proceedings have been held to be bad in law, the examination of this issue in that context would really be academic and, to my mind, unnecessary at the present juncture. *Prima facie*, Dr. Subbarao appears to be right in his interpretation.

**Supreme Court of India
2009 (7) SCC 104 (1)**

Jayendra Vishnu Thakur

vs

State of Maharashtra and Another

S.B. Sinha and Mukundakam Sharma, JJ.

4. Appellant was arrested by the Maharashtra Police on 23rd October, 1993 in connection with FIR No. 3/1992 and was produced before the Chief Judicial Magistrate, Thane on 24th October, 1993 and was remanded to police custody till 20th November, 1993. He was again shown to have been arrested on 20th November, 1993 in two cases ; one relating to FIR No. 237/1992 of Manikpur Police Station and the other in FIR No. 161 of 1992 of Virar Police Station. He was in judicial custody till 21st December, 1993.

10. Mr. Manoj Goel, learned Counsel appearing on behalf of the appellant, inter alia would submit:

...3. Right to confront a witness being a fundamental right in terms of Article 21 of the Constitution of India and Section 299 of the Code being an exception thereto, the same should be strictly construed....

12. A Designated Judge while holding trial under the Act indisputably has the power to determine all questions including the question as regards his own jurisdiction. Section 11 of TADA provides that every offence punishable under any provision of the said Act shall be triable only by the Designated Court within whose local jurisdiction it was committed. Section 12 empowers the Designated Court to try any other offence, at the same trial, with which the accused may be charged if the offence is connected with such other offence.

Section 14 provides for the procedure and powers of the Designated Court. Sub-section (5) of Section 14 provides for a non-obstante clause in terms whereof notwithstanding anything contained in the Code, a Designated Court may, if it thinks fit and for reasons to be recorded by it, proceed with the trial in the absence of the accused or his pleader and record the evidence of any witness, subject to the right of the accused to recall the witness for cross-examination. Section 25 of TADA also provides for a non obstante clause stating that the provisions thereof or any rule made thereunder or any order made under any such rule shall have effect notwithstanding anything

inconsistent therewith contained in any enactment or in any instrument having effect by virtue of any enactment other than the Act.

16. The application having been filed by the Special Public Prosecutor and the order having been passed on the same date it is beyond any cavil that before the Court apart from the fact that a proclamation under Section 82 had been issued against the appellant, no other material was placed. It now stands accepted that even much prior thereto, i.e., as far back as 23rd July, 1993, the appellant was arrested. The said fact was known to the investigating officer. By a letter dated 1st September, 1993 the Investigating Officer himself had informed the Court in regard thereto.

It also now stands admitted that at least in two cases appellant had been arrested and produced before the Courts in Maharashtra and in fact had been remanded to the police custody. It is furthermore neither in doubt nor in dispute that whereas in one of those cases the appellant was arrested on 20th November, 1993 and on the same date he was shown to have been arrested and taken in police custody once again in another case.

These facts were required to be brought to the notice of the Court. The Court's attention should have also been drawn to the aforementioned letter dated 1st September, 1993.

Had these facts been brought to the notice of the court, could it pass the impugned order is the question

We may assume that the court might have done so. But for the purpose of passing an order, be under Section 299 of the Code or Sub-section (5) of Section 14 of TADA, it was required to apply its mind as regards the existence of the jurisdictional fact. The materials on record were required to be discussed, reasons therefor were required to be recorded. How despite the fact that the appellant had already been custody of the Delhi Police viz-a- viz the Maharashtra Police, he could be termed to be an absconder and there was no prospect of securing his immediate presence, was required to be considered.

Indisputably both the conditions contained in the first part of Section 299 of the Code must be read conjunctively and not disjunctively. Satisfaction of one of the requirements should be not sufficient. It was thus, obligatory on the part of the learned court to arrive at a finding on the basis of the materials brought on record by bringing a cogent evidence that the jurisdictional facts existed so as to enable the

court concerned to pass an appropriate order on the application filed by the Special Public Prosecutor.

Section 299 of the New Code corresponds to Section 512 of the Old Code. The applicability of the aforementioned provisions came up for consideration before some of the High Courts.

17. In this case moreover the appellant had not been absconding after he was arrested. The term 'absconding' has been defined in several dictionaries. We may refer to some of them.

Black's Law Dictionary - To depart secretly or suddenly, esp. to avoid arrest, prosecution or service of process.

P. Ramanatha Aiyar - primary meaning of word is 'to hide'. Oxford English Dictionary - 'To bide or sow away'. Words and phrases - 'clandestine manner/intent to avoid legal process'

...An accused ordinarily would not be presumed to have waived his right. The procedural principles like estoppel or waiver would not be attracted where an order is passed without jurisdiction as the same would be a nullity. An order which is a nullity cannot be brought into effect for invoking the principles like estoppel, waiver or res judicata. [See Chief Justice of Andhra Pradesh and Anr. v. L.V.A. Dikshitulu and Ors. ...]

...We have proceeded on the basis that the right of confrontation is not a fundamental right or whereby accused's fundamental right has not been breached. Article 21, however, envisages a fair trial ; a fair procedure and a fair investigation. By reason of such a right alone the appellant was entitled not only to be informed about his fundamental right and statutory rights but it was obligatory on the part of the Special Public Prosecutor to place on record of the requisite materials before the learned Designated Judge to show that the appellant, after his arrest in Delhi case on 23rd July, 1993 was not an absconder and thus the provisions of Section 299 of the Code was not attracted.

Supreme Court of India
AIR 2000 SC 3203
Dadu @ Tulsidas
vs
State of Maharashtra

K.T. Thomas, R.P. Sethi and S.N. Variava, JJ.

1. The Constitutional validity of Section 32A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act") is under challenge in these petitions filed by the convicts of the offences under the Act, The Section is alleged to be arbitrary, discriminatory and violative of Articles 14 and 21 of the Constitution of India which creates unreasonable distinction between the prisoners convicted under the Act and the prisoners convicted for the offences punishable under various other statutes. It is submitted that the Legislature is not competent to take away, by statutory prohibition, the judicial function of the Court in the matter of deciding as to whether after the conviction under the Act the sentence can be suspended or not. The Section is further assailed on the ground that it has negated the statutory provisions of Sections 389, 432 and 433 of the CrPC (hereinafter referred to as "the Code") in the matter of deciding as to whether after the conviction under the Act the sentence can be suspended, remitted or commuted or not and also under what circumstances, restrictions or limitations on the suspension of sentences or the grant of bail could be passed. It is further contended that the Legislature cannot make relevant considerations irrelevant or deprive the courts of their legitimate jurisdiction to exercise the discretion. It is argued that taking away the judicial power of the appellate court to suspend the sentence despite the appeal meriting admission renders the substantive right of appeal illusory and ineffective. According to one of the petitioners, the prohibition of suspension precludes the Executive from granting parole to a convict who is otherwise entitled to it under the prevalent statutes, jail manual or Government instructions issued in that behalf.
2. The petitioner in W.P. No. 169/99 was arrested and upon conviction under Section 21 of the Act sentenced to undergo imprisonment for 10 years. He claims to have already undergone sentence for more than 7 years. He could not claim parole presumably under the impression that Section 32A of the act was a bar for the State to grant it.

Though the petitioner has referred to Maharashtra Jail Manual, particularly Chapter XXXVIII providing various kinds of remissions and authorising the grant of parole yet nothing is on the record to show as to whether he in fact applied for parole or not.

9. The Constitution Bench of this Court in *Sunil Fulchand Shah v. Union of India and Ors.* considered the distinction between bail and parole in the context of reckoning the period which a detenu has to undergo in prison and held:

Bail and parole have different connotation in law. Bail is well understood in criminal jurisprudence and Chapter XXXIII of the CrPC contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. The literal meaning of the word 'bail' is surety.

10. Again in *State of Haryana v. Nauratta Singh and Ors.* it was held by this Court as under:

Parole relates to executive action taken after the door has been closed on a convict. During parole period there is no suspension of sentence but the sentence is actually continuing to run during that period also.

11. It is thus clear that parole did not amount to the suspension, remission or commutation of sentences which could be withheld under the garb of Section 32A of the Act. Notwithstanding the provisions of the offending Section, a convict is entitled to parole, subject, however, to the conditions governing the grant of it under the statute, if any, or the Jail Manual or the Government Instructions. The Writ Petition No. 169 of 1999 apparently appears to be misconceived and filed in a hurry without approaching the appropriate authority for the grant of relief in accordance with jail manual applicable in the matter.

12. We will now deal with the crux of the matter relating to the constitutional validity of Section 32A in the light of the challenge thrown to it. Section 32A of the Act reads: "32A. No suspension, remission or commutation in any sentence awarded under this Act.- Notwithstanding anything contained in the CrPC, 1973 or any other law for the time being in force but subject to the provisions of Section 33, no sentence awarded under this Act (other than Section 27) shall be suspended or remitted or commuted."

...The distinction of the convicts under the Act and under other statutes, in so far as it relates to the exercise of the Executive Powers under Sections 432 and 433 of

the Code is concerned, cannot be termed to either arbitrary or discriminatory being violative of Article 14 of the Constitution. Such deprivation of the Executive can also not be stretched to hold that the right to life of a person has been taken away except, according to the procedure established by law. It is not contended on behalf of the petitioners that the procedure prescribed under the Act for holding the trial is not reasonable, fair and just. The offending Section, in so far as it relates to the Executive in the matter of suspension, remission and commutation of sentence, after conviction, does not, in any way, encroach upon the personal liberty of the convict tried fairly and sentenced under the Act. The procedure prescribed for holding the trial under the Act cannot be termed to be arbitrary, whimsical or fanciful. There is, therefore, no vice of unconstitutionality in the Section in so far as it takes away the powers of the Executive conferred upon it under Sections 432 and 433 of the Code, to suspend, remit or commute the sentence of a convict under the Act.

16. Learned counsel appearing for the parties were more concerned with the adverse effect of the Section on the powers of the judiciary. Impliedly conceding that the Section was valid so far as it pertained to the appropriate Government, it was argued that the Legislature is not competent to take away the judicial powers of the Court by statutory prohibition as is shown to have been done vide the impugned section. Awarding sentence, upon conviction, is concededly a judicial function to be discharged by the courts of law established in the country. It is always a matter of judicial discretion, however, subject to any mandatory minimum sentence prescribed by the law. The award of sentence by a criminal court wherever made subject to the right of appeal cannot be interfered or intermeddled with in a way which amounts to not only interference but actually taking away the power of judicial review. Awarding the sentence and consideration of its legality or adequacy in appeal is essentially a judicial function embracing within its ambit the power to suspend the sentence under the peculiar circumstances of each case, pending the disposal of the appeal.
17. Not providing at least one right of appeal, would negate the due process of law in the matter of dispensation of criminal justice. There is no doubt that the right of appeal is the creature of a statute and when conferred, a substantive right. Providing a right of appeal but totally disarming the court from granting interim relief in the form of suspension of sentence would be unjust, unfair and violative of Article 21 of the Constitution particularly when no mechanism is provided for early disposal of the appeal. The pendency of criminal litigation and the experience in dealing with pending matters indicate no possibility of early hearing of the appeal and its disposal

on merits at least in many High Courts. As the present is not the occasion to dilate on the causes for such delay, we restrain ourselves from that exercise. In this view of the matter, the appellate powers of the court cannot be denuded by Executive or judicial process.

22. The parties to the Convention further resolved to provide in addition to conviction and punishment for an offence that the offender shall undergo measures such as treatment, education, after care, rehabilitation or social re-integration. It was further agreed: "The parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences. The parties shall ensure that their courts or other competent authorities bear in mind the serious nature of the offences enumerated in paragraph 1 of this article and the circumstances enumerated in paragraph 5 of this article when considering the eventuality of early release or parole of persons convicted of such offences."
24. In *Ram Charan v. Union of India* 1991(9) SCR 160, the Allahabad High Court while dealing with the question of the constitutional validity of Section 32A found that as the Section leaves no discretion to the court in the matter of deciding, as to whether, after conviction the sentence deserves to be suspended or not without providing any guidelines regarding the early disposal of the appeal within a specified period, it suffers from arbitrariness and thus violative of mandate of Articles 14 and 21 of the Constitution. In the absence of right of suspending a sentence, the right of appeal conferred upon accused was termed to be a right of infructuous appeal. However, Gujarat High Court in *Ishwar Singh M. Rajput v. State of Gujarat* (1990) 2 GLR 1365 while dealing with the case relating to grant of parole to a convict under the Act found that Section 32A was Constitutionally valid. It was held:

Further, the classification between the prisoners convicted under the Narcotics Act and the prisoners convicted under any other law, including the Indian Penal Code is reasonable one, it is with specific object to curb deterrently habit forming, boozing and paying (beyond imagination) nefarious illegal activity in drug trafficking. Prisoners convicted under the Narcotics Act are class by themselves. Their activities affect the entire society and may, in some cases, be a death-blow to the persons, who become addicts. It is much more paying as it brings unimaginable easy riches. In this view of the matter, the temptation to the prisoner is too great to resist himself from indulging in same type of activity during the period, when he is temporarily released. In most

of the cases, it would be difficult for him to leave that activity as it would not be easy for the prisoner to come out of the clutches of the gang, which operates in nefarious illegal activities. Hence, it cannot be said that Section 32A violates Article 14 of the Constitution on the ground that it makes unreasonable distinction between a prisoner convicted under the Narcotic Act and a prisoner convicted for any other offences.

26. Despite holding that Section 32A is unconstitutional to the extent it affects the functioning of the criminal courts in the country, we are not declaring the whole of the section as unconstitutional in view of our finding that the Section, in so far as it takes away the right of the Executive to suspend, remit and commute the sentence, is valid and intra vires of the Constitution. The Declaration of Section 32A to be unconstitutional, in so far as it affects the functioning of the courts in the country, would not render the whole of the section invalid, the restriction imposed by the offending section being distinct and severable.
27. Holding Section 32A as void in so far as it takes away the right of the courts to suspend the sentence awarded to a convict under the Act, would neither entitle such convicts to ask for suspension of the sentence as a matter of right in all cases nor would it absolve the courts of their legal obligations to exercise the power of suspension of sentence within the parameters prescribed under Section 37 of the Act.
28. This Court in *Union of India v. Ram Samujh and Anr.* 1999 (66) ECC 335 held that the jurisdiction of the court to grant bail is circumscribed by the aforesaid section of the Act. The bail can be granted and sentence suspended in a case where there are reasonable grounds for believing that the accused is not guilty of the offence for which convicted and he is not likely to commit any offence while on bail and during the period of suspension of the sentence. The Court further held:

The aforesaid section is incorporated to achieve the object as mentioned in the Statement of Objects and Reasons for introducing Bill No. 125 of 1988 thus:

Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985 the need to amend the law to further strengthen it, has been felt.

It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while (sic) persons who are(sic) dealing in narcotic drugs are instrumental in causing death or in inflicting deathblow

to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the Narcotic Drugs & Psychotropic Substances Act, has succinctly observed about the adverse effect of such activities in *Durand Dilier v. Chief Secretary, Union Territory of Goa* 1990 (25) ECC 289 as under: (SCC p. 104, para 24).

29. Under the circumstances the writ petitions are disposed of by holding that (1) Section 32A does not in any way affect the powers of the authorities to grant parole; (2) It is unconstitutional to the extent it takes away the right of the court to suspend the sentence of a convict under the Act; (3) Nevertheless, a sentence awarded under the Act can be suspended by the appellate court only and strictly subject to the conditions spelt out in Section 37 of the Act as dealt with in this judgement.

Supreme Court of India

AIR 2009 SC 628

Deepak Bajaj

vs

State of Maharashtra and Another

Altamas Kabir and Markandey Katju, JJ.

1. This writ petition under Article 32 of the Constitution of India has been filed to challenge the detention order dated 22.05.2008 passed against the petitioner, Deepak Gopaldas Bajaj, resident of Mumbai under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short 'the Act'), copy of which is Annexure P-1 to this petition.
5. Since the aforesaid decisions have basically followed the decision of this Court in *Additional Secretary to the Government of India and Ors. v. Smt. Alka Subhash Gadia and Anr.* (supra), it would be useful to refer to the aforesaid decision. In paragraph 30 of the aforesaid decision in Smt. *Alka Subhash Gadia's* case (supra) this Court observed:

30. As regards his last contention, viz., that to deny a right to the proposed detenu to challenge the order of detention and the grounds on which it is made before he is taken in custody is to deny him the remedy of judicial review of the impugned order which right is a part of the basic structure of the Constitution, we find that this argument is also not well merited based as it is on absolute assumptions. Firstly, as pointed out by the authorities discussed above, there is a difference between the existence of power and its exercise. Neither the Constitution including the provisions of Article 22 thereof nor the Act in question places any restriction on the powers of the High Court and this Court to review judicially the order of detention. The powers under Articles 226 and 32 are wide, and are untrammeled by any external restrictions, and can reach any executive order resulting in civil or criminal consequences. However, the courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers⁶. We have carefully perused the above observations in Smt. Alka Subhash Gadia's case (supra) and we are of the opinion that the five grounds mentioned therein on which the Court can set aside the detention order at the pre execution stage are only illustrative not exhaustive....

16. Shri Shekhar Nafade learned senior counsel for the State of Maharashtra submitted that the five conditions mentioned in *Smt. Alka Subhash Gadia's* case (supra) were

exhaustive and not illustrative. We cannot agree. As already stated above, a judgement is not a statute, and hence cannot be construed as such. In Smt. *Alka Subhash Gadia's* case (*supra*) this Court only wanted to lay down the principle that entertaining a petition against a preventive detention order at a pre- execution stage should be an exception and not the general rule. We entirely agree with that proposition. However, it would be an altogether different thing to say that the five grounds for entertaining such a petition at a pre execution stage mentioned in Smt. Alka Subhash Gadia's case (*supra*) are exhaustive. In our opinion they are illustrative and not exhaustive.

17. If a person against whom a prevention detention order has been passed can show to the Court that the said detention order is clearly illegal why should he be compelled to go to jail? To tell such a person that although such a detention order is illegal he must yet go to jail though he will be released later is a meaningless and futile exercise.
18. It must be remembered that every person has a fundamental right of liberty vide Article 21 of the Constitution. Article 21, which gives the right of life and liberty, is the most fundamental of all the Fundamental Rights in the Constitution. Though, no doubt, restrictions can be placed on these rights in the interest of public order, security of the State, etc. but they are not to be lightly transgressed.
21. If a person is sent to jail then even if he is subsequently released, his reputation may be irreparably tarnished. As observed by this Court in *State of Maharashtra and Ors. v. Public Concern for Governance Trust and Ors.* 2007 (3) SCC 587, the reputation of a person is a facet of his right to life under Article 21 of the Constitution (vide paragraphs 39 and 40 of the said decision).
22. As observed by the three Judge bench of this Court in *Joginder Kumar v. State of U.P. and Ors.* 1994 Cri LJ 1981:
...The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person.
24. If a person against whom a preventive detention order has been passed comes to Court at the pre execution stage and satisfies the Court that the detention order is clearly illegal, there is no reason why the Court should stay its hands and compel the petitioner to go to jail even though he is bound to be released subsequently (since the detention order was illegal). As already mentioned above, the liberty of a person is a precious fundamental right under Article 21 of the Constitution and should not

be likely transgressed. Hence in our opinion Smt. Alka Subhash Gadia's case (*supra*) cannot be construed to mean that the five grounds mentioned therein for quashing the detention order at the pre execution stage are exhaustive.

27. Apart from the above, in our opinion non-placement of the relevant materials before the Detaining Authority vitiates the detention order, and grounds (iii) & (iv) of the decision of this Court in *Alka Subhash Gadia's* case (*supra*) are attracted in such a situation as held in *Rajinder Arora v. Union of India* (*supra*) (vide para 25 of the said decision). Hence, even if we treat the five exceptions mentioned in *Alka Subhash Gadia's* case (*supra*) as exhaustive, the present case is covered by the 3rd and 4th exceptions of those five exceptions, as held in Rajinder Arora's case (*supra*).
34. Several submissions have been made by Shri Soli Sorabjee, learned Counsel for the petitioner, but in our opinion it is not necessary to go into all of them since we are inclined to allow this petition on one of these grounds namely, that the relevant material was not placed before the Detaining Authority when he passed the detention order.
35. These relevant materials have been stated in the writ petition in ground 'C' entitled 'Non-placement of relevant material documents by Sponsoring Authority leading to consequent non- consideration thereof by the Detaining Authority'.
37. The most important of these documents which were not placed before the Detaining Authority were the retractions given by Kuresh Rajkotwala to the DRI dated 4.12.2006, Kuresh Rajootwala's affidavit filed before the learned Addl. Chief Metropolitan Magistrate, Esplanade, Mumbai, Bharat Chavhan's retraction to DRI dated 9.5.2008, Bipin Thaker's retraction to DRI dated 19.1.2008, Sharad Bhoite's retraction dated 24.4.2007 before the Addl. Chief Metropolitan Magistrate, Esplanade Mumbai and its affidavit filed before the same authority etc.
40. It has been repeatedly held by this Court that if a confession is considered by the Detaining Authority while passing the detention order the retraction of the confession must also be placed before him and considered by him, otherwise the detention order is vitiated. Thus in *Ashadevi v. K. Shivraj and Anr.* 1979 Cri LJ 203 this Court observed (vide para 7) :

Further, in passing the detention order the detaining authority obviously based its decision on the detenu's confessional statements of December 13 and 14, 1977 and, therefore, it was obligatory upon the Customs Officers to report the retraction of those statements by the detenu on December 22, 1977 to the detaining authority,

for, it cannot be disputed that the fact of retraction would have its own impact one way or the other on the detaining authority before making up its mind whether or not to issue the impugned order of detention. Questions whether the confessional statements recorded on December 13 and 14, 1977 were voluntary statements or were statements which were obtained from the detenu under duress or whether the subsequent retraction of those statements by the detenu on December 22, 1977 was in the nature of an after-thought, were primarily for the detaining authority to consider before deciding to issue the impugned detention order but since admittedly the aforesaid vital facts which would have influenced the mind of the detaining authority one way or the other were neither placed before nor considered by the detaining authority it must be held that there was non-application of mind to the most material and vital facts vitiating the requisite satisfaction of the detaining authority thereby rendering the impugned detention order invalid and illegal.

41. It may be noted that in the above decision, this Court has held that it was the duty of the Customs Officer to have reported the retraction of the statements to the Detaining Authority. Hence, even if the retractions in the present case were not placed before the Detaining Authority that will not be of any avail to the respondents since it has been held that it was the duty of the authorities before whom the retractions were made to have forwarded them to the Detaining Authority and the Sponsoring Authority. We entirely agree with the above view.
42. In *Adishwar Jain v. Union of India and Anr.* 2006 ECR 328 (SC) this Court observed that where the relevant documents have not been placed before the Detaining Authority, issuing of the detention order itself would become vitiated. The same view was taken in *V.C. Mohan v. Union of India* 2002 (7) ELT 141 (SC).
43. In *Alka Subhash Gadia's* (supra) this Court followed its earlier decision in Rajinder Arora's case (supra) in which case it was held that failure to place the retraction of the confession before the detaining authority vitiates the detention order. The same view was taken by this Court in *P. Saravanan v. State of Tamil Nadu and Ors.* 2001 CriLJ 3285 , *Ahmed Nassar v. State of Tamil Nadu and Ors* 2000 CriLJ 33 , *Sita Ram Somani v. State of Rajasthan* 1986 CriLJ 860 , etc.
44. In *Union of India and Ors. v. Manoharlal Narang* 1987 (30) ELT 37 (SC) this Court deprecated the contention that the detaining authority is not required to collect all materials about any court proceedings etc from different Ministries or Departments for the purpose of issuance of a detention order. The Court observed that non-consideration of a relevant material will certainly invalidate the detention order. We respectfully agree with the above view, and reiterate it.

45. In *A. Sowkath Ali v. Union of India and Ors.* 2000 Cri LJ 3961 this Court observed that if the Detaining Authority has relied on a confessional statement then the retraction of that confession should also have been placed before the Detaining Authority, and should have been considered by it, and failure to do so would invalidate the detention order.
46. In our opinion, failure to place the retractions and other materials referred to in paragraph 4 of the petition before the Detaining Authority would certainly vitiate the impugned detention order.
49. Shri Soli Sorabjee, learned Counsel, invited our attention to ground 'B' in the Writ Petition in which it has been stated that the petitioner has not done any business after November 2006 when the alleged last consignment was cleared by the petitioner. This averment has not been rebutted in the counter affidavit filed by the respondent. Hence, Shri Sorabjee submitted that there is now no live link between the alleged prejudicial activities and the purpose of detention now. He has also relied upon the decisions of this Court in *T.A. Abdul Rehman v. State of Kerala and Ors.* 1990 CriLJ 578 and *State of Maharashtra v. Bhauraopunjabrao Gawande* AIR 2008 SC 1705
51. The detention order in our opinion was clearly illegal and deserves to be set aside. We order accordingly. The writ petition is allowed. The impugned detention order dated 22.5.2008 stands quashed. No costs.

**Supreme Court of India
2009 (12) SCR 1093**

Mohd. Farooq Abdul Gafur and Another
vs
State of Maharashtra
AND
State of Maharashtra
vs
Mohd. Zuber Kasam Sheikh and Others

S.B. Sinha and Mukundakam Sharma JJ.

3. It was argued before us by the State of Maharashtra that the case at hand falls within the category of the 'rarest of rare'. It was submitted that in the facts and circumstances of the case only a death sentence would meet the requirements of justice. Contention of the State that what brought this case within the special category of the 'rarest of rare cases' was the fact that the incident in question was not a stray crime of murder but was in fact an extremely sophisticated and organised crime whose strings had been attached to outside the country. Accordingly the incident which resulted in the death of three persons and caused grievous injury to seven, was an assault on civilised society.

Capital Sentencing and Procedural Justice

6. In this regard, it is pertinent to revisit the basic tenets of our sentencing system. Any capital sentencing system, by virtue of the nature of penalty it deals with, inheres a hierarchical review mechanism. A tiered court system is at the heart of achieving a substantial standard of review which essentially kicks in as soon as death punishment is awarded. The review courts are supposed to assess the findings emerging from the pre-sentencing hearing at the trial stage as also other available material and then arrive at conclusion of its own on the propriety of sentence. In this context, apex court as the final reviewing authority has a far more serious and intensive duty to discharge. The court not only has to ensure that award of death penalty does not become a perfunctory exercise of discretion under Section 302 after an ostensible consideration of Rarest of Rare doctrine, but also that the decision making process survives the special rigors of procedural justice applicable in this regard. Procedural

justice threshold not only emphasizes the substantive compliance of *Bachan Singh* dicta, [for a comprehensive treatment of Bachan Singh (supra) see *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* in relation to selection of penalty, but also compliance of other due process requirements. It must be noted that administration of Death Penalty is carried out in the intensive gaze of Article 14 and Article 21 requirements. Bariyar (supra) aptly captures the sentiment in this regard:

We are also governed by the Constitution of India. Article 14 and 21 are constitutional safeguards and define the framework for state in its functions, including penal functions. They introduce values of institutional propriety, in terms of fairness, reasonableness and equal treatment challenge with respect to procedure to be invoked by the state in its dealings with people in various capacities, including as a convict. The position is, if the state is precariously placed to administer a policy within the confines of Article 21 and 14, it should be applied most sparingly. This view flows from Bachan Singh and it this light, we are afraid that Constitution does not permit us to take a re-look on the capital punishment policy and meet society's cry for justice through this instrument.

7. It is universally acknowledged that judicial discretion is subjective in nature and left to itself has potential to become erratic and personality based which makes it antithetical to the spirit of Article 14. Article 14 applies to judicial process including exercise of judicial discretion as it applies to the executive process. Of course, the nature of Article 14 application in this case will be on a different plane altogether and an objective analysis on that count would have to meet the Ceteris paribus (with other things the same) requirement. The disparity in capital sentencing has been unequivocally asserted not only in *Bariyar* (supra) but also in *Aloke Nath Dutt and Ors. v. State of West Bengal* and in *Swamy Shraddananda @ Murli Manohar Mishra v. State of Karnataka*.
8. In such a scenario, rule based judging norms and sound rules of prudence are the only guarantee to fair and equitable sentencing. This emerges from the constitutional context to the administration of capital sentencing problem as also a closer reading of rarest of rare test. The Bachan Singh court invoked the superlative standard safeguarded the judicial space to award death penalty. We should bear in mind that the test will be fulfilled not merely by employing the "personal predilection" of a judge [see *Swamy Shraddananda* (supra)] and deciding the rarest of rare instance on the facts of the case, but only after due consideration of the intangibles relating to the case. The assessment of "rarest of the rare case" is incomplete without coming to the conclusion that the "the lesser alternative is unquestionably foreclosed". And procedural fairness and justice concerns form part of the latter condition have to be established to compare and arrive at a finding of Rarest of rare case.

Primacy to Rules of Prudence

11. In an apparent conflict between a "fair and equitable" sentencing system and an "efficient and deterrent" sentencing philosophy in the context of Death Penalty, the Bachan Singh verdict, without a doubt, favours the former. It is not to suggest that deterrent as a theory of punishment is not relevant at all in Section 302, but that there is more to this question. Capital Sentencing is not a normal penalty discharging the social function of punishment. In this particular punishment, there is heavy burden on court to meet the procedural justice requirements, both emerging from the black letter law as also conventions. In terms of rule of prudence and from the point of view of principle, a court may choose to give primacy to life imprisonment over death penalty in cases which are solely based on circumstantial evidence or where high court has given a life imprisonment or acquittal.
12. At this juncture, it will be pertinent to assess the nature of rarest of rare expression. In light of serious objections to disparity in sentencing by this Court flowing out of varied interpretations to the Rarest of Rare expression, it is clear that the test has to be more than what a particular judge locates as rarest of rare in his personal consideration. There has to be an objective value to the term rarest of rare, otherwise it will fall foul of Article 14. In such a scenario, a robust approach to arrive at rarest of rare situations will give primacy to what can be called the consensus approach to the test. In our tiered court system, an attempt towards deciphering a common view as to what can be called to be the rarest of rare, vertically across the trial court, high court and apex court and horizontally across a bench at any particular level, will introduce some objectivity to the precedent on death penalty which is crumbling down under the weight of disparate interpretations.
18. In a case where a Bench of three Judges delivered judgement in which the opinion of at least one Judge is in favour of preferring imprisonment for life to death penalty as for any particular accused, I think it would be a proper premise for the Bench to review the order of sentence of death in respect of that accused. Such an approach is consistent with Article 21 of the Constitution as it helps saving a human life from the gallows and at the same time putting the guilty accused behind the bars for life. In my opinion, it would be a sound proposition to make a precedent that when one of the three Judges refrains from awarding death penalty to an accused on stated reasons in preference to the sentence of life imprisonment that fact can be regarded sufficient to treat the case as not falling within the narrowed ambit of "rarest of rare cases when the alternative option is unquestionably foreclosed".

I may add as an explanatory note that the reasoning is not to be understood as a suggestion that a minority opinion in the judgement can supersede the majority view therein. In the realm of making a choice between life imprisonment and death penalty the above consideration is germane when the scope for awarding death penalty has now shrunk to the narrowest circle and that too only when the alternative option is "unquestionably foreclosed". In a special situation where one of the three deciding judges held the view that sentence of life imprisonment is sufficient to meet the ends of justice it is a very relevant consideration for the Court to finally pronounce that the prisoner can be saved from death as the lesser option is not "unquestionably foreclosed" in respect of that prisoner.

Facts and Situations of the Present Case

25. In our opinion the trial court had wrongly rejected the fact that even though the accused had a criminal history, but there had been no criminal conviction against the said three accused. It had rejected the said argument on the ground that a conviction might not be possible in each and every criminal trial. In our opinion unless a person is proven guilty, he should be presumed innocent.
26. Further nothing has been brought on behalf of the State even after all these years, that the criminal trials that had been pending against the accused had resulted in their conviction. Unless the same is shown by documents on records we would presume to the contrary. Presumption of innocence is a human right. The learned trial judge should also have presumed the same against all the three accused.
30. If a person is sentenced to imprisonment, even if it be for life, and subsequently it is found that he was innocent and was wrongly convicted, he can be set free. Of course, the imprisonment that he has suffered till then cannot be undone and the time he has spent in the prison cannot be given back. Such a reversal is not possible where a person has been wrongly convicted and sentenced to death. The execution of the sentence of death in such cases makes miscarriage of justice irrevocable. It is a finality which cannot be corrected.
31. And once Accused 5, M Zuber Kasam Shaikh and Accused 6 Fazal Mohd Shaikh have been sentenced to life there remains no question of awarding a death sentence to Accused 7, Azzizuddin Zahiruddin Shaikh who had played no greater a role in the said incident as Accused 5, M Zuber Kasam Shaikh and Accused 6 Fazal Mohd Shaikh. All the three accused stand on an equal footing and therefore the sentences to be imposed upon them must not differ. It is for the aforementioned reasons that the appeals filed by the State as regard the imposition of a death Sentence deserves to be dismissed.

Mukundakam Sharma J.

38. Another submission which was very forcefully placed before us was that the confessional statements cannot be the basis of conviction in the present cases as the said confessional statements which were proved in the instant case did not contain the mandatory certificate as mentioned under Rule 15 of Maharashtra Control of Organized Crime Rules, 1999 (for short 'the MCOC Rules'). Rule 15 of the MCOC Rules requires a certificate to be attached with the confessional statement but the same apparently is not a part of the record in the instant case thereby rendering the confessional statement as invalid. The mandatory certificate contained the warning which are admittedly not proved in the trial and the same having been not proved, all the confessional statements lost its sanctity and, therefore, could not have been the basis of any conviction.
59. So far as conviction under MCOCA is concerned, it is quite clear that conviction could be based solely on the basis of the confessional statement itself and such conviction is also permissible on the basis of the confessional statement of the co-accused which could be used and relied upon for the purpose of conviction. In the case of *State v. Nalini*, it was held by this Court in the context of Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (now repealed), which is pari materia with Section 18 of the MCOCA that the evidence of a co-accused is admissible as a piece of substantive evidence and in view of the non obstante clause, the CrPC will not apply. The Court observed as follows in the relevant paras:

415. When Section 15 TADA says that confession of an accused is admissible against a co-accused as well, it would be substantive evidence against the co-accused. It is a different matter as to what value is to be attached to the confession with regard to the co-accused as that would fall in the realm of appreciation of evidence.

416. The term "admissible" under Section 15 has to be given a meaning. When it says that confession is admissible against a co-accused it can only mean that it is substantive evidence against him as well as against the maker of the confession.

417. Mr. Natarajan said that the confession may be substantive evidence against the accused who made it but not against his co-accused. He reasoned that the confession was not that of the co-accused and it was not the evidence; it is the confessor who owned his guilt and not the co-accused; it is not evidence under Section 3 of the Evidence Act; it is not tested by cross-examination; and lastly, after all it is the statement of an accomplice. According to him it can have only corroborative value and that is a well-established principle of the evidence even though Section 3 and Section 30 of the Evidence Act be ignored. But then Section 15 TADA starts with non obstante clause. It says that neither the Evidence Act nor the Code of Criminal

Procedure will apply. This is certainly a departure from the ordinary law. But then it was also the submission of Mr. Natarajan that the bar which is removed under Section 15 is qua Sections 24, 25 and 26 of the Evidence Act and not that all the provisions of the Evidence Act have been barred from its application. He, therefore, said that the view taken by this Court in Kalpnath Rai case⁷ that Section 30 of the Evidence Act was in any case applicable, was correct. We think, however, that the view expressed in that case needs reconsideration.

421. TADA was enacted to meet extraordinary situation existing in the country. Its departure from the law relating to confession as contained in the Evidence Act is deliberate. Law has to respond to the reality of the situation. What is admissible is the evidence. Confession of the accused is admissible with the same force in its application to the co-accused who is tried in the same case. It is primary evidence and not corroborative. When the legislature enacts that the Evidence Act would not apply, it would mean all the provisions of the Evidence Act including Section 30. By judicial interpretation or judicial rigmarole, as we may put it, the court cannot again bring into operation Section 30 of the Evidence Act and any such attempt would not appear to be quite warranted. Reference was made to a few decisions on the question of interpretation of Sections 3 and 30 of the Evidence Act, foremost being that of the Privy Council in Bhuboni Sahu v. R. 8 and though we note this decision, it would not be applicable because of the view which we have taken on the exclusion of Section 30 of the Evidence Act. In Bhuboni Sahu case⁸ the Board opined as under:

Section 30 seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of 'evidence' contained in Section 3, Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities. Section 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. Their Lordships think that the view which has prevailed in most of the High Courts in India, namely that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction, is correct.

422. In Kashmira Singh v. State of M.P.⁹ one of the questions was how far and in what way the confession of an accused person can be used against a co-accused. The Court relied on the observations made by the Privy Council in Bhuboni Sahu case⁸ and said that testimony of an accomplice can in law be used to corroborate another though it ought not to be used save in exceptional circumstances and for reasons disclosed.

424. *In view of the above discussions, we hold the confessions of the accused in the present case to be voluntarily and validly made and under Section 15 of TADA confession of an accused is admissible against a co-accused as a substantive evidence. Substantive evidence, however, does not necessarily mean substantial evidence. It is the quality of evidence that matters. As to what value is to be attached to a confession will fall within the domain of appreciation of evidence. As a matter of prudence, the court may look for some corroboration if confession is to be used against a co-accused though that will again be within the sphere of appraisal of evidence.*

60. 2. Confessional statement before the police officer under Section 15 of the TADA is substantive evidence and it can be relied upon in the trial of such person or co-accused, abettor or conspirator for an offence punishable under the Act or the Rules. The police officer before recording the confession has to observe the requirement of Sub-section (2) of Section 15. Irregularities here and there would not make such confessional statement inadmissible in evidence. If the legislature in its wisdom has provided after considering the situation prevailing in the society that such confessional statement can be used as evidence, it would not be just, reasonable and prudent to water down the scheme of the Act on the assumption that the said statement was recorded under duress or was not recorded truly by the officer concerned in whom faith is reposed. It is true that there may be some cases where the power is misused by the authority concerned. But such contention can be raised in almost all cases and it would be for the court to decide to what extent the said statement is to be used. Ideal goal may be: confessional statement is made by the accused as repentance for his crime but for achieving such ideal goal, there must be altogether different atmosphere in the society. Hence, unless a foolproof method is evolved by the society or such atmosphere is created, there is no alternative, but to implement the law as it is.
61. In the case of *Jameel Ahmed v. State of Rajasthan*, at page 689, this Court summarized the aforesaid legal position as follows:
35. *To sum up our findings in regard to the legal arguments addressed in these appeals, we find:*
- (i) *If the confessional statement is properly recorded, satisfying the mandatory provision of Section 15 of the TADA Act and the Rules made thereunder, and if the same is found by the court as having been made voluntarily and truthfully then the said confession is sufficient to base a conviction on the maker of the confession.*
 - (ii) *Whether such confession requires corroboration or not, is a matter for the court considering such confession on facts of each case.*

- (iii) *In regard to the use of such confession as against a co-accused, it has to be held that as a matter of caution, a general corroboration should be sought for but in cases where the court is satisfied that the probative value of such confession is such that it does not require corroboration then it may base a conviction on the basis of such confession of the co-accused without corroboration. But this is an exception to the general rule of requiring corroboration when such confession is to be used against a co-accused.*
 - (iv) *The nature of corroboration required both in regard to the use of confession against the maker as also in regard to the use of the same against a co-accused is of a general nature, unless the court comes to the conclusion that such corroboration should be on material facts also because of the facts of a particular case. The degree of corroboration so required is that which is necessary for a prudent man to believe in the existence of facts mentioned in the confessional statement.*
 - (v) *The requirement of Sub-rule (5) of Rule 15 of the TADA Rules which contemplates a confessional statement being sent to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate who, in turn, will have to send the same to the Designated Court is not mandatory and is only directory. However, the court considering the case of direct transmission of the confessional statement to the Designated Court should satisfy itself on facts of each case whether such direct transmission of the confessional statement in the facts of the case creates any doubt as to the genuineness of the said confessional statement.*
65. Accused No. 4 himself has admitted that he was in regular contact over phone with Mohd. Faheem, the associate of Chhota Shakeel, that he purchased mobile phone and sim cards on the instructions of Mohd. Faheem and received payment for the same, that he arranged the Maruti car which was used for the shootout on the instructions of Mohd. Faheem, that he was present during the handing over of AK-56 and pistol to Accused No. 7 on the morning of the incident and he was privy to the conversations between Chhota Shakeel, Mohd. Faheem and Accused No. 7 on the day of the shootout and that he was an active member of the gang of Chhota Shakeel who actively participated in the activities of the organized crime syndicate which fact is corroborated by his confessional statement.
66. So far as confessional statement of Accused No. 4 is concerned, we find the same to be trustworthy and reliable.

Conclusion

From the above cases we can conclude that the right to fair procedure is very much applicable to prisoners in India and these rights have been identified as:

Right to bail – In Babu Singh's case [(1978) 2 S.C.R 777]

Right to be represented in court – In the Hoskot case (A.I.R. 1978 S.C. 1548)

Right to speedy trial – Fair procedure includes a reasonable speedy trial. In the Hussainara Khatoon case (A.I.R. 1979 S.C. 1360) and Maneka Gandhi case (A.I.R. 1978 S.C. 597).

These rights are of extreme importance for prisoners in India, as almost 2/3rd of them are under trial prisoners. Although the rights have been very rigidly stated and framed by the judiciary, yet they have not been implemented appropriately. This has resulted in the large amount of backlog cases before the trial courts in India. Justice is being denied because of the delay experienced in providing a speedy and fair trial to prisoners because most of these prisoners do not have the necessary means to either submit required bail amount combined with the incompetence of the counsels provided to them by the courts.

HUMANE SENTENCING

Introduction

The Judiciary of India while interpreting a law framed by the legislature pays attention to the effects of strict and literal interpretation of that particular law in order to identify the intent of the legislator while drafting the rule. Many times the legislators draft the rules with the intent of giving the judicial authorities enough liberty to apply the law in accordance with the peculiar nature of every case concerning the law. This means that while passing a judgement/order/sentence the judges often look beyond the hard and fast laws and the facts in direct relation to the case before them. It is a judge's sworn duty to provide accurate justice and for this he often looks at every aspect of a case where a serious punishment like life-imprisonment or extensive imprisonment is likely to be given to the prisoner. The process adopted by the judges to take into account other factors while passing such sentences is called "humane sentencing". In short, a sentence that is passed after considering the crucial circumstances which affected or resulted into the illegal act drawing imprisonment of the accused is called a "humane sentence". The Indian Judiciary has been considerate enough to take the following factors into account while sentencing a convict to prolonged imprisonment:

(1) prior criminal record; (2) age; (3) professional or social; (4) background; (5) emotional and mental; (6) prospect of rehabilitation, treatment, training and return to normal life; and (7) the possibility of the sentence as a deterrent. On understanding the case-laws in this chapter one can identify the rights a prospective prisoner has to demand a humane sentence from the Court.

In *Mohammed Giasuddin's* case (1977 (3) SCC 287) the point involved was humane sentencing, i.e. how sentencing ought to be tailored to fit the gravity of the delinquency and the redemption of the deviant. Giasuddin, himself a government employee, had cheated certain unemployed persons of Rs. 1,200/-. Found guilty he was routinely punished with three years rigorous imprisonment. Relying on *Lekhraj's* case the Court reiterated the relevance of the offender's circumstances and social milieu, apart from the daring and reprehensible nature of the offence to be taken into account while sentencing. The court summed up the components of a proper sentence as laid down in the 47th Report of the Law Commission of India: (1) prior criminal record; (2) age; (3) professional and social record; (4) education and social background; (5) emotional and mental condition; (6) prospect of rehabilitation, treatment, training and return to normal life; and (7) the possibility of the sentence serving as a deterrent.

In *Bhagirath's* case (AIR 1985 SC 1050), the Supreme Court overruled its earlier decisions stating that imprisonment for life is not an imprisonment for a term, and thus denying convicts the benefit of the period of undetrial detention. The court held that "equitable considerations must have an important place in the construction of benevolent provisions particularly in the field of criminal law." The Court directed that the period of detention undergone by the undetrial prisoners and the remissions earned by them be taken into account for setting-off the sentence of life convicts mandating that "punishments are no longer retributory. They are reformative."

In *Bhupesh Ramchandra More vs. State of Maharashtra* (1993 Mah LJ 1425), the Bombay High Court held that accused below 21 years of age should as a rule be given the benefit of probation. The Court held that in the present case where the accused was convicted under Section 304 (ii) for culpable homicide not amounting to murder, the trial court failed to consider the suddenness of the incident and the fact that the accused and his mother sustained serious injuries. The accused ought to be given probation. The Court held that in every case of denial of benefit the trial court is duty bound to give reasons for the same.

In *Dr. Jacob George vs. State of Kerala* (1994 (3) SCC 430) the appellant a homoeopath doctor was sentenced to 4 years Rigorous Imprisonment and a fine of Rs. 5000/- by the High Court of Kerala for operating on a pregnant lady in an attempt to abort and causing her death. The Supreme Court holding that the purpose of the sentence is four fold: retribution, prevention, deterrence and reformation, and that since the retributive part of the sentence was taken care of by the adverse effect which the conviction would have on the practice of the appellant, reduced the quantum of the sentence to two months. The Court held that the sentence already undergone by the appellant would prevent him from repeating the illegal act, and would also act as a deterrence and result in reformation of the appellant.

In *Baldev Singh's* case (1995 (6) SCC 593), where the accused and victims were near relations, the Supreme Court directed that each of the accused pay compensation of Rs. 35,000/- to the family of the victims in lieu of undergoing the balance of term of imprisonment imposed by the High Court. The Court held that merely maintaining the sentence of imprisonment on the accused would not benefit the victims or their heirs.

In *State of Haryana v. Balwan* (1999 (7) SCC 355), in order to see that a life convict does not lose any benefit available under the remission scheme which has to be regarded as the guideline, it would be just and proper to direct the State Government to treat the

date on which his case is/ was required to be put up before the Governor under Article 161 of the Constitution as the relevant date with reference to which their cases are to be considered. Ordinarily, when an authority is called upon to exercise its powers that will have to be done consistently with the legal position and the government decision/instructions prevalent at that time.

In *Union of India and Ors. v. Sadha Singh* (1999 (8) SCC 375), the Supreme Court held that the benefit of Section 428 cannot be claimed by the person convicted under the provisions of the Army Act. There is no bearing on the applicability of Section 433-A CrPC, as in the Army Act there is no specific or contrary provision covering the same area. Section 433-A CrPC is a special provision applicable to all the convicts who are undergoing imprisonment for life as provided thereunder. For such convicts, it puts an embargo for reduction of sentence below 14 years of actual imprisonment.

In *State of Maharashtra v. Najakat alias Mubarak Ali* (2001 Cri. LJ 2588), the Supreme Court said that if a prisoner is convicted in different cases, and different set of period is granted by different Courts then in that case maximum period set of in one case should be granted to prisoners, as other set of period will be merged in the set off which is the maximum.

In *Laxman Naskar (Life Convict) v. State of West Bengal and Anr.* (2000 (7) SCC 626), the Supreme Court issued certain guidelines as to the basis on which a convict can be released prematurely:

1. Whether the offence is an individual act of crime without affecting the society at large?
2. Whether there is any chance of future recurrence of committing crime?
3. Whether the convict has lost his potentiality in committing crime?
4. Whether there is any fruitful purpose of confining this convict any more?
5. Socio-economic condition of the convict's family?

In *Zahid Hussein and Ors. v. State of West Bengal* (2001 (3) SCC 750), the Supreme Court observed that the conduct of the petitioners while in jail is an important factor to be considered as to whether they have lost their potentiality in committing crime due to long period of detention. The views of the witnesses who were examined during trial and the people of the locality cannot determine whether the petitioners would be a danger to the locality, if released prematurely. This has to be considered keeping in view the conduct of

the petitioners during the period they were undergoing sentence. Age alone cannot be a factor while considering whether the petitioners still have potentiality of committing crime or not as it will depend on changes in mental attitude during incarceration.

In *State of Madhya Pradesh & Anr. v. Bhola @ Bhairon Prasad Raghuvanshi* (2003 (3) SCC 1), the Supreme Court opined that the reformative system of punishment by releasing prisoners on the basis of their good conduct in prison and for turning them out as good citizens after they serve out their periods of sentences is not to be resorted to indiscriminately without reference to the nature of offence for which they are convicted. It is open to the legislature to lay down a general policy permitting reformative method of punishment but by limiting its application to less serious crimes.

Gravity of offence is an integral dimension in deciding whether a prisoner should be released or not. If the prisoner has any recourse available in law for seeking remission, it would be open to him to avail of the same.

In *Santa Singh's* case (1976 (4) SCC 190), the Court dealt with Section 235 (2) of the Criminal Procedure Code. It held that after convicting the accused the Court must hear the accused on the question of sentence. It can pass sentence only after giving the accused a chance to be heard. This section of the Criminal Procedure Code was in consonance with modern trends in penology and sentencing procedure. What was the meaning of "hear the accused"? It meant that the accused could produce fresh evidence both oral and documentary in respect of the sentence.

If Section 235 (2) was breached the conviction would be illegal because the Section was mandatory and the defect could not be cured under Section 465 of the Criminal Procedure Code. This would be the case even if the accused did not insist on his right. It made no difference since every judge was supposed to know the law and enforce it on behalf of the accused.

In *Bachan Singh's* case (1980 (2) SCC 604), the point of law was regarding the death penalty. The Supreme Court was confronted with the opposing view points of the abolitionists and the retentionists.

In a curious "hands off" approach, the Court was content with saying, "going into the merits of the above debate the very fact that persons of reason are deeply divided in their opinion on this issue is a ground (for continuing with the death penalty). S.302 Indian Penal Code is not unreasonable nor violative of Article 21."

Section 302 of Indian Penal Code reads: "Whoever commits murder shall be punished with death or imprisonment for life and shall also be liable to fine."

Justice Bhagwati dissented in a landmark minority judgement. He held that S.302 of Indian Penal Code is ultra vires and void as being violative of Article 14 and 21 as there was no legislative guideline as to when a death sentence should be imposed.

In *Mithu Singh vs. State of Punjab* (AIR 1983 SC 473), the Supreme Court struck down Section 303 of the Indian Penal Code. Section 303 states that, "Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death."

The Supreme Court held that Section 303 was unconstitutional and directed that there shall be no mandatory death penalty, but that it can only be one of the two alternatives. The Court has no option and the provision of Section 235 (2) and Section 354 (3) of the Code of Criminal Procedure become meaningless as hearing the accused on the question of sentence or stating reasons for imposing death become superfluous. The court held that Section 303 was violative of Articles 14 and 21 as life-convicts being treated as separated class is based on "irrelevant considerations" and there is no scientific basis for treating them differently. The Court also pointed out that 51 sections of the Indian Penal Code provide for life imprisonment, and there is nothing in common between some of the offences which may have been previously committed and the subsequent offence of murder.

The Court observed that the law was arbitrary and irrational, invalid and bad as "the scales of justice are removed from the hands of the Judge as soon as he pronounces the accused guilty of the offence. So final, so irrevocable, and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable."

Rajendra Prasad's cases: The family to which the appellant and the deceased belonged were on enmical term. The appellant who was the son of one of the families murdered the deceased. After some years in the prison, he was released on Gandhi Jayanti Day. On return some minor incident ignited his latent feud and he stabbed to death a friend of the opposite family, he was sentenced to death.

The second murder is not to be confounded with the persistent potential for murderous attacks by the murderer. This was not a menace to the social order but a specific family feud. Here was not a youth of controllable violent propensities against the community but one whose paranoid preoccupation with a family quarrel goaded him to attack the

rival. So long as the therapeutic processes are absent from prison institutions, far from being the healing hope of society, they prove to be hardening schools to train desperate criminals. Desperate criminal is a convenient description to brand a person. Seldom is the other side of the story exposed to judicial view; there is nothing on the record to suggest any such attempts at reform were made inside the prison.

The court observed that life imprisonment for murder was the rule and capital punishment the exception to be awarded only in extraordinary situations.

In *Hiralal Mallik's* case (1977 (4) SCC 44) a 12 year old juvenile was sentenced to many years of hard labour for hitting a person who had attacked his father. Humane sentencing was necessary the Court observed. Social workers must be involved. The State must move away from punitive strategies. The Indian Child must have a new deal. We must move in a correctional and rehabilitative direction. The child prisoner must be given reformatory kind of work. He should not be forced to wear the costume of convicts. He must be granted parole.

In *P. Rathinam's* case (1994 (3) SCC 394), the Supreme Court struck down Section 309 of the Indian Penal Code, which penalizes attempts to commit suicide as unconstitutional as being violative of Article 21. The Court held that the right to life includes the right not to live.

Case Excerpts

**Supreme Court of India
1977 (3) SCC 287**

**Mohammad Giasuddin
vs
State of Andhra Pradesh**

V.R. Krishna Iyer, Jaswant Singh, JJ.

1. Some basic issues bearing on prescription of punishments arise for judicial investigation in this criminal appeal where leave has been limited to tailoring the sentence by appellate review to fit the gravity of the delinquency and the redemption of the deviant.
2. The facts leading up to the conviction may need brief narration. The appellant, along with another accused deceived several desperate unemployed young men, received various sums of Rs.1200/- by false pretences that they would secure jobs for them through politically influential friends and other make-believe representations. The offence of cheating under Section 420, Indian Penal Code was made out and conviction of both the accused followed. The first accused (appellant before us) is a young man around 28 years old and works as a Junior Assistant in the Planning and Financial Department of the Andhra Pradesh Secretariat and other accused is his friend who personated as a State Port Officer. Before the trial Court, there was a formal, almost pharisaic, fulfillment of the pre-sentencing provision in Section 248(2), Criminal Procedure Code, 1973. The opportunity contemplated in the sub-section has a penological significance of far-reaching import, which has been lost on the trial Magistrate. For he disposed of this benignant obligation by a brief ritual.
3. I made of the accused that they were found guilty under Section 420, Indian Penal Code and the punishment contemplated thereof.
4. Reform of the black letter law is a time lagging process. But judicial metabolism is sometimes slower to assimilate the spiritual substance of creative ideas finding their way into the statute book. This may explain why the appellate Courts fell in line with the Magistrate's mechanical approach and confirmed the condign punishment of 3 years' rigorous imprisonment. At all the three tiers the focus was on the serious nature of the crime (cheating of young men by a government servant and his blackguardly

companion) and no ray of light on the ‘criminal’ or on the pertinent variety of social facts surrounding him penetrated the forensic mentation. The humane art of sentencing remains a retarded child of the Indian criminal system.

5. We have dealt with the subject sufficiently to set the humanitarian tone that must inform the sentencing judge, the ‘karuna’ that must lie his verdict. The same compassionate outlook is reflected in some of the decision of this Court and of the High Courts indicating the distance between current penal strategy and Hummarabi’s Code, which, in about 1975 B.C., insisted on ‘an eye for an eye, a tooth for a tooth’.
6. Referring to the earlier Criminal Procedure Code and its deficiency in regard to sentencing, this Court observed in Tejani :

Finally comes the post-conviction stage where the current criminal system is weakest. The Court’s approach has at once to be socially informed and personalized. Unfortunately, the meaningful collection and presentation of the penological facts bearing on the background of the individual, the dimension of damage, the social milieu and what – not these are not provided in the Code and we have to make intelligent hunches on the basis of materials adduced to prove guilt. In this unsatisfactory situation which needs legislative remedying we go by certain broad features.

7. Similarly, in Jagmohan Singh this Court observed :

The sentences follow the conviction, and it is true that no formal procedure for producing evidence with reference to the sentence is specifically provided. The reason is that relevant facts and circumstances impinging on the nature and circumstances of the crime are already before the Court. Where Counsel addresses the Court with regard to the character and standing of the accused, they are duly considered by the Court unless there is something in the evidence itself which belies him or the Public Prosecutor for the State challenges the facts. If the matter is relevant and is essential to be considered, there is nothing in the Cr.P.C. which prevents additional evidence being taken. It must however be stated that is not the experience of criminal Courts in India that the accused with a view to obtaining a reduced sentence ever offers to call additional evidence.

8. However, it is necessary to emphasise that the Court is broadly concerned with the facts and circumstances whether aggravating or mitigating, which are connected with the particular crime under enquiry. All such facts and circumstances are capable of being proved in accordance with the provisions of the Indian Evidence Act in a trial regulated by the Criminal Procedure Code. The trial thus does not come to an end until all the relevant facts are proved and the Counsel on both sides have an opportunity to address the Court.

9. The Kerala High Court, in Shiva Prasad had also something useful to say in this regard:

Criminal trial in our country is largely devoted only to finding out whether the man in the dock is guilty. It is a major deficiency in the Indian system of criminal trials that the complex but important sentencing factors are not given sufficient emphasis and materials are not presented before the Court to help it for a correct judgement in the proper personalized, punitive treatment suited to the offender and the crime.

10. Likewise, Shri Justice Dua (as he then was) of the Public High Court had indicated the guidelines on the application of the rehabilitative theory in *Lekhraj Vs. State* whether the learned judge had pointed out the relevance of the offender's circumstances and social milieu, apart from the daring and reprehensible nature of the offence. The Law Commission of India (in its 47th Report) has summed up the components of a proper sentence :

A proper sentence is a composite of many factors, including the nature of the offence, the circumstances – extenuating or aggravating – of the offence, the prior criminal record, if any, of the offender, the age of the offender, the professional and social record of the offender, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospect for the rehabilitation of the offender, the possibility of return of the offender to normal life in the community, the possibility of treatment or of training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the present community need, if any, for such a deterrent in respect to the particular type of offence involved.

11. All that we have said upto now emphasizes the need on the part of the Judges to see that sentencing ceases to be downgraded to Cinderalla status.

12. The new Criminal Procedure Code, 1973, incorporates some of these ideas and gives an opportunity in Section 248(2) to both parties to bring to the notice of the Court facts and circumstances which will help personalize the sentence from a reformatory angle. This Court, in Santa Singh, has emphasized how fundamental it is to put such provision to dynamic judicial use, while dealing with the analogous provisions in Section 235(2) :

This new provision in Section 235(2) is in consonance with the modern trends in penology and sentencing procedures. There was no such provision in the old Code. It was realized that sentencing is an important stage in the process of administration of criminal justice – as important as the adjudication of guilt – and it should not be consigned to a subsidiary position as if it were a matter of not much consequence. It should be a matter of some anxiety to the Court to impose an appropriate punishment on the criminal and sentencing should, therefore, receive serious attention of the Court (p.194).

13. Modern penology regards crime and criminals as equally material when the right sentence has to be picked out. It turns the focus not only on the crime, but also on the criminal and seeks to personalize the punishment so that the reformist component is as much operative as the deterrent element. It is necessary for this purpose that facts of a social and personal nature, sometimes altogether irrelevant if not injurious, at the stage of fixing the guilt, may have to be brought to the notice of the Court when the actual sentence is determined.
14. A proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances – extenuating or aggravating – of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental conditions of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to normal life in the 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 and the current community need, if any, for such a deterrent in respect to the particular type of offence. These factors have to be taken into account by the Court in deciding upon the appropriate sentence.
15. 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 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. The claim of due and proper hearing would have to be harmonized with the requirement of expeditious disposal of proceedings (p.196).
16. It will thus be seen that there is great discretion vested in the Judge, especially when pluralistic factors his calculations. Even so, the judge must exercise this discretionary power, drawing his inspiration from the humanitarian spirit of the law, and living down the traditional precedents which have winked at the personality of the crime-doer and been swept away by the features of the crime. What is dated has to be discarded. What is current has to be incorporated. Therefore innovation, in all conscience, is in the field of judicial discretion.

17. Unfortunately, the Indian Penal Code still lingers in the somewhat compartmentalized system of punishment viz. imprisonment, simple or rigorous, fine and, of course, capital sentence. There is a wide range of choice and flexible treatment which must be available with the Judge if he is to fulfill his tryst with curing the criminal in a hospital setting. Maybe in an appropriate case actual hospital treatment may have to be prescribed as part of the sentence. In another case, liberal parole may have to be suggested and, yet in a third category, engaging in certain types of occupation or even going through meditational drills or other courses may be part of the sentencing prescription. The perspective having changed, the legal strategies and judicial resources, in their variety, also have to change. Rule of thumb sentences of rigorous imprisonment of other are too insensitive to the highly delicate and subtle operation expected of a sentencing judge. Release on probation, conditional sentence, visits to healing centres, are all on the cards. We do not wish to be exhaustive. Indeed, we cannot be.
18. Sentencing justice is a facet of social justice, even as redemption of a crime – doer is an aspect of restoration of a whole personality. Till the new Code recognized statutorily that punishment required considerations beyond the nature of the crime and circumstances surrounding the crime and provided a second stage for bringing in such additional materials, the Indian Courts had, by and large, assigned obsolescent backside to the sophisticated judgement on sentencing. Now this judicial skill has to come of age.
19. The sentencing stance of the Court has been outlined by us the next question is what 'hospitalisation' techniques will best serve the sentence, having due regard to his just deserts, blending a feeling for a man behind the crime, defence of society by a deterrent component and a scientific therapeutic attitude at once correctional and realistic. The available resources for achieving these ends within the prison campus also has to be considered in this context. Noticing the scant regard paid by the Courts below to the soul of Section 248(2) of the Code and compelled to gather information having sentencing relevancy, we permitted Counsel on both sides in the present appeal to file affidavits and other materials to help the Court make a judicious choice of the appropriate 'penal' treatment. Both sides have filed affidavits which disclose some facts pertinent to the project.
20. We have earlier mentioned that the social abhorrence of the crime is an input, since the emphatic denunciation of a crime by the community must be reflected in the punishment. From this angle we agree with the trial Court that unconscionable

exploitation and unfortunately unemployed young men by heartless deception, compounded by pretension to political influence, calls for punitive severity to serve as deterrent. The crime here is doubly bad and throws light on how gullible young men part with hard money in the hope that political influence, indirectly purchased through money, can secure jobs obliquely. But then the victims of the crime must be commiserated with and in such white-collar offences it is proper to insist upon reparation of the victims, apart from any other sentence. In the present case, four young men have been wheeled out of their little fortunes by two convicts and so, to drive home a sense of moral responsibility to repair the injury inflicted, we think it right to direct the appellant to pay a fine of Rs.12,000/- which will be made over by the trial Court to PW-1 (whose case alone is the subject of the prosecution) under Section 357 of the Code. That is to say, a fine of Rs.1,200/- is imposed will be paid over to the aforesaid PW-1.

21. What are the other circumstances which we may look into ? The appellant is a young man of 28 years. He has a degree of Bachelor of Oriental Languages and another in Commerce, which suggests that he may respond to new cultural impact. He was working as a Junior Assistant in the Government Secretariat and has now lost the post consequent on the conviction. This is a hard lesson in life. The socio-economic circumstances of the man deserve to be noticed. His parents are old and financially weak, since they and appellant's sisters and younger brother are his dependents. The younger brother also is unemployed. These factors suggest that the economic blow, if the appellant is imprisoned for long, will be upon his brother at college and the other members of his family. Extenuation is implicit in this fact. He prays for release on probation or under Section 360 of the Code because he has no blemish by way of previous crime or bad official record. Having regard to his age (not immature) and the deliberate plan behind the crime operated in partnership upon four - perhaps more - persons, we reject his request as overambitious. At the same time, a contrite convict, yet in his twenties, may deserve clement treatment. A just reduction of the sentence is justified and we think that incarceration for 18 months may be adequate. But this long period has to be converted into a spell of healing spent in an intensive care ward of the penitentiary, if we may say so figuratively. How can this be achieved ? First, by congenial work which gives job satisfaction - no jail frustration, nor further criminalisation. We therefore direct the State Government to see that within the framework of the Jail Rules, the appellant is assigned work not of a monotonous, mechanical, degrading type, but of a mental, intellectual, or like type mixed with a little manual labour. This will ensure that the prisoner does work more or less of the

- kind he is used to. The jail, certainly, must be able to find this kind of work for him, even on its own administrative side-under proper safeguards through.
22. Shri P.P. Rao, appearing for the State, assures us that in keeping with this constructive suggestion of the Court the jail authorities will assign to the appellant congenial work of a mental-cum-manual type and promote him to an officer-warder's position if his conduct is good. We have also made the suggestion that the appellant must be paid a reasonable fraction of remuneration by way of wages for the work done, since unpaid work is bonded labour and humiliation. The amount may be remitted to his father once in three months. Shri Rao, on behalf of the State Government, has assured the Court that immediate consideration will be given to this idea by the State Government and the jail authorities.
23. We also think that the appellant has slipped into crime for want of moral fibre. If competent Jail Visitors could organize for him processes which will instill into him a sense of ethics it may help him become a better man. Self-expression and self-realisation have a curative effect. Therefore, any sports and games, artistic activity and/or meditational course, may also reform. We strongly recommended that the appellant be given such opportunities by the jail authorities as will stimulate his creativity and sensitivity. In this connection we may even refer to proven advantages of kindling creative intelligence and normalizing inner imbalance, reportedly accomplished by Transcendental Meditation (TM) propagate by Maharshi Mahesh Yogi in many countries in the West. Research projects conducted in various countries bring out that people practicing such or like courses change their social behaviours and, reduce their crime-proneness. We do not prescribe anything definite but indicate what the prison doctors may hopefully consider. While it is beyond us to say whether the present facilities inside the Central Prison, Hyderabad, make it feasible for the appellant to enjoy these benefits and thereby improve his inner being, we strongly feel that the humanitarian winds must blow into the prison barricades. More than this is expected in this decade, when jail reforms, from abolition of convict's costume and conscript labour to restoration of basic companionship and atmosphere of self-respect and fraternal touch, are on the urgent agenda of the nation. Our prisons should be correctional houses, not cruel iron aching the soul.
24. We have given thought to another humanizing strategy, viz., a guarded parole release every three months for at least a week, punctuating the total prison term. We direct the State Government to extend this parole facility to the appellant, jail rules permitting and the appellant submitting to conditions of discipline and initiation into

an uplifting exercise during the parole interval. We further direct the Advisory Board of the Prison, periodically to check whether the appellant is making progress and the Jail authorities are helping in the process and implementing the prescription hereinabove given. Indeed, the direction of prison reform is not towards dehumanization and rehumanization, not maim and mayhem and vulgar callousness but man-making experiments designed to restore the dignity of the individual and the worth of the human person. This majuscule strategy involves orientation courses for the prison personnel. The State will not hesitate, we expect, to respect the personality in each convict, in the spirit of the Preamble to the Constitution and will not permit the colonial hangover of putting people behind the bars and then forget about them. This nation cannot - and, if it remembers its incarcerated leaders and freedom fighters - will not but revolutionize the conditions inside the grim little world. We make these persistent observations only to drive home the imperative of freedom - that its deprivation, by the State, is validated only by a plan to make the sentence more worthy of that birthright. There is a spiritual dimension to the first page of our Constitution which projects into penology. Indian Courts may draw inspiration from Patanjali Sutra even as they derive punitive patterns from the Penal Code (most of Indian meditational therapy is based on the Sutras of Patanjali).

25. Before we close this judgement we wish to dispel a possible misapprehension about the fine we are imposing upon the cheat although we have proceeded on the footing of this family being relatively indigent. The further direction for making over the fine to the deceives also needs a small explanation.
26. There is nothing in principle, as Lord Parker pointed out in P.V. Kind to prevent a court from imposing a fine even when imposing a suspended sentence of imprisonment. Indeed, in many cases it is quite a good thing to impose a fine which adds a sting Of course, the fine should not be altogether beyond the sentencee's means.
27. As to whether it is wrong to make a sort of compensation order in a case of a convicted person without much means, again, Lord Parker in *R.V. Ironfield* had observed:
If a man takes someone else's property or goods, he is liable in Law to make restriction, or pay compensation..... A victim need not be put to the additional trouble and expense of independent proceedings, and certainly cannot be required to forego his rights in order to facilitate the rehabilitation of the man who has despoiled him.
28. Counsel for the appellant has repeated that his client is taking examination in Accountancy - an indication of his anxiety to improve himself. We have no doubt that the jail authorities will afford facilities to the appellant to do his last minute studies

and take the examination and, for that purpose, allow him to go to any library and the examination hall under proper conditions of security.

29. The affidavit on behalf of the State indicates that a tendency to turn a new page is discernible in the appellant and this has to be strengthened imaginatively by the Jail Superintendent, if need be, by affording him opportunity for initiation into transcendental meditation courses or like exercises provided the appellant shows an appetite in that direction and facilities are available in Hyderabad City.
30. Shri P.P. Rao, for the State, has represented that the Andhra Pradesh Government is processing rules for payment of wages to prisoners who work but that it may take a few months more for finalisation. It is a little surprising that at least two decades or more have been spent in this country after freedom discussing active programmes of correction although in some States, for long years the wage system has been in vogue. Andhra Pradesh State will rise to this civilized norm and, when it finalises rules, will take care to see that the wage rates are reasonable and not trivial and that retrospective effect will be given to see that at least from October 2, 1976 (the birthday of the Father of the Nation) effect is given to the wage policy.
31. Shri Sastry, for the appellant, assured the Court that he had been instructed to state that Rs.1200/- would be paid right away out of the fine imposed.
32. We allow the appeal in humanist part, as outlined above, while affirming the conviction. More concretely, we direct that :
 - (i) the sentence shall be reduced to 18 (eighteen) months, less the period already undergone;
 - (ii) our directions, above mentioned, regarding parole and assignment of suitable work and payment of wages in jail shall be complied with; and
 - (iii) The appellant shall pay a fine of Rs.1200/-.

We appreciate the services of Counsel Shri P.P. Rao in disposing of this appeal firstly. We may also mention that Shri G.V.R. Sastry appearing for the appellant has also helped the Court towards the same end.

Supreme Court of India
AIR 1985 SC 1050

Bhagirath
vs
Delhi Administration

**Y.V. Chandrachud, D.A. Desai, O. Chinnappa Reddy,
E.S. Venkataramiah, Ranganath Misra, JJ.**

1. We have before us an appeal and a writ petition, which are filed by two persons sentenced to life imprisonment for the offence of murder. They contend that they are entitled to the benefit of Section 428 of the Code of Criminal Procedure, that is to say, that the period of detention undergone by them prior to their conviction as undertrial prisoners must be set off against the sentence of life imprisonment imposed upon them.
2. The appellant, Bhagirath, filed a petition in the Delhi High Court asking that his case be referred for the orders of the Delhi Administration under paragraph 516-B of the Punjab Jail Manual since, though sentenced of life imprisonment, he had undergone a period of detention in jail amounting to 14 years together with the remissions earned by him. A learned Single Judge of the High Court rejected that petition on the ground that, in computing the period of 14 years, the period spent by the convict in the jail as an undertrial prisoner cannot be taken into account because, Section 428 of the Code which allows such a set off applies only when an accused has been sentenced to imprisonment is not an the sentence of life imprisonment is not an imprisonment 'for a term'. In coming to the conclusion that Section 428 has no application to cases in which an accused is sentenced to life imprisonment, the learned Judge relied upon a judgement of this Court in Kartar Singh Vs. State of Haryana (1983) 1 SCR 455 : (AIR 1982 SC 1439).
3. The petitioner in the companion writ petition, Rakesh Kaushik, has a somewhat similar grievance, though he has needlessly introduced extraneous matters in his pleadings. One of his contentions is that the remissions earned by him as a convict must be taken into account while computing the period of 14 years under paragraph 516-B of the Punjab Jail Manual. He contends also, that in any case, he ought to be given the benefit of Sections 432 and 433 of the Code because, his case merits a favourable

consideration by the Delhi Administration. In support of his case, he relies upon an order dated March 3, 1983, passed by this Court in *Sukhlal Hansda Vs. State of West Bengal* writ petitions (Cri.) 1128-29 of 1982. According to the counter-affidavit filed by the Deputy Secretary (Home) of the Delhi Administration, the petitioner's case cannot be considered for premature release because he has not yet undergone 14 years of imprisonment, inclusive of remissions earned by him.

4. First, we would prefer to interpret Section 428 of the Criminal P.C. on its own terms, that is, divorced from considerations arising under the Punjab Jail Manual or any other Jail Manual. The provision of Jail Manuals vary from State to State. Therefore, questions arising under those Manuals cannot be mixed up with questions arising under the Code, which is the law of the land. Section 428 of the Code reads thus :

Period of detention undergone by the accused to be set off against the sentence of imprisonment. Where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him or such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.

5. The neat and, we believe, the simple question for decision is whether imprisonment for life is imprisonment 'for a term'. The reason why it is urged that imprisonment for life is not imprisonment for a term is that the latter expression comprehends only imprisonments for a fixed, certain and ascertainable period of time like six months, two years, five years and so on. Since the sentence of life imprisonment, as held by this Court in *Gopal Vinayak Godse Vs. State of Maharashtra* (1961) 3 SCR 440, 444 : (AIR 1961 SC 600 at P.602), is a sentence for life and nothing less and since, the term of life is itself uncertain, the sentence of life imprisonment is for an uncertain term, that is to say, that it is not imprisonment for a term.
6. So goes the argument. So does it go but it fails to carry much conviction. Life is uncertain. In more ways then one. Who knows what good may come tomorrow and how many good tomorrows there are still to go ? But, philosophical digressions apart, especially optimistic, the fact that the term of life is of an uncertain duration does not justify the conclusion that the sentence of imprisonment for life is not for a term. The relevant question and, the only one, to ask under Section 428 is : Has this person been sentenced to imprisonment for a term ? For the sake of convenience, the question may be split into two parts. One, has this person been sentenced to imprisonment ?

And, two, is the imprisonment to which he has been sentenced an imprisonment for a term ? There can possibly be no dispute that a person sentenced to life imprisonment is sentenced to imprisonment. Then what is the term to which he is sentenced ? The obvious answer to that question is that the term to which he has been sentenced is the term of his life. Therefore, a person who is sentenced to life imprisonment is sentenced to imprisonment for a term.

7. We see but little warrant for qualifying the word 'term' by the adjective 'fixed' which is not to be found in Section 428. The assumption that the word 'term' implies a concept of ascertainability or conveys a sense of certainty is contrary to the letter of the law, as we find it in that Section. Even the marginal note to the Section does not bear out that assumption. It rather belies it. And marginal notes are now legislative and not editorial exercises. The marginal note of Section 428 shows that the object of the legislative in enacting 'the particular provision was to provide that accused' should 'be set off against the sentence of imprisonment' imposed upon him. There are no words of limitation either in the Section or in its marginal note which would justify restricting the plain and natural meaning of the word 'term' so as to comprehend only sentences which are imposed for a fixed or ascertainable period.
8. To say that a sentence of life imprisonment imposed upon an accused is a sentence for the term of his life does offence neither to grammar nor to the common understanding of the word 'term'. To say otherwise would offend not only against the language of the statute but against the spirit of the law, that is to say, the object with which the law was passed. A large number of cases in which the accused suffer long undertrial detentions are cases punishable with imprisonment for life. Usually, those who are liable to be sentenced to imprisonment for life are not enlarged on bail. To deny the benefit of Section 428 to them is to withdraw the application of a benevolent provision from a large majority of cases in which such benefit would be needed and justified.
9. Arguments and counter-arguments were advanced before us on the basis of provisions contained in Section 53, 53A(4)(a) and (b), 57, 65 and 511 of the Penal Code. The provision contained in Section 57 that imprisonment for life has to be reckoned as equivalent to imprisonment for twenty years is for the purpose of calculating fractions of terms of punishment. We cannot press that provision into service for a wider purpose. Nor, indeed, can we draw sustenance to our conclusion from the provision contained in Section 511 to the effect that whoever attempts to commit an offence punishable with imprisonment for life shall be punished with imprisonment 'for a term which may extend to one-half of the imprisonment for life'. The argument of

Shri. Mukul Mudgal that if one-half of life imprisonment is 'a term', ex hypothesis, life imprisonment would be 'a term of imprisonment' is attractive but slender. But equally, we do not consider that anything contained in the rest of the Sections above noted, militates against the view which we have taken.

10. The modalities for working out the provision contained in Section 428 in cases of persons sentenced to imprisonment for life should not present any serious difficulty in practice. In the first place, by reason of Section 433A of the Code of Criminal Procedure, where a sentence of imprisonment for life is imposed on a person for an offence for which death is one of the punishment provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 to one of imprisonment for life, such person cannot be released from prison unless he has served at least fourteen years of imprisonment. The only point to note is that while upholding the Constitutional validity of Section 433A, it was held by this Court in *Maru Ram Vs. Union of India* (1981) 1 SCR 1196 : (AIR 1980 SC 2147), that the Section is prospective in operation, with the result that it cannot apply to cases which were decided by the trial Court before December 18, 1978, being the date on which the Section came into force.
11. The second aspect of the matter which has to be borne in mind is the one arising out of the judgement of this Court in *Gopal Vinayak Godse* (AIR 1961 SC 600). It was held by a Constitution Bench in that case that a prisoner sentenced to life imprisonment is bound to serve the remainder of his life in prison unless the sentence imposed upon him is commuted or remitted by the appropriate authority. It was further held that since such a sentence could not be equated with any fixed term, the Rules framed under the Prison Act entitled such a person to earn remissions but that, such remissions were to be taken into account only towards the end of the term. Under Section 432 of the Code of Criminal Procedure, the appropriate Government has the power to remit the whole or any part of the punishment to which a person has been sentenced. Under Section 433 of the Code, the appropriate Government has the power, inter alia, to commute the sentence of imprisonment for life to imprisonment for a term not exceeding fourteen years or to fine. The question of setting off the period of detention undergone by an accused as an undertrial prisoner against the sentence of life imprisonment can arise only if an order is passed by the appropriate the Code. In the absence of such order, passed generally or specially, and apart from the provisions, if any, of the relevant Jail Manual, imprisonment for life would mean, according to the rule in *Gopal Vinayak Godse*, imprisonment for the remainder of life.

12. The two cases before us were referred to a larger Bench because of the doubt entertained as regards the correctness of the decision in *Kartar Singh* (AIR 1982 SC 1439), especially because of the apparently conflicting view taken by another Bench of this Court in *Sukhlal Hansda Vs. State of West Bengal*. Both of those decisions were rendered by a three-Judge Bench. In *Kartar Singh*, persons who were sentenced to life imprisonment challenged an order passed by the Government of Haryana, denying to them the benefit of the period of undertrial detention under Section 428 of the Code. It was held by this Court that the Penal Code and the Criminal Procedure Code make a clear distinction between ‘imprisonment for life’ and ‘imprisonment for a term’ and, in fact, the two expressions are used in contradistinction with each other in one and the same Section, the former meaning imprisonment for the remainder of the natural life of the convict and the latter meaning imprisonment for a definition or fixed period. The Court proceeded to hold that an order of remission passed by the appropriate authority merely affects the execution of the sentence passed by the Court, without interfering with the sentence passed or recorded by the Court. Therefore, Section 428 which interfering with words ‘where an accused person has, on conviction, been sentenced to imprisonment for a term’, would come into play only in cases with ‘imprisonment for a term’ is awarded on conviction by a Court and no where the sentence imposed upon an accused becomes a sentence for a term by reason of the remission granted by the appropriate authority. Finally, according to the Court, ‘the question is not whether the beneficent provision should be extended to life convicts on a prior reasoning or equitable consideration but whether on true construction, the Section comprises life convicts within its purview’. The Court found support to its view in the objects and reasons for introducing Section 428 in the Code, as set out in the Report of the Joint Committee.
13. We have considered with great care the reasoning upon which the decision in *Kartar Singh* proceeds. With respect, we are unable to agree with the decision. We have already discussed why, imprisonment for life is imprisonment for a term, within the meaning of Section 428. We would like to add that we find it difficult to agree that the expressions ‘imprisonment for life’ and ‘imprisonment for a term’ are used either in the Penal Code or in the Criminal Procedure Code in contradistinction with each other. Sections 304, 305, 307 and 394 of the Penal Code undoubtedly provide that persons guilty of the respective offences shall be punished with imprisonment for life or with imprisonment for a term not exceeding a certain number of years. But, that is the only manner in which the Legislature could have expressed its intention that persons who

are guilty of those offences shall be punished with either of the sentences mentioned in the respective Sections. The circumstances on which the learned Judges have placed reliance in *Kartar Singh*, do not afford any evidence, intrinsic or otherwise, of the use of the two expressions in contra-distinction with each other. Two or more expressions are often used in the same Section in order to exhaust the alternatives which are available to Legislature. That does not mean that there is, necessarily, an antithesis between those expressions.

14. The reasoning in *Kartar Singh* (AIR 1982 SC 1439) that an order of remission does not interfere with the sentence recorded by the Court but merely affects the execution of the sentence, stands answered by the interpretation which we have put upon the language of Section 428 that persons sentenced to imprisonment for life are sentenced to imprisonment for a term. It is not because of remission that a sentence of life imprisonment becomes an imprisonment for a term.
15. We have also already answered the last of the reasons given in *Kartar Singh* that the question is not whether the beneficent provision contained in Section 428 should be extended to life convicts on equitable considerations. We enter a most respectful caveat. Equity sustains law and the twin must meet. They cannot run in parallel streams. Equitable considerations must have an important place in the construction of beneficent provision, particularly in the field of criminal law. To exclude such considerations is to denude law's benevolence of its true and lasting content. Lastly, view expressed by the Joint Committee in its Report does not yield to the inference that the 'mischief sought to be remedied has no relevance where gravity of offence requires the imposition of imprisonment for life'. As we have indicated earlier, graver the crime, longer the sentence and, longer the sentence, greater the need for set-offs and remissions. Punishments are no longer retributory. They are reformative.
16. The Order passed by this Court in *Sukhlal Hansda* related to the cases of 24 prisoners who were sentenced to life imprisonment. Most of those prisoners had undergone imprisonment for a period which, after taking account of the remissions earned by them, exceeded fourteen years. It was held by this Court that, for the purpose of considering whether the cases of those prisoners should be examined for premature release under the relevant provisions of the West Bengal Jail Manual, there was no reason why the period of imprisonment undergone by them as undertrial prisoners should not be taken into account. The court directed that the cases of the prisoners should be considered by the State Government, both for the purpose of setting off the period of detention undergone by them as undertrial prisoners and for taking

into account the remissions earned by them. The order passed by the Court does not discuss the point which arises before us though, the observations made therein are consistent more with the view which we have taken that with the view taken in *Kartar Singh* (AIR 1982 SC 1439).

17. For these reasons, we allow the appeal and the writ petition and direct that the period of detention undergone by the two accused before us as undertrial prisoners, shall be set off against the sentence of life imprisonment imposed upon them, subject to the provision contained in Section 433A and, provided that Orders have been passed by the appropriate authority under Section 432 or Section 433 of the Criminal P.C.
18. Appeal allowed.

Bombay High Court
1993 Mah. LJ 1425

Bhupesh Ramchandra More
vs
State of Maharashtra

Ashok Agarwal, J.

1. A short question which is agitated in the present appeal is, whether the appellant is entitled to a benefit of the provisions of the Probation of Offenders Act, 1958 ? By a judgement and order, passed on the 14th of May, 1987 by the learned 6th Additional Sessions Judge, Thane, in Sessions Case No.445 of 1986, appellant, who is original accused No.1, is acquitted of the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, but is convicted for the offence punishable under Section 304 Part-II of the Indian Penal Code and has been sentenced to suffer further rigorous imprisonment for five years and to pay a fine of Rs.300/-, in default to suffer rigorous imprisonment for one month. By the very same order accused Nos. 2 and 3 are acquitted of all the charges leveled against them. The order insofar as the same is adverse to accused No.1, is impugned in the present appeal.
2. The only contention which has been raised by Shri Chitnis, the learned Advocate appearing in support of the appeal, is that benefit of the provisions of Section 6 of the Probation of Offenders Act, 1958, ought to have been extended in favour of accused No.1. Shri Chitnis has pointed out that a separate application seeking the benefit of the said Act was filed before the learned Judge of the trial Court, that application is at Exhibit-28. However, the learned Judge had declined to extend the benefit to accused No.1. According to Shri. Chitnis, this is pre-eminently a fit case for granting the benefit of the said provision. He has further criticized the reasons which have been given by the learned Judge of the trial Court for rejecting the prayer of the accused for being granted the benefit of Section 6 of the Act.
3. In order to determine the merits of the prayer made by Shri Chitnis, it would be necessary to see the nature of offence which is alleged to have been committed by the accused. At Exhibit-9, we have the First Information Report, which has been lodged by P.W.1 Chandrakant Babul More, who is the son of the deceased Babulal. The incident in question had taken place on the 5th of March, 1986 at about 8.30 p.m. According to

the complainant he was in his house at that time. At that time, he saw his uncle's son Satish Pandurang and accused No.2 who is the brother of Satish, abusing and beating each other. The complainant came out of his house and advised them against abusing and beating each other. At that time there was exchange of severe beating between Satish and accused No.2. The complainant cried loudly. Hence, there to rescue. At that time the three accused suddenly appeared on the scene and started beating the complainant. The complainant cried loudly. Hence the father of the complainant Babulal and the wife of the complainant Chandrakala came to rescue the complainant. At that time accused No.1 gave two blows and a cricket stump on the head of Babulal. Babulal fell on the ground. Accused Nos.2 and 3 had assaulted the complainant and his wife with hands and legs. Neighbours arrived and hence the accused ran away. During the incident both accused No.1 and his mother had sustained injuries. These injuries are noted in a medical certificate which is at Exhibit-12.

4. At the trial, the defence had raised a plea of private defence. In this behalf, this is what has been observed in para 15 of the judgement :

From the above discussion, it is very clear that the prosecution had adduced cogent, consistent and convincing evidence to prove that at the relevant time, accused No.1 gave a blow with cricket stump on the head of Babul, and thereby caused bleeding injury to him. It was also argued on behalf of the defence that is have come on record that at that very time accused No.1 had also sustained injury to his head. Not only that but he had also lodged complaint against present complainant and he was also treated by the Medical Officer, and so this circumstances shows that the accused No.1 may have caused injury in the right of his private defence. Firstly it must be noted that plea regarding private defence is not specifically taken by the accused. Of course it is true that even if such plea is not taken, it is open to the Court to consider such plea. However, in such a case, it is incumbent on the party who takes the plea of self-defence to show that there are such circumstances from which such plea can be safely spelt out. In the instant case, no such material has brought on record due to which one can say that the accused No.1 must have attacked Babul in self-defence. Besides this, it is well settled that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. In the instant case, the manner in which the accused No.1 Bhupesh had given two blows on the vital part of head of Babul, it cannot be said that the plea of right of private defence is open to him. So I am not inclined to accept the argument of the learned Advocate for the defence in this behalf."

- 4A. By the impugned judgement and order, the trial Court found that the prosecution has failed to prove its case against accused Nos. 2 and 3. Accused Nos.2 and 3 were, therefore, held to be entitled to an order of acquittal. As far as accused No.1 is

concerned, the learned Judge found that the prosecution has failed to make good the charge under Section 302, Indian Penal Code. He, however, found accused No.1 guilty for an offence punishable under Section 304, Part-II, Indian Penal Code. After giving the aforesaid findings, the learned Judge gave an opportunity to accused No.1 to make his submissions on the point of sentence. At that stage, an application, which is at Exhibit-28, was filed on behalf of accused No.1 claiming benefit of Section 5 of the Probation of Offenders Act. In the application the accused stated that he has been convicted under Section 304, Part-II, that he was born on the 1st of June, 1966 and is, therefore, below the age of 21 years, the offence with which the accused is convicted is not punishable with death or imprisonment for life, the facts of the case do not warrant a serious sentence as the weapon used is an ordinary cricket stump, only a single blow was given and the assault was not premeditated. Moreover, the injuries are caused on a sudden fight. It was a case of sudden fight, the accused had also received injury at the hands of the complainant. Therefore, as a right of private defence the accused gave a single blow to the deceased. Therefore, the circumstances are not very serious. This is the first offence of the accused. He is not previously convicted in any offence in any Court. There is no previous criminal history in respect of the accused. He, therefore, prayed that he be released under the Probation of Offenders Act.

5. The said application was forwarded to the learned Public prosecutor for offering his say, and this is what has been stated by the learned Public prosecutor :

No plea of private defence has been taken. However, after verifying the age of the accused the Honourable Court may pass a suitable order about sentence, taking into consideration that a life is lost.

6. While disposing of the case, this is, what the learned Judge has observed in respect of the above application :

While considering the question whether accused can be given benefit of provisions of Probation of Offenders Act, one has to take into consideration all the facts and circumstances of the case. In the instant case, we do find that the accused has committed very grave offence and ultimately because of his act, his uncle i.e. Babul has succumbed. So considering this fact that he gave severe blow with cricket stump on the head of his own uncle. I think that this is not a proper case, where the benefit of Probation of Offenders Act can be given to the accused. On the contrary, I think that it is necessary to award such punishment to the accused, which would pinch him and would prevent him and others from doing such type of offences again. So I am not inclined to grant the application submitted on behalf of the accused in this benefit. So, having regard to all the facts and circumstances of the case, and considering the

young age of the accused, and also having regard to the fact that there is no record of previous conviction against the accused, I pass the following Order, which I think will meet the ends of justice.

7. In my view, the above observations which are made by the learned Judge while declining to entertain the application of the accused have overlooked material facts which are on record. It has also overlooked the objects and reasons behind passing of the Probation of Offenders Act. The learned Judge has overlooked the fact that the present case arose out of a sudden fight. In fact, the fight was going on between two brothers, accused No.2 and his brother Satish. To this fight, neither accused No.1, the deceased or the complainant were parties. All are closely related to each other. The complainant went to the spot and tried to intervene. At that stage accused No.1 appears to have also come on the spot. Similarly, the deceased has also appeared on the scene. Thus, the entire incident arose suddenly. It was not at all premeditated. Another feature, which, in my view, the learned Judge has overlooked is the fact that two from the side of the accused have received injuries. Both accused No.1 and his mother Ramabai have sustained serious injuries. A third feature which has also been overlooked is that accused No.1 appears to have given only one blow with a cricket stump, which he may have found handy. In the circumstances, it is difficult to subscribe to the view of the learned Judge that 'the accused had committed a very grievous offence and hence taking into consideration all the facts and circumstances of the case it is not a case for grant of the benefit to the Probation of Offenders Act.'
8. It is undisputed that the accused was born on the 1st of June, 1966. The incident in question has taken place on the 5th of March, 1986 and the judgement of the trial Court was delivered on the 14th of May, 1986. Hence, the accused was below the age of 21 years both on the date of the incident as also on the date of passing of the order of conviction and sentence.
9. The accused, in the instant case, has been held not guilty for the offence punishable under Section 302. He has been found guilty for an offence punishable under Section 304, Part-II of the Indian Penal Code. Hence, the accused has been convicted for an offence which is not punishable with imprisonment for life. In the circumstances, the provisions of Section 6 of the Probation of youthful offender into obdurate criminals as a result of their association with hardened criminals of mature age in case the youthful offenders are sentenced to undergo imprisonment in jail. The above object is in consonance with the present trend in the field of penology, according to which effort should be made to bring about correction and reformation of the individual offenders

and not to resort to retributive justice. Modern criminal jurisdiction recognizes that no one is a born criminal and that a good many crimes are the product of socio-economic milieu. Although not much can be done for hardened criminals, considerable stress has been laid on bringing about reform of young offenders not guilty of very serious offences and of preventing their association with hardened criminals. The Act gives statutory recognition to the above objective. In my view, if one has regard to all the facts and circumstances of the present case, as also the object which is predominantly behind the Act, it is pre-eminently a fit case in which the accused deserves to be given the benefit of the provisions of the Act. I have already narrated all the facts and circumstances of the case which are relevant on the issue. I find that the same are such which richly deserve the said benefit.

10. As far as the provisions of Section 6 of the Act are concerned, they relate to offenders who are below 21 years old. It would appear that under Section 6, the ordinary rule is to grant the benefit. Granting the benefit is a rule and to deny the benefit is no exception. This is apparent from sub-section (2) of Section 6 of the Act. The said sub-section provides that in case it is found that it is not desirable to extend the benefit to an offender, the Court shall call for a report from a probation officer and consider the report, if any, and mental condition of the offender. It would, thus, appear that in case a benefit is to be extended nothing further is required. It is only when a benefit is to be denied that the aforesaid procedure is to be adopted. The above procedure is in contrast with the procedure which has been laid down in Section 4. Section 4 deals with all offenders above the age of 21. In cases falling under Section 4, the Court is required, before making an order, extending the benefit of Section 4, to take into consideration the report, if any, of the probation officer concerned in relation to the case. That, however, is not required for giving benefit under Section 6. Hence, while extending the benefit of Section 4 a procedure is regard to taking into consideration the report of the probation office has been laid down. No such procedure is required to be followed in case a benefit is to be given under Section 6. It is only when the benefit is to be denied that the procedure prescribed under sub-section (2) of Section 6 i.e. of calling for a report from the probation officer and considering the same is required to be undertaken. The scheme of the provisions is clear. Benefit of Section 6 will ordinarily have to be granted. It is only in rare and exceptional cases that the benefit can be refused.
11. If a benefit under Section 6 of the Act is intended to be given no reasons are required to be given in support. If, however, the provisions of Section 6 are applicable to an

accused and if the case is not found fit for amending the benefit, reasons will have to be given why the benefits is being denied. As far as the learned Judge of the trial Court is concerned, it has, no doubt, given some reasons why he has not found this a fit case to extend the benefit. As already pointed out, the learned Judge has omitted to take into account several vital and important facts which appear on the record and which are in favour of the accused. If the same are taken into account, I find this a fit and proper case to extend the benefit of Section 6, of the Probation of Offenders Act, in favour of the present accused.

12. For the foregoing reasons I am inclined to extend the benefit of Section 6 read with Section 3 of the Probation of Offenders Act. The order of conviction passed against the accused under Section 304 Part-II is maintained. Instead of sentencing accused No.1 to any punishment I release him on probation of good conduct to his entering into a bond in a sum of Rs.2,000/- with two sureties of the like amount to appear and receive sentence when called upon during the period of two years and I further direct that in the meantime accused No.1 will keep peace and be of good behaviour. It is clarified but the aforesaid order of conviction will be subject to the provisions of Section 12 of the Act i.e. the accused will not suffer disqualification, if any, attaching in a conviction of the offence under law. The accused No.1 appellant herein will enter into a bond with sureties as directed, within a period of four weeks. On execution of the aforestated bond along with sureties his bail bonds shall be cancelled. The appeal is partly allowed in the above terms.
13. Appeal partly allowed.

**Supreme Court of India
1994 (3) SCC 430**

Dr. Jacob George

vs

State of Kerala

R.M.Sahai, B.L.Hansaria, JJ

.....

4. In the present appeals we are not concerned with taking away of life before its birth. We are concerned with destruction of foetus life. This is what is known as abortion or miscarriage.
5. This distinction is, however, not material for our purpose because Section 312 of the Penal Code speaks about causing of miscarriage and Section 314 punishes the person who has intent to cause miscarriage of a woman and while doing so causes the death of such woman. It is under this section that the appellant has been found guilty by the High Court of Kerala after setting aside the acquittal order of the learned Assistant Sessions Judge. For the offence under section 314, the appellant has been sentenced RI for 4 years and a fine of Rs.5000. The High Court had also taken suo motu cognizance against the order of acquittal and it is because of this that along with the criminal appeal filed by the State which was registered as Criminal Appeal No.415 of 1989 the High Court disposed of CrRC No.44 of 1989, which is relatable to its own action. So, two aforesaid appeals have been preferred by the appellant. It may be stated that out of fine of Rs.5000 as awarded, a sum of Rs. 4000 was directed to be paid to the children of the deceased towards compensation for loss of their mother, in case of realisation of fine.
6. Our lawmakers had faced some difficulty when our Penal Code was being enacted. The authors of the Code observed as below while enacting Section 312:

With respect to the law on the subject of abortion, we think it necessary to say that we entertain strong apprehension that this or any other law on that subject may, in this country, be abused to the vilest purposes. The charge of abortion is one which, even where it is not substantiated often leaves a stain on the honour of families. The power of bringing a false accusation of this description is therefore a formidable engine in the hands of unprincipled men. This part of the law will, unless great care be taken, produce few convictions but much misery and terror to respectable families, and a

large harvest of profit to the vilest pests of society. We trust that it may be in our power in the code of Criminal Procedure to lay down rules, which may prevent such an abuse. Should we not be able to do so, we are inclined to think that it would be our duty to advise his Lordship in Council rather to suffer abortion, where the mother is a party to the offence, to remain wholly unpunished, than to repress it by provisions, which would occasion more suffering to the innocent than to the guilty.

So what finds place in the aforesaid section is the result of very mature and hard thinking and we have to give full effect to it.

7. After the enactment of the Medical Termination of Pregnancy Act, 1971, the provisions of the Penal Code relating to miscarriage have become subservient to this Act because of the non - obstante clause in Section 3, which permits abortion / miscarriage by a registered practitioner under certain circumstances. This permission can be granted on the three grounds:
 - (i) health - when there is danger to the life or risk to the physical or mental health of the woman;
 - (ii) humanitarian - such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman;
 - (iii) eugenic - where (here is substantial risk that the child, if born, would suffer from deformities and diseases. (See Statement of Objects and Reasons).
8. The above shows that concern for even unborn child was evinced by the legislature, not to speak of hazard to the life of the woman concerned.
9. The allegations which led the High Court to find the appellant guilty under section 314 were these. Deceased Thakamani was married to one Sathyan. After the marriage they lived as husband and wife for about one and half years and a son was born out of the wedlock. About six months thereafter, Sathyan reportedly deserted Thankamani but then there was reconciliation three months prior to the death of Thankamani who became pregnant again. For reasons not quite known, Thankamani told her mother that she would desire to go for abortion since she did not want another child. The mother, who was examined as PW-2 in the trial, sent for PW-1 her brother-in-law and told him about the predicament of Thankamani. PW-1 happened to know the clinic (hospital) being run by the appellant in Nilambur where abortions were being done.
10. Prosecution case is that on 14.1.1987, PW-1 and Thankamani went to the clinic and the matter was discussed with the appellant. Thereafter, she was admitted and the appellant agreed to abort her on payment of Rs.600 of which Rs.500 was paid

immediately undertaking to pay the balance afterwards, which amount was paid on 15.1.1987. On that day, Thankamani was taken to operation theatre at about 10.00 p.m. and at midnight the appellant told that the operation was successful. PW 1 however found Thankamani unconscious. She regained consciousness at about 5.00 a.m. on 16th and asked for some water. PW-1 instead brought a cup of tea which Thankamani could drink with difficulty and started shivering. On information given to appellant he came with a nurse and on examination found Thankamani in sinking condition. Forth came out from her mouth and life ebbed out of her. What happened thereafter is not material, except that after sometime police was informed, which set it into motion resulting in charge-sheeting of the appellant under various sections including section 314. In the trial, which commenced, 16 witnesses were examined, apart from bringing many documents on record. The learned trial court, however, held that charges had not been established beyond reasonable doubt and therefore acquitted the appellant.

11. On appeal being preferred by the State and suo motu cognizance being taken by the High Court, the acquittal order has been set aside and the appellant has been convicted and sentenced as aforesaid, after refusing to give the benefit of Probation of Offenders Act as prayed for. Hence these appeals under Article 136 of the Constitution.

...

- 13 ... The High Court has rightly described the exercise of the appellant in this regard as "daring, crude and criminal". We therefore, agree with the High Court that an innocent life was sacrificed at the altar of a quack.
14. We would, therefore, uphold the conviction as awarded by the High Court, as the case is apparently not covered by any exception mentioned in the aforesigned Pregnancy Termination Act. It may be pointed out that the High Court did not accept the case of the prosecution in so far as the offence under section 201 of the Indian Penal Code, or for that matter, under Section 342, is concerned.
15. This takes us to the question of sentence. The High Court has awarded sentence of 4 years and a fine of Rs.5000, of which a sum of Rs. 4000 was made payable to the children of the deceased towards compensation for the loss of their mother. Shri Jain has urged that the appellant has undergone imprisonment for about two months, and the sentence may be reduced to the period already undergone. Indeed the learned counsel has further prayed in this regard to grant the benefit of Probation of Offenders Act and referred us to a decision of *Madras High Court in V. Manickam Pillai V. State*,

(1972) 1 Cri LJ 1488 : 1972 Mad LW (Cri) 141 where the High Court had granted such a benefit. We are, however, of the opinion that keeping in view the nature of the offence and character of the appellant, he does not deserve the benefit of probation. If a homeopath takes to his head to operate a pregnant lady and perforate her uterus by trying to abort, he does not deserve the benefit of probation. It would have been a different matter if a trained surgeon while carrying out the operation in question with the consent of the lady, as in the present case, would have committed some mistake of judgement resulting in death of the patient. The present case is poles apart.

16. We, therefore, refuse to give benefit for the aforesaid Act to the appellant. We may, however, put on record that Shri Jain advanced this submission as granting of probation would have removed the disqualification attached to conviction because of what has been stated in Section 12 of the aforesaid Act. We do not, however think that if the appellant is required to be given this protection and if his practice were to suffer because of the unwanted act undertaken by him, let it suffer, as it is required to suffer.
17. Let us now deal with Shri Jain's submission that the substantive period of imprisonment may be reduced to the one already undergone, which is of about 2 months. To decide whether this contention merits acceptance, we have to inform ourselves as to why a punishment is required to be given for an offence of criminal nature. The purpose, which punishment achieves or is required to achieves are four in number. First, retribution: i.e. taking of eye for eye or tooth for tooth. The object behind this is to protect the society from the depredations of dangerous persons; and so, if somebody, takes an eye of another, his eye is taken in vengeance. This form of protection may not receive general approval of the society in our present state of education and understanding of human psychology. In any case, so far as the matter at hand is concerned, retribution cannot have full play, because the sentence provided by Section 314 is imprisonment of either description for a term, which may extend to ten years where the miscarriage has been caused with the consent of the woman as is the case at hand. So death penalty is not provided. The retributive part of sentencing object is adequately taken care of by the adverse effect which the conviction would have on the practice of the appellant.
18. The other purpose of sentence is preventive. We are sure that the sentence of imprisonment already undergone would be an eye-opener to the appellant and he would definitely not repeat the illegal act of the type of hand.

19. Deterrence is another object which punishment is required to achieve. Incarceration of about two months undergone by the appellant and upholding of his conviction by us which is likely to affect the practice adversely, would or should deter others to desist them from indulging in an illegal act like the one at hand.
20. Reformation is also an expected outcome of undergoing sentence. We do think that two months' sojourn of the appellant behind the iron and stone walls must have brought home to him the need of his changing the type of practice he had been doing as a homeopath. The reformatory aspect of punishment has achieved its purpose, according to us, by keeping the appellant inside the prison boundaries for about two months having enabled him to know during this period the trauma which one suffers in jail, and so the appellant is expected to take care to see that in future he does not indulge in such an act which would find him in prison.
21. Section 314 has not visualised the sentence of imprisonment only, but permits imposition of fine also. The High Court has imposed a fine of Rs.5000. According to us, however, the fine is required to be enhanced considerably. We have taken this view, *inter alia*, because of what has been provided in Section 357 of the Code of Criminal Procedure which has a message of its own in this regard. It was spelt out by this Court in *Hart Singh v. Sukhbir Singh*, (1988) 4 SCC 551: 1988 SCC (Cri) 984: AIR 1988 SC 2127 in which Shetty, J. speaking for a two-Judge Bench stated that the power of imposing fine is intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is to some extent a constructive approach to crimes and a step forward in a criminal justice system. It is because of this that it was recommended that all criminal courts should exercise this power liberally so as to meet the ends of justice, by cautioning that the amount of compensation to be awarded must be reasonable.
22. What is reasonable has to depend upon the facts and circumstances of each case. Let us see what should be the quantum of fine to be imposed in the present case. We are concerned here with the death of a woman deserted by a husband who wanted to abort. We understand that she had a son born to her earlier and that son must have become a destitute with no one to look after. The appellant, on the other hand seems to have had a roaring practice as would appear, *inter alia*, from the photographs of his clinic put on record. The building as an RCC one and is three-storeyed and presents a good look.

23. If a child has to be nursed in these days and nursed reasonably, a sum of Rs.1000 per month would definitely be necessary. We, therefore, think that the fine to be imposed should be of Rs. one lakh, and so, we enhance the fine from Rs.5000 as awarded by the High Court to a sum of Rs. One lakh. We grant six months' time to the appellant for depositing this amount, as prayed by Shri Lain. On this amount being deposited with the Registry of this Court, steps would be taken to deposit the same in a nationalized bank in the name of the son of the deceased after ascertaining the same from appropriate authority. The bank would allow the guardian of the aforesaid son to withdraw the interest on the aforesaid amount till the son becomes major. On the son becoming major, it would be for him to decide as how to use the money and the bank would therefore act in accordance with the decision taken by the son.
24. Before closing, we may state that this judgement of ours may not be understood to have expressed any opinion on the right of Thankamani or for that matter of any woman of this country to go for abortion, as this question has not arisen directly in this case. We are not expressing any opinion whether such a right can be read in Article 21 of the Constitution; and if so, to what extent.
25. The result is that the appeals are disposed of by upholding the conviction of the appellant. The sentence awarded by the High Court is modified by reducing the substantive sentence of imprisonment to the one already undergone and by enhancing the fine to a sum of Rs one lakh to be deposited and dealt with as stated above. If the fine as enhanced by us would not be paid within six months from today, the sentence as awarded by the High Court would get revived and the appellant would undergo the remaining part of imprisonment. To enable the High Court to monitor the matter, the appellant would inform the High Court also about the fact of his depositing the sum of Rs. One lakh if and when he would do so. The High Court would wait for a period of six months from today to see whether the aforesaid amount has been deposited. In case it would be noted that it has not been done so, it would take necessary steps for execution of the sentence as awarded by it.

**Supreme Court of India
1995 (6) SCC 593**

**Baldev Singh & Another
vs
State of Punjab**

K.S. Paripoornan, A.S. Anand, JJ.

....

14. In evaluating the legality and propriety of the conviction sentence so passed by the court below, the following facts highlighted before us by appellants' counsel deserve consideration. The accused as also the victims (deceased) are members of the same family (near relations) (father and sons). The feud in the family centered round the entitlement to property. According to the prosecution, the deceased Balbir Singh moved to Saddushahwala village three years prior to the incident and was cultivating two and half kilas of property, admittedly belonging to the father (family) and it is in evidence that father Roor Singh (accused No. 3) wanted properties in Alli village in lieu of the property taken over by deceased in Saddushahwala village, which was not heeded to. While deceased Balbir Singh was carrying on cultivation in Saddushahwala property, the father Roor Singh (Accused No. 3) and his other sons appeared in the scene and shouted about the unauthorised cultivation carried on by Balbir Singh. The accused, no doubt had arms (Kirpan, barchhas) and in the final analysis, the finding is that accused Nos. 1 and 3, only inflicted wounds in the thigh and back. The plea of the accused, though not accepted, was a right of self-defence. No doubt, the wounds inflicted by the accused caused the death of Balbir Singh. In the context and nature of the several injuries inflicted, it could, at best, be (assumed) stated that the bodily injuries inflicted were likely to cause the death of Balbir Singh and the acts committed by the accused amounts to culpable homicide as defined in section 299 IPC. It is not proved nor does any material exists to state that the accused had in intention to cause the death of Balbir Singh or had the knowledge that in inflicting the injuries, that death was likely to be caused. So, it was argued that the facts proved will not bring the case within section 300 IPC punishable under section 302 IPC and, if at all, the accused can be convicted and sentenced only under section 299 read with section 304 (first part) of IPC only. It was further submitted that the father Roor Singh was more than 80 years of age, that he is possessed of valuable properties, and the dispute itself having

stemmed from the right to property, this is a fit and proper case where the court should consider, mitigative circumstances and substitute the sentence of imprisonment awarded by the award of reasonable and appropriate compensation under section 357 Cr.P.C. to the heirs of the victim, who are none other than their near relations.

Our attention was invited to the decision of this Court in *State of Andhra Pradesh vs. Rayavarapu Punnayya* (1977 (1) SCR 601), at pp.608-609 to contend, that, if at all, the conviction and sentence can be, only under section 299 read with section 304 I Part IPC and stress was laid on the following passage : "...whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder', on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in s. 299. If the answer to this question is *Prima facie* found in the affirmative, the stage for considering the operation of s. 300, Penal Code is reached. This is the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four Clauses of the definition of murder contained in s. 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of s.304, depending, respectively, on whether the second or the third Clause of s. 299 is applicable. If this question is found in the positive, but the case comes, within any of the Exceptions enumerated in s.300, the offence would still be 'culpable homicide not amounting to murder.' punishable under the First Part of s.304, Penal Code."

16. We are of the view that the submissions made as stated hereinabove, are entitled to acceptance. The medical evidence negatives any wound as having been sustained by deceased Balbir Singh, by pistol. The arms possessed by the accused are not inherently dangerous to infer that the intention of the accused was to cause death or that the accused had knowledge that inflicting the injuries as was done, death was likely to be caused. There is no evidence or finding as to who caused the fatal injuries which resulted in the death of Balbir Singh. The appellants-accused inflicted injuries only on the thigh and at the back. The incident happened nearly 11 years ago (4.5.1984). The injuries inflicted on the thigh of Amrik Singh by Baldev Singh have not been proved to be serious or fatal and Amrik Singh died nearly 8 days after the incident on account of cumulative effect of the injuries. The passage of time should have its impact in taking an over all view of

the matter. The appellants have served the sentence of imprisonment for more than two years, till they were allowed bail by this Court by order dated 17.11.1987. Balbir Singh is an unfortunate victim. The property dispute between the father and son has led to the unfortunate incident. PW-5, widow and children of Balbir Singh, are the persons to suffer and they should not be forgotten and by merely maintaining the sentence of imprisonment on the accused, the victim or his heirs are not benefited. Considering the nature of the crime, the fact that the accused and the victim are near relations, that it is a property issue which ended in the calamity, the fact that the accused are admittedly in a position to pay, we are of the view that this is a fit case, in which section 357 (3) Cr. P.C. can be invoked and a just and reasonable compensation given to the family of Balbir Singh - (PW-5 and children). In the circumstances, while upholding the conviction of the appellants for the offence under section 299 read with section 304, Part-I, IPC, we give the further following directions in the interests of justice:-

1. That the appellants are found guilty and sentenced under Section 299 read with section 304, Part-I of the Indian Penal Code to a term of imprisonment, which will be limited to the period they have already undergone for causing the death of Balbir Singh and Amrik Singh.
2. In addition to the above, we order that the two appellants/accused Nos. 1 and 3 shall pay by way of compensation a sum of Rs.35,000/- each to PW-5 and her children who have suffered the irreparable loss due to the death of Balbir Singh for which the appellants/accused persons have been sentenced to the term of imprisonment already undergone by them.
3. The amount of compensation ordered by us shall be paid to PW-5 and her children within a period of 3 months from today. If it is not so paid, the amount shall be recovered by the persons entitled to the amount from the appellants as if the direction contained herein is a decree passed against them by this Court. If not recovered, the accused shall suffer the balance of the term of imprisonment as imposed by the trial court, which shall stand revived.

**Supreme Court of India
1999 (7) SCC 355**

**State of Haryana
vs
Balwan**

G.T.Nanavati, S.N.Phukan, JJ

1. These appeals arise out of the judgements of the Punjab and Haryana High Court in writ petitions filed by "life convicts" for their premature release. The High Court held that for deciding their entitlement for premature release what was relevant to consider was the government policy/instructions in force at the time of their conviction by the trial court and that the State Government was not right in applying the subsequent policy decisions and instructions that were in force at the time when their cases were taken up for consideration. Taking this view the High Court allowed the writ petitions and directed the State Government to reconsider their applications. The view taken by the High Court is challenged in these appeals. As the point raised in these appeals is the same they were heard together and are disposed of by this common judgement.
2. It is not necessary to refer to the facts of these cases or the government instructions issued prior to 18-12-1978 when Section 433-A came to be inserted into the Code of Criminal Procedure. As laid down by this Court in *Maru Ram v. Union of India* ((1981) 1 SCC 107 : 1981 SCC (Cri) 112) the power of the State Government under Sections 432 and 433 CrPC cannot now extend beyond what is provided by Section 433-A. The premature release of those convicted before that date had to be considered on the basis of the relevant government instructions and the dates of their convictions. As regards those persons who have been convicted after Section 433-A came into force and thus fall within the purview of that section their cases will have to be considered consistently with Section 433-A and if life convicts are to be given a larger benefit, it can only be done now under Articles 72 and 161 of the Constitution.
3. The State of Haryana was earlier considering premature release of life convicts in accordance with the rules framed and instructions issued by it in that behalf. To be consistent with the correct legal position emerging after the enactment of Section 433-A and the decision of this Court in *Maru Ram* case ((1981) 1 SCC 107 : 1981

SCC (Cri) 112) the State of Haryana modified its policy decision and instructions and declared that though the cases of life convicts for their premature release will still be governed by the instructions issued by it, in respect of those convicts who fall within the purview of Section 433-A their cases will be considered on an individual basis and such cases will be put up to the Governor through the Minister of Jails and Chief Minister, with the full background of the prisoner and recommendations of the State-level committee, along with the copy of the judgement etc., for order under Article 161 of the Constitution of India. Neither the record of these cases nor the judgements of the High Court make it clear when the said change in the instructions was made but it appears that it was made either sometime in 1982 or latest on 27-6-1984. Obviously, the cases of the respondent convicts, who are all life convicts and fall within the purview of Section 433-A, were required to be considered in accordance with the modified instructions as they could have been released prematurely only if an order in that behalf was, passed by the State Government in exercise of its power under Article 161 of the Constitution.

4. As held by this Court in *Gopal Vinayak Godse v. State of Maharashtra* (AIR 1961 SC 600 : (1961) 3 SCR 440) and in *Maru Ram* ((1981) 1 SCC 107 : 1981 SCC (Cri) 112) by earning remissions a life convict does not acquire a right to release, but release would follow only upon an order made under the Criminal Procedure Code by the appropriate Government or on a clemency order in exercise of owner under Article 72 or Article 161 of the Constitution. This Court observed in *Maru Ram* ((1981) 1 SCC 107 : 1981 SCC (Cri) 112) as under : (SCC p. 132, para 30)

Even if the remissions earned have totalled up to 20 years, still the State Government may or may not release the prisoner and until such a release order remitting the remaining part of the life sentence is passed, the prisoner cannot claim his liberty. The reason is that life sentence is nothing less than lifelong imprisonment. Moreover, the penalty then and now is the same - life term. And remission vests no right to release when the sentence is life imprisonment. ... Nor is any vested right to remission cancelled by compulsory 14-year jail life once we realise the truism that a life sentence is a sentence for a whole life ...

Thus, this Court in clear terms has laid down that by earning remissions a life convict does not acquire a right to be released prematurely. But if the Government has framed any rule or made a scheme for early release of such convicts then those rules or schemes will have to be treated as guidelines for exercising its power under Article 161 of the Constitution.

5. If this is the correct legal position then no life convict can validly contend that his case for premature release should be considered according to the government policy/instructions that were in force on the date on which he came to be convicted as he acquired a right to get remissions as declared and to be released accordingly. If according to the government policy/instructions in force at the relevant time the life convict has already undergone the sentence for a period mentioned in the policy decision/instructions, then the only right which he can be said to have acquired is the right to have his case put up by the prison authorities in time before the authorities concerned for considering exercise of power under Article 161 of the Constitution. Ordinarily, when an authority is called upon to exercise its powers that will have to be done consistently with the legal position and the government decision/instructions prevalent at that time. However, in order to see that a life convict does not lose any benefit available under the remission scheme which has to be regarded as the guideline, it would be just and proper to direct the State Government to treat the date on which his case is/was required to be put up before the Governor under Article 161 of the Constitution as the relevant date with reference to which their cases are to be considered. The direction given by the High Court is not consistent with the decision of this Court in *Maru Ram* ((1981) 1 SCC 107 : 1981 SCC (Cri) 112) and the view which we are now taking and, therefore, it has to be set aside.
6. Accordingly, we allow these appeals, set aside the impugned judgements of the High Court and direct the State Government to reconsider the applications of the respondent life convicts, who fall under the purview of Section 433-A Cr.P.C. in accordance with the correct legal position pointed out above. The State Government is directed to do so within 15 days from the date of receipt of the order of this Court.

**Supreme Court of India
1999 (8) SCC 375**

**Union of India and Others
vs
Sadha Singh**

K.T. Thomas, M.B. Shah, JJ

.....

2. This appeal is filed against the judgement and order dated 22-9-1998 passed by the High Court of Punjab & Haryana at Chandigarh in Criminal Writ Petition No. 1752 of 1997 filed by the respondent.
3. The respondent was awarded life imprisonment and dismissed from service by the General Court Martial after being tried for the offence under Section 302 IPC and under Section 69 of the Army Act, 1950. He preferred a writ petition in the High Court for his immediate release from imprisonment on the ground that he had undergone imprisonment exceeding 14 years. The High Court arrived at the conclusion that in view of the decision in *Ajit Kumar v. Union of India* (1987 Supp SCC 493:1988 SCC (Cri) 101) the respondent would be entitled to remissions earned in jail and thereby the respondent spent a total period of 15 years 8 months and 29 days of imprisonment which obviously exceeded 14 years. The Court, therefore, directed immediate release of the respondent. That order is challenged by filing this appeal.
4. It has been pointed out by the learned counsel for the appellant that the respondent has not undergone actual imprisonment for 14 years. Before the High Court, it was admitted that the respondent had spent 11 years and 1 month in actual custody, 1 year 7 months and 29 days in pre-trial custody and had earned 4 years' remission in the jail. It is, therefore, submitted that the order passed by the High Court is, on the face of it, against the provision of Section 433-A CrPC and its interpretation given by this Court in the case of *Maru Ram v. Union of India* ((1981) 1 SCC 107 : 1981 SCC (Cri) 112).
5. A Constitution Bench of this Court in Maru Ram case ((1981) 1 SCC 107 : 1981 SCC (Cri) 112) held that Section 433-A CrPC overrides all other laws which reduce or remit the term of life sentence and mandates that a minimum of 14 years of actual

imprisonment should be undergone by a convict where a sentence of life is imposed for an offence for which death is one of the punishments provided by law and remissions vest no right to release when sentence is for life imprisonment. The Court also reiterated that imprisonment for life lasts until the last breath and whatever be the length of remission earned, the prisoner can claim release only if the remaining sentence is remitted by the Government. The Court further negatived the contention that Section 5 of the Criminal Procedure Code saves all remissions, short-sentencing schemes as special and local laws and, therefore, they must prevail over the Code including Section 433-A. For that purpose, Section 5 was referred to which is as under:

5. *Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.*
6. The Court observed that broadly speaking, the said section consists of three components - (i) the Criminal Procedure Code generally governs matters covered by it; (ii) if a special or local law exists covering a certain area, such law will be saved and will prevail over the provisions in the Code (the short-sentencing measures and remission schemes promulgated by the various States are "special and local laws"); and (iii) if there is a specific provision to the contrary, then that will override the special or local law. After considering the submissions and decisions cited by the parties, the Court held thus : (SCC pp. 134-35, para 38)

[T]he Criminal Procedure Code is a general Code. The remission rules are special laws but Section 433-A is a specific, explicit, definite provision dealing with a particular situation or narrow class of cases, as distinguished from the general run of cases covered by Section 432 CrPC. Section 433-A picks out of a mass of imprisonment cases a specific class of life imprisonment cases and subjects it explicitly to a particularised treatment. It follows that Section 433-A applies in preference to any special or local law because Section 5 expressly declares that specific provisions, if any, to the contrary will prevail over any special or local law. We have said enough to make the point that 'specific' is specific enough and even though 'special' to 'specific' is near allied and 'thin partition do their bounds divide' the two are different. Section 433-A escapes the exclusion of Section 5.

7. In the present case, the respondent was convicted under Section 69 of the Army Act, 1950 for the offence of murder. It is true that the Army Act is a special Act, inter alia, providing for investigation, trial and punishment for the offences mentioned therein by a special procedure. Section 177 empowers the Central Government to make rules in respect of prisons and prisoners. Sections 179 to 190 provide for pardon,

remissions and suspension of the sentence. There is no specific provision similar to Section 433-A or contrary to it. Hence, Section 433-A would operate in the field and a prisoner who is undergoing sentence of imprisonment for life and is convicted for an offence for which death is one of the punishments provided by law or where a sentence of death imposed on a person has been commuted under Section 433(1) [sic 433(a)] CrPC to imprisonment for life, has to serve at least 14 years of imprisonment excluding remissions earned in jail.

8. However, learned counsel for the respondent submitted that in the case of *Ajit Kumar* (1987 Supp SCC 493 : 1988 SCC (Cri) 101) this Court dealt with a similar question and held that prisoners who have been convicted and sentenced by the General Court Martial under the Army Act and who have been lodged in civil prison, were not entitled to the benefit of set-off provided under Section 428 CrPC. In that case, this Court held that in view of the provisions in the Army Act, which is a special enactment containing elaborate procedure for trial of the persons covered therein, prisoners who have been convicted and sentenced by the General Court Martial under the Army Act are not entitled to get the benefit of set-off under Section 428 of the Code. In the said base, the Court considered Section 167 of the Army Act, which provides that the term of sentence imposed by a Court Martial shall be reckoned to commence on the day on which the original proceedings were signed by the Presiding Officer or by the officer holding the Court Martial, as the case may be. In view of this specific provision, the Court held that the benefit of Section 428 cannot be claimed by the person convicted under the provisions of the Army Act. In our view, the said decision will have no bearing on the applicability of Section 433-A CrPC, as in the Army Act there is no specific or contrary provision covering the same area. Section 433-A CrPC is a special provision applicable to all the convicts who are undergoing imprisonment for life as provided thereunder. For such convicts, it puts an embargo for reduction of sentence below 14 years of actual imprisonment. We would also mention that after the decision in *Ajit Kumar* (1987 Supp SCC 493 : 1988 SCC (Cri) 101) the Army Act was amended (by Act 37 of 1992) and Section 169-A was added, which is similar to Section 428 of the Criminal Procedure Code.
9. In view of the above, as the respondent has not completed 14 years of actual imprisonment, the order passed by the High Court is quashed and set aside.

**Supreme Court of India
2001 Cri. LJ 2588**

State of Maharashtra

vs

Najakat *alias* Mubarak Ali

K.T. Thomas, R.P. Sethi, S.N. Phukan, JJ.

1. Leave granted.
2. An accused has been convicted and sentenced to imprisonment in two criminal cases. As he was arrested on the same day in connection with both the cases he remained in jail as an under-trial prisoner during the same period in both cases. The question mooted in this appeal is this: Is it permissible for him to claim the benefit of set off envisaged in Section 428 of the Code of Criminal Procedure (for short ‘the Code’) in both cases? As the High Court of Bombay has answered the question in the affirmative by the impugned judgement this appeal is filed by the State of Maharashtra in challenge of the said view of the High Court.
3. A two Judge Bench of this Court has made observations in *Raghbir Singh v. State of Haryana (1984) 4 SCC 348 : (AIR 1984 SC 1796)* that on that fact situation in the said case the accused cannot claim a double benefit. In other words, learned Judges held that the accused can have the benefit of set off in one of these cases but not in both. When the said decision was cited before the High Court, the learned single Judge who rendered the impugned judgement has stated that on the facts in the case of Raghbir Singh (*supra*) the question in issue involved here never arose. Learned Judge expressed the view that the accused is “entitled to the benefit of set off in the second case as well where he was in custody during the course of the trial”. When the special leave petition in this case came up for consideration on 20-1-2000, we felt that since Raghbir Singh was decided by a two Judge Bench it would be appropriate that this matter is heard by a larger Bench so that a fresh look can be made on Section 428 of the Code.
4. As the accused respondent was benefited by the decision of the High Court he would have been released from jail. That might be the reason why he did not enter appearance in this appeal despite notice served on him. So we appointed Ms. Aparna Bhatt, Advocate, as *amicus curiae*. She presented the case for the accused very effectively

after looking up all the decisions pertaining to the subject. We are indeed immensely grateful to her and we record our appreciation for the help rendered by her.

5. The facts out of which the aforesaid question has winched to the fore can be stated briefly thus: Respondent accused was tried in two cases. One was numbered SC 230 of 1995 and the other as SC 313 of 1996. He was arrested on 21-9-1995 in connection with both cases. The Sessions Judge who convicted him in SC 230 of 1995 on 3-4-1998, while sentencing him, directed that the accused would be entitled to the set off under Section 428 of the Code.
6. Subsequently a sessions Court (we are not sure whether the same sessions Court or a different one) convicted him in SC 323 of 1998 on 23-7-1998 and sentenced him to certain terms of imprisonment. The sessions Judge concerned observed therein that the accused is entitled to the set off under Section 428 of the Code.
7. On 14-9-1998 the respondent accused sent an intimation to the jail authorities that he is entitled to be released from jail since he has already served the sentences imposed on him in both cases. But the jail authorities refused to release him on the premise that he could not claim the benefit of set off in the second case "as he had been given set off in the first case". The jail authorities did so on the strength of a resolution dated 7-9-1974 adopted by the Government of Maharashtra. That resolution reads thus :

If a prisoner is convicted in different cases, and different set of period is granted by different Courts then in that case maximum period of set off in one case should be granted to prisoners, as other set of period will be merged in the set off which is the maximum.
8. When the prisoner challenged the decision of the jail authorities before the High Court learned single Judge observed that the construction placed by the authorities on the said Government Resolution "is completely contrary to the interpretation of Section 428 of the Code and the spirit of the section itself." Learned single Judge after ordering the prisoner to be release forthwith from jail, directed the Government and the jail authorities "to review the cases of all persons who continue to be in custody based on the Government Resolution dated 7th September, 1994 within a period of two months and to take steps to see that they are released within the said period of two months (if not earlier released) based on the interpretation to Section 428 as now given."
9. The respondent prisoner was released by the jail authorities before the Government of Maharashtra took up the matter to this Court. The State felt that the High Court has gone wrong in giving the benefit of Section 428 of the Code to the prisoner in two cases.

...

15. *The purpose is therefore clear that the convicted person is given the right to reckon the period of his sentence of imprisonment from the date he was in jail as an under-trial prisoner.* In other words, the period of his being in jail as an under-trial prisoner would be added as a part of the period of imprisonment to which he is sentenced. We may now decipher the two requisites postulated in Section 428 of the Code.
 - (1) During the stage of investigation, inquiry or trial of a particular case the prisoner should have been in jail at least for a certain period.
 - (2) He should have been sentenced to a term of imprisonment in that case.
16. If the above two conditions are satisfied then the operative part of the provision comes into play i.e. if the sentence of imprisonment awarded is longer than the period of detention undergone by him during the stages of investigation, inquiry or trial, the convicted person need undergo only the balance period of imprisonment after deducting the earlier period from the total period of imprisonment awarded. The word “if any” in the section amplifies that if there is no balance period left after such deduction the convict will be entitled to be set free from jail, unless he is required in any other case. In other words, if the convict was in prison, for whatever reason, during the stages of investigation, inquiry or trial of a particular case and was later convicted and sentenced to any term of imprisonment in that case the earlier period of detention undergone by him should be counted as part of the sentence imposed on him.
17. In the above context it is apposite to point out that very often it happens when an accused is convicted in one case under different counts of offences and sentenced to different terms of imprisonment under each such count, all such sentences are directed to run concurrently. The idea behind it is that the imprisonment to be suffered by him for one count of offence will, in fact and in effect be imprisonment for other count as well.
18. Reading Section 428 of the Code in the above perspective, the words “*of the same case*” are not to be understood as suggesting that the set off is allowable only if the earlier jail life was undergone by him exclusively for the case in which the sentence is imposed. The period during which the accused was in prison subsequent to the inception of a particular case, should be credited towards the period of imprisonment awarded as sentence in that particular case. It is immaterial that the prisoner was under-going sentence of imprisonment in another case also during the said period. The words “*of the same case*” were used to refer to the pre-sentence period of

detention undergone by him. Nothing more can be made out of the collocation of those words.

...

21. We have no reason to think that the High Courts mentioned above have gone wrong in taking the view that Section 428 of the Code permits the accused to have the period undergone by him in jail as an under-trial prisoner set off against the period of sentence imposed on him irrespective of whether he was in jail in connection with the same case during that period. We therefore, respectfully dissent from the view expressed by the two Judge Bench of this Court in *Raghbir Singh v. State of Haryana* (AIR 1984 SC 1796) (*supra*).

22. In the result we dismiss this appeal.

...

PHUKAN, J. (Concurring with K. J. THOMAS, J.)

43. I had the advantage of going through the reasoned judgements of both my learned Brother Judges but with respect I am unable to accept the views expressed by my learned Brother Mr. Justice R. P. Sethi. In addition to the views expressed by my learned Brother Mr. Thomas, I would like to add a para on the language of Section 428 of the Code of Criminal Procedure.

The only question which according to me needs consideration is true effect of the expression "same case" as appearing in Section 428 of the Code of Criminal Procedure. The provision is couched in clear and unambiguous language and states that the period of detention which it allows to be set off against the term of imprisonment imposed on the accused on conviction must be one undergone by him during investigation, inquiry or trial in connection with the "same case", in which he has been convicted. Any other period which is not connected with the said case cannot be said to reckonable to be for set off. The view of learned Brother Mr. Justice Thomas according to me accords the legislative intent. Acceptance of any other view would be necessary either adding or subtracting words to the existing provision; which would not be a proper procedure to be adopted while interpreting the provision in question.

44. I am, therefore, in respectful agreement with the views expressed by my learned Brother Mr. Justice Thomas.

**Supreme Court of India
2000 (7) SCC 626**

**Laxman Naskar (Life Convict)
vs
State of West Bengal and Another**

S.Rajendra Babu, Shivaraj V.Patil, JJ

1. This writ petition filed under Article 32 of the Constitution seeks for the release of the petitioner who is undergoing imprisonment for life after having been convicted under Section 302 IPC read with Section 34 IPC.

.....

The petitioner also claims that under Section 61(1) of the West Bengal Correctional Services Act 32 of 1992, which on Presidential assent being given came to force with effect from 14-4-2000, he is entitled to be released inasmuch as he had served the sentence and earned remissions as detailed above and was entitled to be released as on 27-9-1996.

.....

After examining the legal position as to the nature of the powers arising under Section 432 CrPC read with Article 161 of the Constitution and the relevant Rules relating to remission of sentences, it is observed in *State of M.P. v. Rattan Singh* ((1976) 3 SCC 470: 1976 SCC (Cri) 428) as under : (SCC Headnote)

- (1) *That a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under various jail manuals or under the Prisons Act cannot supersede the statutory provisions of the Indian Penal Code. A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure, 1898;*
- (2) *That the appropriate Government has the undoubted discretion to remit or refuse to remit the sentence and where it refuses to remit the sentence no writ can be issued directing the State Government to release the prisoner;*

In *Naib Singh v. State of Punjab* ((1983) 2 SCC 454 : 1983 SCC (Cri) 536) it was noticed that a distinction between "imprisonment for life" and "imprisonment for a term" has

been maintained in the Indian Penal Code in several of its provisions and moreover, whenever an offender is punishable with "imprisonment for life" he is not punishable with "imprisonment which may be of either description" within the meaning of Section 60 IPC and therefore, we cannot come to the conclusion that the court, by itself, could release the convict automatically before the full life term is served. This aspect was highlighted in *Gopal Vinayak Godse v. State of Maharashtra* (AIR 1961 SC 600 : (1961) 3 SCR 440 : (1961) 1 Cri LJ 736) wherein it was held that sentence for "imprisonment for life" ordinarily means imprisonment for the whole of the remaining period of the convicted person's natural life; that a convict undergoing such sentence may earn remissions of his part of sentence under the Prison Rules but such remissions in the absence of an order of an appropriate Government remitting the entire balance of his sentence under this section does not entitle the convict to be released automatically before the full life term is served. It was observed that though under the relevant Rules a sentence for imprisonment for life is equated with the definite period of 20 years, there is no indefeasible right of such prisoner to be unconditionally released on the expiry of such particular term, including remissions and that is only for the purpose of working out the remissions that the said sentence is equated with definite period and not for any other purpose. In view of this legal position explained by this Court it may not help the petitioner even on the construction placed by the learned counsel for the petitioner on Section 61(1) of the West Bengal Correctional Services Act 32 of 1992 with reference to explanation thereto that for the purpose of calculation of the total period of imprisonment under this section the period of imprisonment for life shall be taken to be equivalent to the period of imprisonment for 20 years. Therefore, solely on the basis of completion of a term in jail serving imprisonment and remissions earned under the relevant Rules or law will not entitle an automatic release, but the appropriate Government must pass a separate order remitting the unexpired portion of the sentence.

If what we have stated above is the correct position in law then what arises for consideration in this case is whether there has been due consideration of the case of the petitioner by the Government. On an earlier occasion when the matter had come up before this Court an order dated 15-2-2000 (*Laxman Naskar v. Union of India*, (2000) 2 SCC 595 : 2000 SCC (Cri) 509) had been made directing the Government to reconsider the cases for premature release of all life convicts who had approached the Court earlier. Thereafter, the Government constituted a Review Committee consisting of the following members to examine the matter and make a report thereof to the Court

This Court also issued certain guidelines as to the basis on which a convict can be released prematurely and they are as under : (SCC p. 598, para 6)

- (i) *Whether the offence is an individual act of crime without affecting the society at large.*
- (ii) *Whether there is any chance of future recurrence of committing crime.*
- (iii) *Whether the convict has lost his potentiality in committing crime.*
- (iv) *Whether there is any fruitful purpose of confining this convict any more.*
- (v) *Socio-economic condition of the convict's family."*

In the present case, the report of the jail authorities is in favour of the petitioner. However, the Review Committee constituted by the Government recommended to reject the claim of premature release of the petitioner for the following reasons :

- (1) that the police report has revealed that the two witnesses who had deposed before the trial court and the people of the locality are all apprehensive of acute breach of peace in the locality in case of premature release of the petitioner;
- (2) that the petitioner is a person of about 43 years and hence he has the potential of committing crime; and
- (3) that the incident in relation to which the crime had occurred was the sequel of the political feud affecting the society at large.

If we look at the reasons given by the Government, we are afraid that the same are palpably irrelevant or devoid of substance. Firstly, the views of the witnesses who had been examined in the case or the persons in the locality cannot determine whether the petitioner would be a danger if prematurely released because the persons in the locality and the witnesses may still live in the past and their memories are being relied upon without reference to the present and the report of the jail authorities to the effect that the petitioner has reformed himself to a large extent. Secondly, by reason of one's age one cannot say whether the convict has still potentiality of committing the crime or not, but it depends on his attitude which matters, which is not being taken note of by the Government. Lastly, the suggestion that the incident is not an individual act of crime but a sequel of the political feud affecting society at large, whether his political views have been changed or still carries the same so as to commit crime has not been examined by the Government.

On the basis of the grounds stated above the Government could not have rejected the claim made by the petitioner. In the circumstances, we quash the order made by the Government and remit the matter to it again to examine the case of the petitioner in

the light of what has been stated by this Court earlier and our comments made in this order as to the grounds upon which the Government refused to act on the report of the jail authorities and also to take note of the change in the law by enacting the West Bengal Correctional Services Act 32 of 1992 and to decide the matter afresh within a period of three months from today. The writ petition is allowed accordingly. After issuing rule the same is made absolute.

**Supreme Court of India
2001 (3) SCC 750**

**Zahid Hussein and Others
vs
State of West Bengal**

S.N.Phukan, S.Rajendra Babu, JJ

1. Four life convicts have filed the present petitions under Article 32 of the Constitution challenging the orders of the State Government rejecting their prayer for premature release.
2. Four petitioners were convicted under Sections 302/34 IPC and sentenced to suffer rigorous imprisonment for life. They are in Central Correctional Home, Alipore, Kolkata and have served actual imprisonment of more than 18 years and the total period of imprisonment including remission being more than 24 years. They had approached this Court earlier as their prayer for premature release was rejected by the State Government. This Court set aside the orders of the Government and directed reconsideration. As their prayers have again been rejected, the petitioners are again before us.
3. Mr. Malik, learned Senior Counsel for the petitioners has urged that in view of sub-rules (4) and (29) of Rule 591 of the West Bengal Rules for the Superintendence and Management of Jails (for short "the Rules") relating to premature release of a life convict and Explanation to Section 61 of the West Bengal Correctional Services Act, 1992 (hereinafter referred to as "the Act") all the petitioners are entitled to be released as of right as their total period of imprisonment is more than 20 years. Mr. Mukul Rohatgi, learned Additional Solicitor General has contended that there is no right of premature release in view of the law laid down by this Court, as sentence for imprisonment for life means imprisonment for the entire life of the prisoner, unless the appropriate Government decides to exercise its discretion to remit either whole or part of the sentence of a life convict. According to learned Additional Solicitor General in view of the facts and circumstances of cases of the petitioners and the police report, the State Government rightly rejected the prayers of the petitioners.
4. This Court after examining the provisions of Article 161 of the Constitution, Cr.P.C. and IPC has consistently held that a sentence of imprisonment for life does not

automatically expire at the end of 20 years of imprisonment including remission, as a sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or part of the sentence. (See *Gopal Vinayak Godse v. State of Maharashtra* (AIR 1961 SC 600 : (1961) 3 SCR 440 : (1961) 1 Cri LJ 736); *State of M.P. v. Ratan Singh* ((1976) 3 SCC 470 : 1976 SCC (Cri) 428); *Sohan Lal v. Asha Ram* ((1981) 1 SCC 106) and *Bhagirath v. Delhi Admn.* ((1985) 2 SCC 580 : 1985 SCC (Cri) 280).

5. We extract below sub-rules (4) and (29) of Rule 591 of the Rules :

(4) *In considering the cases of prisoners submitted to it under sub-rules (1) and (2), the State Government shall take into consideration - (i) the circumstances in each case, (ii) the character of the convict's crime, (iii) his conduct in prison, and (iv) the probability of his reverting to criminal habits or instigating others to commit crime. If the State Government is satisfied that the prisoner can be released without any danger to the society or to the public it may take steps for issue of orders for his release under Section 401 of the Code of Criminal Procedures, 1898.*

...

(29) *Every case in which a convict, who has not received the benefit of any of the foregoing Rules, is about to complete a period of 20 years of continued detention including remission earned, if any, shall be submitted three months before such completion by the Superintendent of the Jail in which the convict is for the time being detained, through the Inspector General, for orders of the State Government. If the convict's jail records during the last three years of his detention are found to be satisfactory the State Government may remit the remainder of his sentence.*

6. These sub-rules do not provide for automatic release of a life convict after he has completed 20 years of the detention including remission. Under these sub-rules the only right which a life convict can be said to have acquired is a right to have his case put up by the prison authorities in time to the State Government for consideration for premature release and in doing so the Government would follow the guidelines mentioned in sub-rule (4).

7. The Explanation to Section 61 of the Act is as follows :

Explanation. - For the purpose of calculation of the total period of imprisonment under this section, the period of imprisonment for life shall be taken to be equivalent to the period of imprisonment for 20 years.

8. The Explanation came for consideration by this Court in *Laxman Naskar (Life Convict) v. State of W.B.* ((2000) 7 SCC 626 : 2000 SCC (Cri) 1431) and this Court held that the said Explanation is only for the purpose of calculation of the total period of

imprisonment of a life convict under Section 61, which shall be taken to be equivalent to the period of imprisonment for 20 years and a life convict would not be entitled to automatic release under this provision of law. We, therefore, find no substance in the submission made by Mr. Malik, the learned Senior Counsel.

9. Learned Additional Solicitor General has rightly pointed out that in view of the law laid down by this Court a positive order of release has to be passed by the Government after due consideration. Now we have to consider whether the impugned orders are sustainable.

10. From the counter filed on behalf of the Government, we find that the State Government constituted a Review Board to consider the cases of premature release of the petitioners. The said Review Board consists of the following :

(1) Home Secretary	Chairman
(2) Judicial Secretary	Convenor
(3) IG of Prisons, West Bengal	Member
(4) Secretary, Home (Jails) Department	Member
(5) Director General & IG of Police, West Bengal	Member
(6) Commissioner of Police, Calcutta	Member
(7) Chief Probation Officer	Member

11. Following guidelines were firmed by the Government for the premature release of life convicts, namely:

- (i) Whether the offence is an individual act of crime without affecting the society at large.
- (ii) Whether there is any chance of future recurrence of committing crime.
- (iii) Whether there is any fruitful purpose of confining of these convicts any more.
- (iv) Whether the convicts have lost potentiality in committing crime.
- (v) Socio-economic condition of the convicts' families.

12. The Review Board refused to grant premature release of the petitioners on the following grounds: (1) police report is adverse; (2) the convicts are not overaged persons and as such have not lost the potentiality in committing crime; (3) since other co-convicts were trying to come out from jail, there was a possibility of regrouping for antisocial activities; (4) the offence was not an individual act of crime but was

- affecting society at large; (5) convicts were antisocial; and (6) the witnesses who had deposed at the trial as well as local people were apprehensive of retaliation in the event of premature release.
13. In case of one of the petitioners, namely, Md. Talib, the Review Board also noted that one of the co-convicts was granted premature release who was murdered in an encounter after the release.
 14. We may state here that the jail authority recommended premature release of the writ petitioners. In our opinion, the conduct of the petitioners while in jail is an important factor to be considered as to whether they have lost their potentiality in committing crime due to long period of detention. The views of the witnesses who were examined during trial and the people of the locality cannot determine whether the petitioners would be a danger to the locality, if released prematurely. This has to be considered keeping in view the conduct of the petitioners during the period they were undergoing sentence. Age alone cannot be a factor while considering whether the petitioners still have potentiality of committing crime or not as it will depend on changes in mental attitude during incarceration.
 15. While coming to the conclusion for possibility of regrouping for antisocial activities, the Review Board did not take into account that the life convicts are in jail for more than 18 years. The Board also did not consider whether there would be any fruitful purpose of confining the convicts any more and also the socio-economic condition of their families. Regarding the petitioner - Md. Talib, the Review Board also noted that one co-convict was released prematurely and was murdered in the encounter with other criminals after his release. The learned Additional Solicitor General informed us that the said co-accused was released in the year 1991 and was murdered in the year 1998 and therefore, in our opinion this fact has no nexus for consideration of premature release of the petitioner, Md. Talib.
 16. We are, therefore, of the view that the reasons given by the Review Board for rejecting the prayers for premature release of the petitioners are irrelevant and devoid of any substance. Accordingly, we quash the impugned orders of the Government and remit the matter again for deciding it afresh within the period of 3 months from today.

Supreme Court of India
2003 (3) SCC 1

State of Madhya Pradesh and Another
vs
Bhola @ Bhairon Prasad Raghuvanshi

S. Rajendra Babu, D.M. Dharmadhikari and G.P. Mathur, JJ.

1. This appeal has been preferred by the State of Madhya Pradesh against judgement dated 16-1-2001 of the High Court of Madhya Pradesh in Writ Petition (Crl.) No.3603 of 1999. By placing reliance on a two-Judge Bench decision of this Court in State of U.P. vs. Sadhu Saran Shukla the High Court has held that Rule 3(a) of the Madhya Pradesh Prisoners' Release on Probation Rules,1964 is ultra vires Section 2 of the Madhya Pradesh Prisoners' Release on Probation Act,1954 (hereinafter referred to as "the Rules and "the Act" respectively).
2. The two-judge Bench of this Court in the case Sadhu Saran declared similar Rule 3(a) of the U.P. Prisoners' Release on Probation Rules as ultra vires Section 9 and Section 2 of the U.P. Prisoners' Release on Probation Act, 1938 (hereinafter shortly referred to as "the U.P. Rules" and the "the U.P. Act" respectively).
3. This appeal was listed before a two-Judge Bench of this Court on 21-8-2002 and it has referred this case to a larger Bench stating that the two-Judge Bench of this Court in this case of Sadhu Saran needs reconsideration.
4. A legal question of general importance on the validity of Rule 3(a) of the Rules is before us for consideration. The respondent prisoner is not represented by counsel. On our request, Shri Rakesh Dwivedi, Senior Advocate had agreed to assist this Court and to project the possible view in favour of the prisoner. The appellant State of M.P. is represented by Senior Advocate Shri R.P. Gupta who took us through the relevant provisions of the Act and the Rules and almost similar provisions of the U.P. Act and the Rules.
5. On completion of more than five years' sentence of imprisonment, the respondent prisoner made an application for his release on probation in accordance with Section 2 of the Act read with the Rules. His application for release on probation under the M.P. Act and Rules was not considered by the State because by Rule 3(a) convicts for

offences specified under Section 396 of the Indian Penal Code cannot seek release on probation under the Act.

6. The prisoner approached the High Court in the writ petition. By placing reliance on the decision of Sadhu Saran the writ petition was allowed by the impugned order and directions were issued to the State Government to consider the application of the prisoner for release on merits in accordance with the provisions of the Act and the Rules.
7. The legislation contained in the Act and Rules and its counterpart the U.P. Act and Rules is to give effect to the current penal philosophy on sentences. Penologists hold the view that imprisonment should not necessarily be "retributory" and "deterrent" but should be "rehabilitative". Hegel's theory of punishment says that "reform is to be effected through punishment". The modern reformists hold a view that "reform should accompany punishment". Hegel asserts that "object of punishment is to make the criminal repent his crime, and by doing so to realize his moral character, which has been temporarily obscured by his wrong action, but which is his deepest and truest nature". (See Justice through Punishment by Barbara Hudson,p.3)
8. The legislation---for consideration before us----gives effect to this penal philosophy recommending rehabilitation of the criminals so that they come out of the prison to return to society as law-abiding citizens. Under the scheme of the two Acts, certain classes of prisoners which appear to the Government from their antecedents and their conduct in the prison as likely to abstain from crime and lead a peaceful life, can be released on a "licence" but their conduct outside prison shall be supervised by specified individuals or institutions. The period of release of licence or probation granted to them would give them opportunity to lead a crime-free and peaceful life. Such period shall be counted towards the sentence of imprisonment imposed on them. Such licensed releases legislatively sanctioned have been recognised as valid law by this Court in the case of *Maru Ram vs. Union of India* (SCC at para 71, pp. 152-53). Release on licence is an experiment with prisoners for open jails or as the court describes it is an "imprisonment of loose and liberal type".
9. A brief survey of the scheme of the Act and the Rules with detailed examination of the impugned provisions would be necessary. The preamble of the Act is meaningful and conveys the object of the Act. It reads thus:

An Act to provide for the release of certain prisoners on conditions imposed by the (Madhya Pradesh) Government. (italicized for emphasis).

10. Section 2 of the Act which authorizes the Government to release the prisoner on probation on consideration of his antecedents and his conduct in the prison, reads thus:

2. Notwithstanding anything contained in Section 401 of the Code of Criminal procedure, 1898 where a person is confined in a prison under a sentence of imprisonment, and it appears to the Government from his antecedents and his conduct in the prison that he is likely to abstain from crime and lead a peaceful life, if he is released from prison, the Government may by licence permit him to be released on condition that he be placed under the supervision or authority of a government officer or of a person professing the same religion as the prisoner or such institution or society as may be recognised by the Government for the purpose, provided such other person, institution or society is willing to take charge of him.

11. Section 9 of the Act contains the rule-making power for carrying into effect the provisions of the Act and sub-section (4) which is relevant for our purposes is also required to be reproduced for its proper interpretation:

9. The Government may make rules consistent with this Act:

- (1) for the form and conditions of licence on which prisoners may be released;*
- (2) for the appointment of government officer, the recognition of institutions, societies and persons referred to in Section 2;*
- (3) for defining the powers and duties of government officers, institutions, or persons, under whose authority or supervision conditionally released prisoners may be kept;*
- (4) for defining the classes of offenders who may be conditionally released and the periods of imprisonment after which they may be so released ...*

...

12. In exercise of its rule-making power, the State Government framed the Rules of 1964 and Rule 3(a), which was challenged in the High Court by the prisoner, reads thus:

3. The following classes of prisoners shall not be released under the Act:

- (a) Those convicted of offences under the Madhya Pradesh Bharat Vagrants, Habitual Offenders and Criminals (Restrictions and Settlement) Act, 1952, or any law in force in any region of the State corresponding to the said Act, or the Explosive Substances Act, 1908 or under the following chapters or sections of the Indian Penal Code: Chapters V-A, VI and VII and Sections 216-A, 224 and 225 (if it is a case of an escape from a jail), 231, 232, 303, 311, 328, 361, 376, 382, 386 to 389, 392 to 402, 413, 1459, 460 and 489-A.*

(See Section 396 IPC mentioned as excluding application of Section 2 of the Act)

13. In the impugned judgement of the High Court of Madhya Pradesh, reliance has been placed on the decision of a two-Judge Bench of this Court in the case of Sadhu Saran which had arisen from almost identical provisions of U.P. Act and Rules and they have been quoted in the said judgement. We have also perused the judgement of the Lucknow Bench of the Allahabad High Court dated 11-9-1980 in Writ Petition No.2070 of 1978 from which Crl. Appeal No.163 of 1983 decided on 12-1-1994 in the case of Sadhu Saran had arisen. The Lucknow Bench of the Allahabad High Court is taking the view as it did that Rule 3(a) is in excess of the rule-making power and defeats the purposes of the Act contained in Section 2, observed thus:

The purpose of Section 9 is to achieve the objective contained in Section 2 and Section 8. It permits the making of the rule for that purpose only. When it speaks about the classification of offenders, it means to give power to the State Government to make rules for classifying for purposes of release and not for prohibiting the release of prisoners. A rule framed under the Act cannot eliminate prisoner serving a sentence of imprisonment from the field of eligibility contemplated by Section 2 of the Act.

It further holds thus:

No rule can be made to prohibit a person in jail from getting the benefit of Section 2 of the Act because such a rule will have an effect of destroying the purpose of the Act itself.... The purpose of the rule is to give effect to the provisions of the Act and not to make them ineffective. This rule must, therefore, be held to have been made not only in excess of the powers but in violation of the powers conferred under Section 9 of the Act on the State Government....

14. The Lucknow Bench of the Allahabad High Court in the said judgement also interpreted comparable provisions of Section 4 and Section 9 of the U.P. Act to hold that it does not permit classification of offenders on the basis of nature of offences but envisages their classification on the basis of "their age and sex having some nexus with their individual personalities". Rule 3(a) of the U.P. Rules was struck down by the Lucknow Bench also on the ground of it being violative of Article 14 of the Constitution of India. According to it, "it classifies prisoners on the basis of the offences committed by them and not on the basis of their antecedents and their conduct in the prison which alone could have been the nexus with the objective of the Act".
15. In appeal carried by the State of U.P. to this Court against the judgement of the Lucknow Bench of the Allahabad High Court, this Court upheld the judgement of the High Court but only to a limited extent and on its reasoning that "Rule 3(a) in effect precludes the Government from considering the release of the prisoners though they satisfy the requirements of Section 2 of the Act" (SCC p.447,para 4)

16. For better appreciation of the contention advanced in this case before us, it would be necessary to reproduce the relevant part of the judgement of the two-Judge Bench of this Court in the case of State of U.P. which reads thus: (SCC pp.447-48, paras 4-7)

4. ... *It can be seen that Rule 3(a) in effect precludes the Government from considering the release of the prisoners though they satisfy the requirements of Section 2 of the Uttar Pradesh Prisoner's Release on Probation Act,1938. It is also rightly contended that this rule is beyond the power conferred under Section 9 of the Act and if the rule is given effect to, it defeats the object of Section 2.*

5. *We have carefully perused the reasoning of the High Court and we are in agreement with the High Court to this extent namely that Section 9 of the Act has to be held as complementary and supplementary provision of Section 2 and Rule 3 cannot frustrate the very purpose by negativing the rights of those prisoners to claim the benefit of Section 2 of the Act...*

...

7. *However, we are of the view that if the U.P. Government thinks that in respect of serious offences like Section 396 IPC etc. the prisoners should not be released it is better if they bring about some suitable amendments in the Act, then frame necessary rules.*

...

18. We have carefully examined the scheme of the Act and particularly the provisions contained in Section 2, 9(4) and Rule 3(a). What we find is that Rule 3(a) is a piece of "delegated legislation". Such a delegated legislation is recognised as valid because on certain legislative fields, it is possible for the legislature only to lay down a policy and give sufficient guidelines for the executive authorities to carry it into effect. The legislation before us aims at giving effect to the current penal philosophy of reforming the prisoners while they are undergoing sentences of imprisonment. For the above purpose, Section 2 confers the power on the authorities to release a prisoner on probation keeping in view his antecedents and his conduct in the prison. Section 9 contains the rule-making power and sub-section (4) clearly authorises the State Government to frame rules to define or specify the class of offenders who can be conditionally released. By specifying in Rule 3(a) the offenders undergoing imprisonment under certain offences of serious nature as not eligible for release on licence, there is implied specification of offences excluded in Rule 3(a) to be the class of offenders whose cases can be considered for release on probation under the Act. It was therefore, an error in interpretation on the part of the Lucknow Bench of the Allahabad High Court that specification of offenders under certain sections of penal

provisions in Rule 3(a) frustrates the object of the Act contained in Section 2. The preamble of the Act has been quoted by us. It indicates the intention of the legislature that the benefit of release on probation for good conduct in prison is to be made available not to all but to "certain prisoners" meaning prisoners of a particular class. Thus, they can be classified in relation to the offences committed by them for which they are sentenced. Reformative system of punishment by releasing prisoners on the basis of their good conduct in prison and for turning them out as good citizens after they serve out their periods of sentences is not to be resorted to indiscriminately without reference to the nature of offence for which they are convicted. It is open to the legislature to lay down a general policy permitting reformatory method of punishment but by limiting its application to less serious crimes. Gravity of offence is an integral dimension in deciding whether a prisoner should be released or not. If we see the offences mentioned in Rule 3(a), in the category of exclusion therein are such serious or heinous offences which are against community and society in general where even release on probation may be found hazardous because of the possibility of the crime being repeated or the prisoner escaping. Habitual offenders or those dealing in explosive substances or involved in dacoities and robberies are treated as criminals guilty of heinous crimes who deserve to be treated differently from other offenders guilty of less serious crimes. The offenders could be classified thus reasonably with the object to be fulfilled of reformation of those prisoners who show prospects of some reform. Classification can also be made between habitual offenders and non-habitual offenders or between corrigibles and incorrigibles. Such a classification thorough delegated legislation of a rule cannot be held to be a legislative step defeating the substantive provisions of the Act. In our considered opinion, the judgement of the Lucknow Bench of the Allahabad High Court which has been upheld by a two-Judge Bench of this Court proceeds on misinterpretation and misconception of Rule 3(a). Rule 3(a) which excludes certain offences from the application of the Act for release of the prisoners on probation impliedly makes the Act applicable to other kinds of prisoners and in no manner defeats the objective of the Act. Thus the Act is intended to be made applicable to categories of offenders not mentioned in Rule 3(a).

...

24. Lastly, learned Senior Counsel appearing as amicus curiae tried to make a submission that rejection of the prayer of the prisoner to be released under the Act should not come in his way of claiming remission in accordance with Section 432 of the Code of Criminal Procedure. It is not necessary for us to express any opinion on the case. If

the prisoner has any recourse available in law for seeking remission, it would be open to him to avail of the same. Before parting with the case, we thankfully record our appreciation for the valuable assistance given by Shri Rakesh Dwivedi, learned Senior Advocate who had appeared as amicus curiae in this manner.

25. Consequent upon the aforesaid discussion, this appeal succeeds and is allowed. The impugned judgement dated 16.1.2001 of the High Court of Madhya Pradesh in Writ Petition No.3603 of 1999 is hereby set aside.

**Supreme Court of India
1976 (4) SCC 190**

**Santa Singh
vs
State of Punjab**

P.N. Bhagwati and S. Murtaza Fazal Ali, JJ.

1. **Bhagwati, J.** This appeal, by special leave raises an interesting question of law relating to the construction of Section 235(2) of the Code of Criminal Procedure, 1973. The appellant was tried before the Sessions Judge, Ludhiana for committing a double murder, one of his mother and the other of her second husband. He was represented by a lawyer during the trial and after the evidence was concluded and the arguments were heard, the learned Sessions Judge adjourned the case on February 13, 1975 for pronouncing the judgement. It appears that on February 13, 1975, the judgement was not ready and hence the case was adjourned to February 20, 1975 and again to February 26, 1975. The roznama of the proceedings shows that on February 26, 1975 the appellant was present without his lawyer and the learned Sessions Judge pronounced the judgement convicting the appellant of the offence under Section 302 of the Indian Penal Code and sentenced him to death. It was common ground that after pronouncing the judgement convicting the appellant, the learned sessions judge did not give the appellant an opportunity to be heard in regard to the sentence to be imposed on him and by one single judgement, convicted the appellant and also sentenced him to death. The appellant preferred an appeal to the High Court and the case was also referred to the High Court for confirmation of the death sentence, the High Court agreed with the view taken by the learned Session Judge and confirmed the conviction as also the sentence of death. The appellant thereupon preferred the present appeal with special leave obtained from this Court.
2. The appeal is limited to the question of sentence and the principal arguments advanced on behalf of the appellant is that in not giving an opportunity to the appellant to be heard in regard to the sentence to be imposed on him after the judgement was pronounced convicting him, the learned Sessions Judge committed a breach of Section 235(2) of the Code of Criminal Procedure, 1973 and that vitiated the sentence of death imposed on the appellant. This argument is a substantial one and it rests on the

true interpretation of Section 235(2). This is a new provision and it occurs in Section 235 of the Code of Criminal Procedure, 1973 which reads as follows :

- (1) *After hearing arguments and points of law (if any), the Judge shall give a judgement in the case.*
 - (2) *If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.*
3. This provision is clear and explicit and does not admit of any doubt. It requires that in every trial before a Court of Sessions, there must first be a decision as to the guilt of the accused. The Court must, in the first instance, deliver a judgement convicting or acquitting the accused. If the accused is acquitted, no further question arises. But if he is convicted, then the Court has to 'hear the accused on the question of sentence, and then pass sentence on him according to law'. When a judgement is rendered convicting the accused, he is, at that stage, to be given an opportunity to be heard in regard to the sentence and it is only after hearing him that the Court can proceed to pass the sentence.
4. This new provision in Section 235(2) is in consonance with the modern trends in penology and sentencing procedures. There was no such provision in the old Code. Under the old Code, whatever the accused wished to submit in regard to the sentence had to be stated by him before the arguments concluded and the judgement was delivered. There was no separate stage for being heard in regard to sentence. The accused had to produce material and make his submissions in regard to sentence on the assumption that he was ultimately going to be convicted. This was most unsatisfactory. The legislature, therefore, decided that is only when the accused is convicted that the question of sentence should come up for consideration and at that stage, an opportunity should be given to the accused to be heard in regard to the sentence. Moreover, it was realized that sentencing is an important stage in the process of administration of criminal justice - as important as the adjudication of guilt - and it should not be consigned to a subsidiary position as if it were a matter of not much consequence. It should be a matter of some anxiety to the Court to impose an appropriate punishment on the criminal and sentencing should, therefore, receive serious attention of the Court. In most of the countries of the world, the problem of sentencing the criminal offender is receiving increasing attention and that is largely because of the rapidly changing attitude towards crime and criminal. There is in many of the countries, intensive study of the sociology of crime and that has shifted

the focus from the crime to the criminal, leading to a widening of the objectives of sentencing and, simultaneously, of the range of sentencing procedures. Today, more than ever before, sentencing is becoming a delicate task, required an interdisciplinary approach and calling for skills and talents very much different from those ordinarily expected of lawyers.....

5.But, on the interpretation of Section 235(2) another question arises and that is, what is the meaning and content of the words 'hear the accused'. Does it mean merely that the accused has to be given an opportunity to make his submission, or he can also produce material bearing on sentence which has so far not come before the Court ? Can he lead further evidence relating to the question of sentence or it is hearing to be confined only to oral submissions ? That depends on the interpretation to be placed on the word 'hear'.....
6.Here, in this provision, the word 'hear' has been used to give an opportunity to the accused to place before the Court various circumstances bearing on the sentence to be passed against him..... Is made in that behalf by either the prosecution of the accused, an opportunity for leading evidence on the question of sentence 'should be given'. We are, therefore, of the view that the hearing contemplated by Section 235(2) is not confined merely to haring 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.....
7.Now there can be no doubt that in the present case the requirement of Section 235(2) was not complied with, inasmuch as no opportunity was given to the appellant, after recording his conviction, the produce material and make submissions in regard to the sentence to be imposed on him.....
8.The breach of the mandatory requirement of Section 235(2) cannot, in the circumstances, be ignored as inconsequential and it must be held to vitiate the sentence of death imposed by the Sessions Court.
9. It was, however, contended on behalf of the State that non-compliance with the mandatory requirement of Section 235(2) was a mere irregularity curable under Section 465 of the Code of Criminal Procedure, 1973 as no failure of justice was occasioned by it and the trial could not on the account be held to be bad. The State leaned heavily on the fact that the appellant did not insist on his right to be heard under Section 235(2)

before the Sessions Court, nor did he make any complaint before the High Court that the Sessions Court had committed a breach of Section 235(2) and this omission on the part of the appellant, contended the State, showed that he had nothing to say in regard to the question of sentence and consequently, no prejudice was suffered by him as a result of non-compliance with Section 235(2). This contention is, in my opinion, without force and must be rejected. It must be remembered that Section 235(2) is a new provision introduced for the first time in the Code of Criminal Procedure, 1973 and it is quite possible that many lawyers and judges might be unaware of it. Before the Sessions Court, the appellant was not represented by a lawyer at the time when the judgement was pronounced and obviously, he could not be aware of this new stage in the trial provided by Section 235(2). Even the Sessions Judge was not aware of it, for it is reasonable to assume that if he had been aware, he would have informed the appellant about his right to be heard in regard to the sentence and given him an opportunity to be heard. It is unfortunate that in our country there is no system of continuing education for judges so that judges can remain fully informed about the latest developments in the law and acquire familiarity with modern methods and techniques of judicial decision-making. The world is changing fast and in our own country, vast social and economic changes are taking place. There is a revolution of rising expectations amongst millions of human beings who have so far been consigned to a life of abject poverty, hunger and destitution. Law has, for the first time, adopted a positive approach and come out openly in the service of the weaker sections of the community. It has ceased to be merely an instrument providing a framework of freedom in which men may work out their destinies. It has acquired a new dimension, a dynamic activism and it is now directed towards achieving socio-economic justice which encompasses not merely a few privileged classes but the large masses of our people who have so far been denied freedom and equality - social as well as economic - and who have nothing to hope for and to live for. Law strives to give them social and economic justice and it has, therefore, necessarily to be weighted in favour of the weak and the exposed. This is the new law which judges are now called upon to administer and it is, therefore, essential that they should receive proper training which would bring about an orientation in their approach and outlook, stimulate sympathies in them for the vulnerable sections of the community and inject a new awareness and sense of public commitment in them. They should also be educated in the new trends in penology and sentencing procedures so that they may learn to use penal law as a tool for reforming and rehabilitating criminals and smoothening out the uneven texture of the social fabric and not as a weapon, fashioned by law, for protecting and

perpetuating the hegemony of one class over the other. Be that as it may, it is clear that the learned Sessions Judge was not aware of the provision in Section 235(2) and so also was the lawyer of the appellant in the High Court unaware of it. No inference can, therefore, be drawn from the mission of the appellant to raise this point, that he had nothing to say in regard to the sentence and that consequently no prejudice was caused to him.

Supreme Court of India
1980 (2) SCC 604
Bachan Singh
vs
State of Punjab

**Y.V. Chandrachud, C.J. and P.N. Bhagwati, R.S. Sarkaria,
A.C. Gupta, and N.L. Untwalla, J.J.**

1. **Sarkaria, J.** Death penalty has been the subject of an age-old debate between Abolitionists and Retentionists, although recently the controversy has come in sharp focus. Both the groups are deeply anchored in their antagonistic views. Both firmly and sincerely believe in the righteousness of their respective stands, with overtones of sentiment and emotion. Both the camps can claim among them eminent thinkers, penologists, sociologists, jurists, judges, legislators, administrators and law enforcement officials.
2. The Chief arguments of the Abolitionists, which have been substantially adopted by the learned counsel for the petitioners, are as under :
 - (i) The death penalty is irreversible. Decided upon according to fallible processes of law by fallible human beings, it can be - and actually has been - inflicted upon people innocent of any crime.
 - (ii) There is no convincing evidence to show that death penalty serves any penological purpose :
 - (a) Its deterrent effect remains unproven. It has not been shown that incidence of murder has increased in countries where death penalty has been abolished, after its abolition.
 - (b) Retribution in the sense of vengeance, is no longer an acceptable end of punishment.
 - (c) On the contrary, reformation of the criminal and his rehabilitation is the primary purpose of punishment. Imposition of death penalty nullifies that purpose.
 - (iii) Execution by whatever means and for whatever offence is a cruel, inhuman and degrading punishment.

3. It is proposed to deal with these arguments, as far as possible, in their serial order.

Regarding (a) : It is true death penalty is irrevocable and a few instances, can be cited, including some from England, of persons who after their conviction and execution for murder, were discovered to be innocent. But this, according to the Retentionists is not a reason for abolition of the death penalty, but an argument for reform of the judicial system and the sentencing procedure. Theoretically, such errors of judgement cannot be absolutely eliminated from any system of justice, devised and worked by human beings, but their incidence can be infinitesimally reduced by providing adequate safeguards and checks. We will presently see, while dealing with the procedural aspect of the problem, that in India, ample safeguards have been provided by law and the Constitution which almost eliminate the chances of an innocent persons being convicted and executed for a capital offence.

Regarding (b) : Whether death penalty serves any penological purpose.

Firstly, in most of countries in the world, including India, a very large segment of the population, including notable penologists, judges, jurists, legislators and other enlightened people still believe that death penalty for murder and certain other capital offences does serve as a deterrent, and a greater deterrent than life imprisonment.

4. The Law Commission of India in its 35th Report, after carefully shifting all the materials collected by them, recorded their views regarding the deterrent effect of capital punishment as follows :

In our view, capital punishment does act as a deterrent. We have already discussed in detail several aspects of this topic. We state below, very briefly, the main points that have weighed with us in arriving at this conclusion:

- (i) *Basically, every human being dreads death.*
- (ii) *Death as a penalty, stands on a totally different level from imprisonment of life or any other punishment. The difference is one of quality and not merely of degree.*
- (iii) *Those who are specifically qualified to express an opinion on the subject, including particularly the majority of the replies received from State Governments, Judges, Members of Parliament and Legislatures and Members of the Bar and police officers are definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.*
- (iv) *As to conduct of prisoners released from jail (after undergoing imprisonment for life), it would be difficult to come to a conclusion, without studies extending over a long period of years.*
- (v) *Whether any other punishment can possess all the advantages of capital punishment is a matter of doubt.*

- (vi) *Statistics of other countries are inconclusive on the subject. If they are not regarded as providing the deterrent effect, neither can they be regarded as conclusively disproving it -*
5. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intangible issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provisions as to death penalty in Section 302, Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two anti tactical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners' argument that retention of death penalty is the impugned provision, is totally devoid of reason and purpose, if, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognized legal sanction for murder or some types of murder in most of the civilized countries in the world, if the framers of the Indian Constitution were fully aware - as we shall presently show they were - of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in section 302, Penal Code is unreasonable and not in the public interest. We would, therefore conclude that the impugned provision in Section 302, violates neither the letter nor the ethos of Article 19.

6. **Bhagwati, J. (dissenting)** I have had the advantage of reading the careful judgement prepared by my learned brother Sarkaria, but I find myself unable to agree with the conclusions reached by him. I am of the view that Section 302 of the Indian Penal Code insofar as it provides for imposition of death penalty as an alternative to life sentence is ultra vires and void as being violative of Articles 14 and 21 of the Constitution since it does not provide any legislative guidelines as to when life should be permitted to be extinguished by imposition of death sentence.
7. I would therefore strike down Section 302 as unconstitutional and void insofar as it provided for imposition of death penalty as an alternative to imprisonment for life. I shall give my reasons for this view on the day on which the Court reopens after the summer vacation.

Supreme Court of India
AIR 1983 SC 473

Mithu Singh
vs
State of Punjab

**Y.V. Chandrachud, C.J., S. Murtaza Fazal Ali, V.D. Tulzapurkar,
O. Chinnappa Reddy and A. Varadarajan, J.J.**

1. **Chandrachud, C.J.** (for himself and on behalf of Murtaza Fazal Ali, Tulzapurkar and Varadarajan, JJ.) The question which arises for consideration in these proceedings is whether Section 303 of the Indian Penal Code infringes the guarantee contained in Article 21 of the Constitution, which provides that “No person shall be deprived of his life or personal liberty except according to procedure established by law”.

2. Section 300 of the Penal Code defines ‘Murder’, while Section 302 prescribes the punishment for murder, Section 302 reads thus :

302. Punishment for murder - whoever commits murder shall be punished with death, or imprisonment for life and shall also be liable to fine

3. Section 302 is not the only Section in the Penal Code which prescribes the sentence of life imprisonment. Literally, it is one of the fifty-one Sections of that Code which prescribes that sentence. The difference between those Sections on one hand and Section 302 on the other is that whereas, under those Sections life imprisonment is the maximum penalty that can be imposed, under Section 302 life imprisonment is the minimum penalty which has to be imposed. The only option open to a Court which convicts a person of murder is to impose either the sentence of life imprisonment or the sentence of death. The normal sentence for murder is life imprisonment. Section 354(3) of the Code of Criminal Procedure, 1973 provides :

354(3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgement shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

4. While upholding the validity of the death sentence as a punishment for murder, a Constitution Bench of this Court ruled in *Bachan Singh*, (1980) 2 SCC 684: (AIR 1980 SC 898), that death sentence can be imposed in a very exceptional class of cases : ‘the rarest of rare cases’.

5. The Indian Penal Code was passed in 1860. The frames of that Code achieved a measure of success in classifying offences according to their subject-matter, defining them with precision and in prescribing what in the context of those times, was considered to be commensurate punishment for those offences. One of the problems which they had to deal with was as to the punishment which should be prescribed for the offence of murder committed by a person who is under a sentence of life imprisonment. They solved that problem by enacting Section 303, which reads thus :

303. Punishment for murder by life convict - Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death.

6. The reason, or at least one of the reasons why the discretion of the Court to impose a lesser sentence was taken away and the sentence of death was made mandatory in cases which are covered by Section 303 seems to have been that if, even the sentence of life imprisonment was not sufficient to act as a deterrent and the convict was hardened enough to commit a murder while serving that sentence, the only punishment which he deserved was death. The sovereignty of this legislative judgement accorded with the deterrent and retributive theories of punishment which then held sway. The reformative theory of punishment attracted the attention of criminologists later in the day. How sternly the legislature looked at the offence of murder committed by a life-convict can be gauged by the fact that in the early history of the Code of Criminal Procedure unlike as at present, if a person undergoing the sentence of transportation for life was sentenced to transportation for another offence, the latter sentence was to commence at the expiration of the sentence of transportation to which he was previously sentenced, unless the Court directed that the subsequent sentence of transportation was to run concurrently with the previous sentence of transportation. It was in 1955 that Section 397 of the Cr.P.C. of 1898 was replaced by a new Section 397 by Amendment Act, 26 of 1955. Under the new sub-section (2) of Section 397 which came into force on Jan. 1, 1956, if a person already undergoing a sentence of imprisonment for life was sentenced on a subsequent conviction to imprisonment for life, the subsequent sentence had to run concurrently with the previous sentence. Section 427(2) of the Criminal Procedure Code of 1073 is to the same effect. The object of referring to this aspect of the matter is to emphasise that when Section 303 of the Penal Code was originally enacted, the legislature did not consider that even successive sentences of transportation for life were an adequate punishment for the offence of murder committed by a person who was under the sentence of life imprisonment.

7. While enacting Section 303 in terms which create an absolute liability, the framers of the Penal Code ignored several important aspects of cases which attract the application of that Section and of questions which are bound to arise under it. They seem to have had only one kind of case in their mind and that is, the commission of murder of a jail official by a life-convict. It may be remembered that in those days, jail officials were foreigners, mostly Englishmen and, alongside other provisions which were specially designed for the members of the ruling class as, for example, the choice of jurors, Section 303 was enacted in order to prevent assaults by the indigenous breed upon the white officers. In its 42nd Report (1971), the Law Commission of India has observed in para 16, 17 (page 239), that 'the primary object of making the death sentence mandatory for an offence under this Section seems to be to give protection to the prison staff'. We have no doubt that if a strictly penological view was taken of the situation dealt with by Section 303, the framers of the Code would have had a second thought on their decision to make the death sentence mandatory, even without the aid of the constitutional constraints which operate now.
8. But before we proceed to point out the infirmities from which Section 303 suffers we must indicate the nature of the argument which has been advanced on behalf of the petitioners in order to assail the validity of that Section. The sum and substance of the argument is that the provision contained in Section 303 is wholly unreasonable and arbitrary and thereby, it violates Article 21 of the Constitution which affords the guarantee that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. Since the procedure by which Section 303 authorises the deprivation of life is unfair and unjust, the Section is unconstitutional. Having examined this argument with care and concern, we are of the opinion that it must be accepted and Section 303 of the Penal Code struck down.
9. In *Maneka Gandhi Vs. Union of India*, (1978 2 SCR 621 : (AIR 1978 SC 597), it was held by a seven-Judge Bench that a statute which merely prescribes some kind of procedure for depriving a person of his life or personal liberty cannot ever meet the requirements of Article 21 : The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary.
10. These decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the Courts to follow it; that it is for the legislature to provide the punishment and for the Courts to impose it. Two instances, undoubtedly extreme, may be taken by way of illustration for the purpose of showing how the Courts are not bound, and

are indeed not free, to apply a fanciful procedure by a blind adherence to the letter of the law or to impose a savage sentence. A law providing that an accused shall not be allowed to lead evidence in self-defence will be hit by Articles 14 and 21. Similarly, if a law were to provide that the offence of theft will be punishable with the penalty of the cutting of hands, the law will be bad as violating Article 21. A savage sentence is anathema to the civilized jurisprudence of Article 21. These are, of course, extreme illustrations and we need have no fear that our legislatures will ever pass such laws. But these examples serve to illustrate that the last work on the question of justice and fairness does not rest with the legislature. Just as reasonableness of restrictions under Clauses (2) to (6) of Article 19 is for the Courts to determine, so is it for the Courts to decide whether the procedure prescribed by a law for depriving a person of his life or liberty is fair, just and reasonable. The question which then arises before us is whether the sentence of death, prescribed by Section 303 of the Penal Code for the offence of murder committed by a person who is under a sentence of life imprisonment, is arbitrary and oppressive so as to be violative of the fundamental right conferred by Article 21.

11. Counsel for the respondents rely upon the decision in *Bachan Singh* (AIR 1980 SC 898) in support of their submission that the provision contained in Section 303 does not suffer from any constitutional infirmity. They contend that the validity of death sentence was upheld in that case and since, Section 303 does no more than prescribe death sentence for the offence of murder, the ratio of *Bachan Singh* would apply and the question as regards the validity of that Section must be treated as concluded by that decision. These questions, it is said, should not be allowed to raise their head over and over again. This argument suffers from a twofold defect. In the first place, it betrays a certain amount of misunderstanding of what was decided in *Bachan Singh* and secondly, it overlooks the essential distinction between the provisions of Section 302 and Section 303. Academicians and textbooks writers have the freedom to discuss legal problems in the abstract because, they do not have to decide any particular case. On the other hand, the decision rendered by the Court have to be understood in the light of the legal provisions which came up for consideration therein and in the light of the facts, if facts were involved. The majority did not lay down any abstract proposition in *Bachan Singh* that 'Death sentence is constitutional', that is to say, that 'It is permissible under the Constitution to provide for the sentence of death'. To be exact, the question which arose for the consideration of the Court was not whether, under the Constitution, it is permissible to provide for the sentence of death. The

precise question which arose is that case was whether Section 302 of the Penal Code which provides for the sentence of death as one of the two alternative sentences is valid. It may be recalled that Section 302 provides for the sentence of death as an alternative sentence which may be imposed. The normal sentence for murder is life imprisonment; and if the death sentence has to be imposed, the Court is under a legal obligation under Section 354(3) of the Cr.P.C. to state the special reasons for imposing that sentence. That explains why, in *Bachan Singh*, Sarkaria, J., who spoke for the majority, underscored the words ‘alternative’ and ‘may’ in para 19 of the judgement, whilst observing that the Penal Code prescribes death as an alternative punishment to which the offender may be sentenced in cases relating to seven kinds of offences. The majority concluded that Section 302 of the Penal Code is valid for three main reasons : Firstly, that the death sentence provided for by Section 302 is an alternative to the sentence of life imprisonment; secondly, that special reasons have to be stated if the normal rule is departed from and the death sentence has to be imposed; and thirdly, because the accused is entitled, under Section 235(2) of the Criminal P.C., to be heard on the question of sentence. The last of these three reasons becomes relevant, only because of the first of these reasons. In other words, it is because the Court has an option to impose either of the two alternative sentences, subject to the rule that the normal punishment for murder is life imprisonment, that it is important to hear the accused on the question of sentence. If the law provides a mandatory sentence of death as Section 303 of the Penal Code does, neither Section 235(2) nor Section 354(3) of the Code of Criminal Procedure can possibly come into play. If the Court has no option save to impose the sentence of death, it is meaningless to hear the accused on the question of sentence and it becomes superfluous to state the reasons for imposing the sentence of death in such a case is that the law compels the Court to impose that sentence. The ratio of *Bachan Singh*, therefore, is that, death sentence is constitutional if it is prescribed as an alternative sentence for the offence of murder and if the normal sentence prescribed by law for murder is imprisonment for life.

12. It will be clear from this discussion that since there is a fundamental distinction between the provisions of Section 302 and Section 303 of the Penal Code, the ratio of *Bachan Singh* will not govern the question as regards the validity of Section 303. This latter question is res integra. Stated briefly, the distinction between the two sections is that whereas, Section 302 provides for the sentence of death as an alternative sentence, the only sentence which Section 303 prescribes is the sentence of death. The court has no option under Section 303 to impose any other sentence, no matter

what is the motivation of the crime and the circumstances in which the Code of Criminal Procedure applies in terms to those cases only wherein 'the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years'. Since Section 303 does not provide for an alternative sentence, Section 354(3) has no application to cases arising under that Section. Thirdly, Section 235(2) of the Code of Criminal Procedure which confers a right upon the accused to be heard on the question of sentence, becomes, a meaningless ritual in cases arising under Section 303. If the Court itself has no option to pass any sentence except the sentence of death, it is an idle formality to ask the accused as to what he has to say on the question of sentence.

13. The question which we had posed for our consideration at the beginning of this judgement was somewhat broad. In the light of the aforesaid discussion, that question narrows itself to a consideration of certain specific issues. The first and foremost issue which arises specifically for our consideration is whether there is any intelligible basis for giving differential treatment to an accused who commits the offence of murder whilst under a sentence of life imprisonment. Can he be put in a special class or category as compared with others who are found guilty of murder and be subjected to hostile treatment by making it obligatory upon the Court to sentence him to death ? In other words, is there a valid basis for classifying persons who commit murders whilst they are under the sentence of life imprisonment, separately from those who commit murders whilst they are not under the sentence of life imprisonment, for the purpose of making the sentence of death obligatory in the case of the former and optional in the case of the latter ? Is there any nexus between such discrimination and the object of the impugned statute ? These questions stem principally from the position that Section 303 makes the sentence of death mandatory. That position raises certain side issues which are equally important. Is a law which provides for the sentence of death for the offence of murder, without affording to the accused an opportunity to show cause why that sentence should not be imposed, just and fair ? Secondly, is such a law just and fair if, in the very nature of things, it does not require the Court to state the reasons why the supreme penalty of law is called for ? Is it not arbitrary to provide that whatever may be the circumstances in which the offence of murder was committed, the sentence of death shall be imposed upon the accused ?
14. The first question which we would like to examine is whether there is any valid basis for classifying persons who commit murders whilst they are under the sentence of life imprisonment as distinguished from those who commit murders whilst they are

not under the sentence of life imprisonment, for the purpose of making the sentence of death mandatory in the case of the former class and optional in the case of the latter class. We are unable to see any rational justification for making a distinction, in the matter of punishment, between these two classes of offenders. Murders can be motiveless in the sense that, in a given case, the motive which operates on the mind of the offender is not known or is difficult to discover. But, by and large, murders are committed for any one or more of a variety of motives which operates on the mind of the offender, whether he is under a sentence of life imprisonment or not. Such motives are too numerous and varied to enumerate but hate, lust, sex, jealousy, gain, revenge and a host of weaknesses to which human flesh is subject are common motives for the generality of murders. Those reasons can operate as a innovative force of the crime whatever may be the situation in which the criminal is placed and whatever may be the environment in which he finds himself. But, as we have stated earlier, the framers of the Penal Code had only one case in mind, namely, the murder of jail officials by life-convicts. Even if we confine ourselves to that class of cases, the test of reasonableness of classification will break down inevitably. From that point of view, it will be better to consider under different heads cases in which murders are committed by life-convicts within the jail precincts and murders which are committed by life-convicts outside the jail, while they are on parole or bail.

15. We will first deal with cases of murders committed by life-convicts within the precincts of the jail. The circumstances that a person is undergoing a sentence of life imprisonment does not minimize the importance of mitigating factors which are relevant on the question of sentence which should be imposed for the offence committed by him while he is under the sentence of life imprisonment. Indeed a crime committed by a convict within the jail while he is under the sentence of life imprisonment may, in certain circumstances, demand and deserve greater consideration, understanding and sympathy than the original offence for which he was sentenced to life imprisonment. This can be illustrated with the help of many instances but one or two of those may suffice. A life-convict may be driven to retaliate against his systematic harassment by a warder, who habitually tortures, starves and humiliates him. If the act results in the death of the warder, the crime may amount to murder because none of the exceptions mentioned in Section 300 may apply. The question is whether it is reasonable to provide that a life-convict who has committed the offence of murder in these circumstances must necessarily be sentenced to death and an opportunity denied to him to explain why the death sentence should not be imposed upon him. And, how is it relevant on the question of the prescription of a mandatory sentence of

death that the murder was committed by a life-convict ? Then again, to take another instance, there are hundreds of inmates in central jails. A life-convict may be provoked gravely but not suddenly or suddenly but not gravely enough, by an insinuation made against his wife's chastity by another inmate of the jail. If he commits the murder of the insinuator, the only sentence which can be imposed upon him under Section 303 is the sentence of death. The question is, whether it is reasonable to deprive such a person, because he was under a sentence of life imprisonment when he committed the offence of murder, from an opportunity to satisfy the Court that he acted under the pressure of a grave insult of his wife and should not therefore be sentenced to death. We are of the opinion that, even limiting oneself to murders committed by life-convicts within the four walls of the jail, it is difficult to hold that the prescription of the mandatory sentence of death answers the test of reasonableness.

16. The other class of cases in which, the offence of murder is committed by a life-convict while he is on parole or on bail may now be taken up for consideration. A life-convict who is released on parole or on bail may discover that taking undue advantage of his absence, a neighbour has established illicit intimacy with his wife. If he finds them in an amorous position and shoots the seducer on the spot, he may stand a fair chance of escaping from the charge of murder, since the provocation is both grave and sudden. But if, on seeing his wife in the act of adultery, he leaves the house, goes to a shop, procures a weapon and returns to kill her paramour, there would be evidence of what is called mens rea, the intention to kill. And since, he was not acting on the spur of the moment and went away to fetch a weapon with murder in his mind, he would be guilty of murder. It is a travesty of justice not only to sentence such a person to death but to tell him that he shall not be heard why he should not be sentenced to death. And, in these circumstances, how does the fact that the accused was under a sentence of life imprisonment when he committed the murder, justify the law that he must be sentenced to death ? In ordinary life, we will not say it about law, it is not reasonable to add insult to injury. But, part from that, a provision of law which deprives the Court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. It has to be remembered that the measure of punishment for an offence is not afforded by the label which that offence bears, as for example 'Theft', 'Breach of Trust' or 'Murder'. The gravity of the offence furnishes the guidelines for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. The

Legislature cannot make relevant circumstances irrelevant, deprive the Courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. Equity and good conscience are the hall marks of justice. The mandatory sentence of death prescribed by Section 303, with no discretion left to the Court to have regard to the circumstances which led to the commission of the crime, is a relic of ancient history. In the times in which we live, that is the lawless law off military regimes. We, the people of India, are pledged to a different set of values. For us, law ceases to have respect and relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hung by the neck until he is dead.

17. We are also unable to appreciate how, in the matter of sentencing any rational distinction can be made between a person who commits a murder after serving out the sentence of life imprisonment and a person who commits a murder while he is still under that sentence. A person who has been in jail, say for 14 years, and commits the offence of murder after coming out of the jail upon serving out that sentence is not entitled to any greater consideration than a person who is still serving the sentence of life imprisonment for the mere reason that the former has served out his sentence and the latter is still under the sentence imposed upon him. The classification based upon such a distinction processes upon irrelevant considerations and bears no nexus with the object of the statute, namely, the imposition of a mandatory sentence of death. A person who stands unreformed after a long term of incarceration is not, by any logic, entitled to preferential treatment as compared with a person who is still under the sentence of life imprisonment. We do not suggest that the latter is entitled to preferential treatment over the former. Both have to be treated alike in the matter of prescription of punishment and whatever safeguards and benefits are available to the former must be made available to the latter.
18. We have already adverted to the stresses and strains which operate on convicts who are sentenced to long terms of imprisonment like the sentence of life imprisonment. Many scholars have conducted research into this matter. It will serve our purpose to draw attention to the following passage from a book called. 'The Penalty of Death' by Thorsten Sellin, Sage Library of Social Research, London, Ed. 1980 :

Anyone who has studied prisons and especially the maximum-security institutions, which are the most likely abodes of murderers serving sentences of like imprisonment or long terms of years, realizes that the society of captives within their walls is subject

to extraordinary strains and pressures, which most of those in the outside world experience in attenuated forms, if at all. The prison is an unnatural institution. In an area of limited size, surrounded by secure walls, it houses from a few score to several thousand inmates and their custodians. In this unisexual agglomeration of people, separated from family and friends, prisoners are constantly thrown into association with one another and subject to a host of regulations that limit their freedom of action and are imposed partly by the prison authorities and partly by the inmate code. It is not astonishing that in this artificial environment altercations occur, bred by the clash of personalities and the conflict of interests that lead to fights in free society, especially when one considers that most of the maximum-security prison inmates are fairly young and have been raised in the poorer quarters of our cities, where resort to physical violence in the settlement of disputes is common. Indeed what surprises the student of prison violence is the relative rarity of assaultive events, everything considered.

19. This is some good reason why convicts who are under the sentence of life imprisonment should not be discriminated against as compared with others, including those who have served out their long terms of imprisonment. There is another passage in the same book which shows with the help of statistics that the frequency of murders committed by life convicts while they are on parole is not so high as to justify a harsher treatment being accorded to them when they are found guilty of having committed a murder while on parole, as compared with other persons who are guilty of murder. The author says:

In the United States, convicts whose death sentences have been commuted or who have been sentenced to life imprisonment for murder may regain their freedom by being paroled after spending a decade or two in prison. Some are deprived of this opportunity, because they die a natural or violent death while in the institution. Some may be serving time in states that have laws barring the release of first-degree murderers or lifers, but even there the exercise of executive clemency may remove the barrier in individual cases. There is no need to discuss here the various aspects of the parole process when murderers are involved because we are concerned only with how such parolees behave once they have been set free. Do they, indeed, abuse their freedom and are they especially likely to prove a menace to the lives of their fellow citizens? It is fear of that menace that makes some people favour capital punishment as a sure means of preventing a murderer from killing again after his return to freedom in the community. As we shall see, paroled murderers do sometimes repeat their crime, but a look at some facts will show that among parolees who commit homicides, they rank very low. (p. 113)

20. According to the statistics tabulated at page 115 of the book out of 6835 life convicts who were released on parole, 310 were returned to prison for new crimes committed by them while on parole. Out of those 310, twenty-one parolees were returned to

the prison on the charge of willful homicide, that is, murder. There is no comparable statistical data in our country in regard to the behaviour of life-convicts who are released on parole or bail but there is no reason to assume that the incidence of murders committed by such persons is unduly high. Indeed, if there is no scientific investigation on this point in our country, there is no basis for treating such persons differently from others who commit murders.

21. Thus, there is no justification for prescribing a mandatory sentence of death for the offence of murder committed inside or outside the prison by a person who is under the sentence of life imprisonment. A standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case.

The infinite variety of cases and facets to each would make general standards either meaningless 'boiler plate' or a statement of the obvious." (Dennis Councle McGautha Vs. State of California, (1972) 28 L Ed 2nd 711).

22. As observed by Palekar, J. who spoke for a Constitution Bench in Jagmohan Singh Vs. State of U.P. (1973) 2 SCR 541 : (AIR 1973 SC 947) :

The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judge with a very wide discretion in the matter of fixing the degree of punishment..... The exercise of judicial discretion on well-recognised principle is, in the final analysis, the safest possible safeguard for the accused. (page 559 of SCR) : (at pp. 957-58 of AIR)

23. The self-confidence which is manifested in the legislative prescription of a computerized sentence of death is not supported by scientific data. There appears to be no reason why in the case of a person whose case falls under Section 303, factors like the age and sex of the offender, the provocation received by the offender and the motive of the crime should be excluded from consideration on the question of sentence. The task performed by the legislature while enacting Section 303 is beyond even the present human ability which has greater scientific and sophisticated resources available for compiling data, than those which were available in 1860 when Section 303 was enacted as a part of the Indian Penal Code .

24. It is because the death sentence has been made mandatory by Section 303 in regard to a particular class of persons that, as a necessary consequence, they are deprived of the opportunity under S.235(2) of Criminal Procedure Code to show cause why they should not be sentenced to death and the Court is relieved from its obligation under Section 354(3) of that Code to state the special reasons for imposing the sentence

of death. The deprivation of these rights and safeguards which is bound to result in injustice is harsh, arbitrary and unjust.

25. We have stated at the beginning of this judgement that there are as many as 51 Sections of the Penal Code which provide for the sentence of life imprisonment. Those Sections are : Sections 121, 121-A, 122, 124-A, 125, 128, 130, 131, 132, 194, 222, 225, 232, 238, 255, 302, 304, Part I, 305, 307, 311, 313, 314, 326, 329, 363-A, 364, 371, 376, 388, 389, 394, 395, 396, 400, 409, 412, 413, 436, 438, 449, 459, 460, 467, 472, 474, 475, 477, 489-A, 489-B, 489-D and Section 511 (attempt to commit offences punishable with imprisonment for life). A person who is sentenced to life imprisonment for any of these offences incurs the mandatory penalty of death under Section 303, if he commits a murder while he is under the sentence of life imprisonment. It is impossible to see the rationale of this aspects of Section 303. There might have been the semblance of some logic to explain, if not to sustain, such a provision is murder was the only offence for which life imprisonment was prescribed as a punishment. It could then be argued that the intention of the legislature was to provide for enhanced sentence for the second offence of murder. But, under the section as it stands, a person who is sentenced to life imprisonment for breach of trust (though, such a sentence is rarely imposed), or for sedition under Section 124-A or for counterfeiting a coin under Section 232 or for forgery under Section 467 will have to be sentenced to death if he commits a murder while he is under the sentence of life imprisonment. There is nothing in common between such offences previously committed and the subsequent offence of murder. Indeed, it defies all logic to understand why such a provision was made and what social purpose can be served by sentencing a forgerer to a compulsory punishment of death for the mere reason that he was undergoing the sentence of life imprisonment for forgery when he committed the offence of murder. The motivation of the two offences is different, the circumstances in which they are committed would be different and indeed the two offences are basically of a different genre. To prescribe a mandatory sentence of death for the second of such offences for the reason that the offender was under the sentence of life imprisonment for the first of such offences is arbitrary beyond the bounds of all reason. Assuming that Section 235(2) of the Criminal Procedure Code was applicable to the case and the Court was under an obligation to hear the accused on the question of sentence, it would have to put some such question to the accused:

You were sentenced to life imprisonment for the offence of forgery. You have committed a murder while you were under that sentence of life imprisonment. Why should you not be sentenced to death ?

The question carries its own refutation. It highlights how arbitrary and irrational it is to provide for a mandatory sentence of death in such circumstances.

26. In its thirty-fifth Report of 'Capital Punishment' published in 1967, the Law Commission of India considered in paragraphs 587 to 591 the question of prescribing a lesser sentence for the offences under Section 302 and 303 of the Penal Code. It observed in para 587 that :

For the offence under Section 303, Indian Penal Code, the sentence of death is mandatory. The reason for this is that in the case of an offence committed by a person who is already under sentence of imprisonment for life, the lesser sentence of imprisonment for life would be a formality. It has, however, been suggested that even for this offence the sentence of death should not be mandatory. We have considered the arguments that can be advanced in support of the suggested change. It is true that, ordinarily speaking, leaving the Court no discretion in the matter of sentence is an approach which is not in conformity with modern trends.

27. After dealing with the question whether the sentence of death ought not to be mandatory and after considering whether Section 303 should be amended so as to limit its application to cases in which a person sentenced to life imprisonment for the offence of murder commits again a murder while he is under the sentence of life imprisonment, the Law Commission concluded in para 591 of its report that 'It is not necessary to make any change'. It felt that :

Acute cases of hardship, where the extenuating circumstances are overwhelming in their intensity, can be dealt with under Section 401, Code of Criminal Procedure, 1898, and that seems to be sufficient.

28. In its Forty-second Report on the Indian Penal Code, published in June 1971, the Law Commission considered again the question of amending Section. It found it anomalous that a person whose sentence of imprisonment for life was remitted unconditionally by the Government could be held not to be under the sentence of life imprisonment, but if a person who released conditionally, he could still be held to be under the sentence. It therefore suggested that Section 303 should be amended so as to restrict its application to life convicts who are actually in prison. The Commission did not, however, recommend any change since, Section 303 was 'very rarely applied'. It felt that if there was an exceptionally hard case, it could be easily dealt with by the President or the Governor under the prerogative of mercy.

29. On Dec. 11, 1972, a Bill was introduced in the Rajya Sabha to amend the Penal Code, one of the amendments suggested being that Section 303 of the Code should be deleted. On a motion made by the then Minister of State in the Ministry of Home

Affairs, the Bill was referred to the Joint Committee of the Rajya Sabha and the Lok Sabha. The Committee held 97 sittings and made various recommendations, one of which was that the punishment for murder which was prescribed separately by Sections 302 and 303 of the Penal Code should be brought under one Section of the Code. The Committee further recommended that it should not be obligatory to impose the sentence of death on a person who commits a murder while under the sentence of life imprisonment and the question whether, in such a case, the sentence of death or the sentence of life imprisonment should be awarded should be left to the discretion of the Court. The Committee accordingly suggested the addition of a new Clause 125 in the Bill, for omitting Section 303 of the Penal Code. The Report of the Joint Committee was presented to the Rajya Sabha on Jan. 29, 1976 whereupon The Indian Penal Code (Amendment) Bill, XLII-B of 1972, was tabled before the Rajya Sabha. But, what was proposed by the Parliament was disposed of by the ballot-box. A midterm Parliamentary poll was held while the Bill was pending and there was a change of Government. The Bill lapsed and that was that. It is to be deeply regretted that the attention of an overworked Parliament has not yet been drawn to urgent reforms suggested in the Penal Code Amendment Bill XLII-B of 1972. In all probability, the amendment suggested by Clause 125(New) for the deletion of Section 303 of the Penal Code would have passed muster without any opposition. The only snag in the passing of the Bill has been that it was not revived and put to vote. Section 303 was destined to die at the hands of the Court. Our only regret is that during the last six years since 1977, some obscure犯人 sentenced to life imprisonment, who may have committed murder while under the sentence of life imprisonment, may have been sentenced to the mandatory sentence of death, unwept and unasked why he should not be hanged by the neck until he is dead.

30. On a consideration of the various circumstances which we have mentioned in this judgement, we are of the opinion that Section 303 of the Penal Code violates the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution that no persons shall be deprived of his life or personal liberty except according to procedure established by law. The Section was originally conceived to discourage assaults by life-convicts on the prison staff, but the Legislature chose language which far exceeded its intention. The Section also assumes that life-convicts are a dangerous breed of humanity as a class. That assumption is not supported by any scientific data. As observed by the Royal Commission in its Report on 'Capital Punishment', 1949-1953, para 517 :

There is a popular belief that prisoners serving a life sentence after conviction of murder form a specially troublesome and dangerous class. That is not so. Most find themselves in prison because they have yielded to temptation under the pressure of a combination of circumstances unlikely to recure.

31. In *Dilip Kumar Sharma Vs. State of M.P.* (1976) 2 SCR 289 : (AIR 1976 SC 133), this Court was not concerned with the question of the vires of Section 303, but Sarkaria, J., in his concurring judgement, described the vast sweep of that Section by saying that : 'the Section is Draconian in severity, relentless and inexorable in operation.' We strike down Section 303 of the Penal Code as unconstitutional and declare it void. It is needless to add that all cases of murder will now fall under Section 302 of the Penal Code and there shall be no mandatory sentence of death for the offence of murder.

Supreme Court of India
Rajendra Prasad
vs
State of Uttar Pradesh

V.R. Krishna Iyer, D.A. Desai and A.P. Sen, JJ.

1. The only question before the Court is as to when and why shall capital punishment be pronounced on a murderer and why not in other cases, within the confines of the Code. Urgency to the solution is obvious. The overt ambivalence and covert conflict among judges concerning continued resort to the death sentence mirrors the uncertainties and conflicts of values in the community itself. [89G & 90D]
2. Section 302 of the IPC throws little light on when the Court shall hang the sentence of why the lesser penalty shall be preferred. Since law reflects life, new meanings must permeate the Penal Code. Deprivation of life under our system is too fundamental to be permitted except on the gravest ground and under the strictest scrutiny.
3. To say that discretion of the judge passing the sentence under Section 302 Indian Penal Code is guided by well-recognized principles shifts the issue to what those recognized rules are. The big margin of subjectivism, a preference for old precedents, theories of modern penology, behavioral emphasis or social antecedents, judicial hubris or human rights perspectives, reverence for out worn social philosophers - this plurality of forces plays a part in swinging the pendulum of sentencing justice erratically. Until Parliament speaks, this Court cannot be silent.
4. Executive commutation is no substitute for judicial justice, at best it is administrative policy and at worst pressure-based partially. The criteria for clemency are often different.
5. In so far as Section 302 is concerned several attempts have been made to restrict to remove death penalty but never to enlarge its application. Parliamentary pressure has been to cut down penalty, although the Section formally remains the same. In the case of Criminal Procedure Code the legislative development has shifted the punitive center of gravity from life taking to life sentence. In other words, the legislative trend seems to be while formerly the rule was to sentence to death a person who is convicted for murder, it is now to impose a lesser sentence for reasons to be recorded in writing. Formerly, capital punishment was to be imposed unless special

reasons could be found to justify the lesser sentence. After 1955 Courts were left equally free to award either sentence. The 1973 Code has made an unmistakable shift in legislative emphasise under which life imprisonment for murderer is the rule and capital sentence the exception for reasons to be stated.

6. Criminologists all the world over, however, argued that death has decisively lost the battle, and even in our Codes it has shrunk into a weak exception. What are the exceptional cases ? Personal story of an actor in a shocking murder, if considered, may bring tears and soften the sentence. He might have been a tortured child, an ill-treated orphan, a jobless man or the convict's poverty might be responsible for the crime.
7. In the post Constitution period Section 302 Indian Penal Code and Section 345(3) of the Cr.P.C. have to be read in the humane light of Parts III and IV illuminated by the Preamble of the Constitution. In other words the sacrifice of a life sentence is sanctioned only if otherwise public interest and social defence and public order would be smashed irretrievably. Such extraordinary grounds alone constitutionally qualify as special reasons. One stroke of murder hardly qualifies for this drastic requirement, however gruesome the killing may be. The searching question the Judge must put to himself is what is so extraordinary reasonable as to validate the wiping out of life itself and with it the great rights which are in him in the totality of facts.
8. The retributive theory has had its day and is no longer valid. Deterrence and reformation are the primary social goals which makes deprivation of life and liberty reasonable as penal panacea.
9. The current ethos, with its strong emphasis on human rights and against death penalty, together with the ancient strains of culture spanning the period from Buddha to Gandhi must ethically inform the concept of social justice which is a paramount principle and cultural paradigm of our Constitution.
10. The personal and social, the motivational and physical circumstances, of the criminal are relevant factors in adjudging the penalty as clearly provided for under the Code of 1973. So also the intense suffering already endured by prison torture or agonising death penalty hanging over head consequent on the legal process.
11. Although the somewhat obsolescent Mc'Naughten Rules codified in Section 84 of the Penal Code alone are exculpatory, mental imbalances, neurotic upsets and psychic crises may be extenuatory and the sense of diminished responsibility may manifest itself in judicial clemency of commuted life incarceration.

12. The social justice which the Preamble and Part IV (Article 38) highlights, as paramount in the governance of the country has a role to mould the sentence. If the murderous operation of a diehard criminal jeopardizes social security in a persistent, planned and perilous fashion then his enjoyment of fundamental rights may be rightly annihilated. One test for imposition of death sentence is to find out whether the murderer offers such a traumatic threat to the survival of social order. Some of the principles are never hang unless society or its members may lose more lives by keeping alive an irredeemable convict. Therefore social justice protected by Article 38 colors the concept of reasonableness in Article 19 and non-arbitrariness in Article 14. This complex of articles validates death penalty in limited cases. May be train dacoity and bank robbery bandits reaching menacing proportions, economic offenders profit killing in an intentional and organized way, are such categories in a Third World setting.
13. Survival of an orderly society without which the extinction of human rights is a probability compels the higher protection of the law to those officers who are charged with the fearless and risky discharge of hazardous duties in strategic situations. Those officers of law, like policemen on duty or soldiers and the like have to perform their functions even in the face of threat of violence, sometimes in conditions of great handicap. If they are killed by designers of murder and the law does not express its strong condemnation in extreme penalization, justice to those called upon to defend justice may fail. This fact of social justice also may in certain circumstances and at certain stages of social life demand death sentence.
14. Special reasons necessary for imposing death penalty must relate not to the crime as such but to the criminal.

[This judgement is also reported in Penal Code Section 302. Scope of Death Sentence-when should be awarded.]

**Supreme Court Cases
1977 (4) SCC 44**

Hiralal Mallick

vs

State of Bihar

V.R. Krishna Iyer, P.K. Goswami, JJ.

Hiralal Mallick, the sole appellant before us, was a 12-year old lad when he toddled into crime, conjointly with his two elder brothers. The three, together, were charged with the homicide of one Arjan Mallick which ended in a conviction of all under S. 302 read with S. 34 IPC. The trial judge impartially imposed on each one a punishment of imprisonment for life. On appeal by all the three, the High Court, taking note of some peculiarities, directed the conversion of the convictions from S. 302 (read with S. 34) into one under s. 326 (read S. 303 with s. 34) IPC and, consequently, pared down the punishment awarded to the co-accused into rigorous imprisonment for 8 years. The third accused, the appellant before us, was shown consideration for his tender age of 12 years (at the time of commission of the crime) and the court, in a mood of compassion, softened the sentence on the boy into rigorous imprisonment for 4 years.

A close-up of the participatory role of the youthful offender, as distinguished from that of his elder brothers, discloses a junior partnership for him. For, argued Shri Goburdhan, while accused 1 and 2 caused the fatal stabs, the appellant was found to have inflicted superficial cuts on the victim with a sharp weapon, probably angered by the episode of an earlier attack on their father, induced by the stress of the reprisal urge and spurred by his brothers' rush after the foe, but all the same definitely helping them in their aggression. That he was too infantine to understand the deadly import of the sword blows he delivered is obvious; that he inflicted lesser injuries of a superficial nature is proved; that he, like the other two, chased and chopped and took to his heels, is evident. The immature age of the offender, the fraternal company which circumstanced his involvement, the degree of intent gauged by the depth of the wounds he caused and the other facts surrounding the occurrence, should persuade us to hold that this juvenile was guilty-not of death-dealing brutality-but of naughty criminality, in a violent spree. Measured by his intent and infancy, his sinister part in the macabre offence ran upto infliction of injury with a cutting weapon attracting s. 324 IPC, not more. Such was the mecaronic submission of counsel anxious to press for an extenuatory exoneration from incarceration.

...

When a teenager, tensed by his elders or provoked by the stone-hit on the head of his father, avenges with dangerous sticks or swords, copying his brothers, we cannot altogether ignore his impaired understanding, his tender age and blinding environs and motivations causatory of his crime.

In English Law, when an adolescent is charged with an offence, the prosecution has to prove more than the presence of a guilty mind but must go further to make out that 'when the boy did the act, he knew that he was doing what wrong- not merely what was wrong but what was gravely wrong, seriously wrong' (emphasis added).

Adult intent, automatically attributed to infant mens, is itself an adult error. It is everyday experience that little boys as a class have less responsible appreciation of dangers to themselves or others by injurious acts and so it is that the new penology in many countries immunises crimes committed by children of and below ten years of age and those between the ages of 10 and 14 are 'in a twilight zone in which they are morally responsible not as a class, but as individuals when they know their act to be wrong. The Indian Penal Code, which needs updating in many portions, extends total immunity upto the age of seven (s. 82) and partial absolution upto the age of twelve (s. 83). The latter provision reads :

"83. Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

No evidence as to whether he was under twelve, as conditioned by s. 83 IPC is adduced; no attention to feeble understanding or youthful frolic is addressed. And we are past the judicial decks where factual questions like this can be investigated. The *prima facie* inference of intent to endanger the life of the deceased with a sharp weapon stands unrebutted. Indeed, robust realism easily imputes *doli capax* to a twelver who cuts on the neck of another with a sword; for, if he does not know this to be wrong or likely to rip open a vital part he must be very abnormal and in greater need of judicial intervention for normalisation.

The conviction under S. 326, IPC, therefore, must be reluctantly sustained. When such is the law, we cannot innovate to attenuate, submit to spasmodic sentiment, or ride an unregulated benevolence. We cannot forget Benjamin Cardozo's caveat that "the Judge, even when he is free, is still not wholly free". Fettered by the law, we uphold the conviction.

Now to the issue of ‘sentence’. Guidelines for sentencing are difficult to prescribe and more difficult to practice. ...

The dignity and divinity, the self-worth and creative potential of every individual is a higher value of the Indian people; special protection for children is a constitutional guarantee writ into Art. 15(3) and 39(f). Therefore, without more, our judicial processes and sentencing paradigms must lead kindly light along the correctional way. That is why Gandhiji emphasized the hospital setting, the patient’s profile in dealing with ‘criminals’. In-patient, out-patient and domiciliary treatment with curative orientation is the penological reverence to the Father of the Nation. A necessary blossom of this ideology is the legislative development of criminological pediatrics. And yet it is deeply regrettable that in Bihar, the land of the Buddha-the beacon-light whose compassion encompassed all living beings- the delinquent child is inhospitably treated.

... With all our boasts and all our hopes, our nation can never really be decriminalized until the crime of punishment of the young deviants is purged legislatively, administratively and judicatively. This twelve-year old delinquent would have had a holistic career ahead, instead of being branded a murderer, had a Children Act refined the Statute Book and the State set up Children’s Courts and provided for healing the psyche of the little human.

Conceptually, the establishment of a welfare-oriented jurisdiction over juveniles is predicated and over-judicialisation and over-formalisation of court proceedings is contraindicated. Correctionally speaking, the perception of delinquency as indicative of the person’s underlying difficulties, inner tensions and explosive stresses similar to those of maladjusted children, the-belief that court atmosphere with forensic robes, gowns and uniforms and contentious disputes and frowning paraphernalia like docks and stands and crowds and other criminals marched in and out, are psychically traumatic and socially astigmatic, argues in favour of more informal treatment by a free mix of professional and social workers and experts operating within the framework of the law. There is a case to move away from the traditional punitive strategies in favour of the nourishing needs of juveniles being supplied by means of a treatment-oriented perspective. This radicalisation and humanisation of *jus juvenalis* has resulted in legislative projects which jettison procedural rigours and implant informal and flexible measures of freely negotiated non-judicial settlement of cases. These advances in juvenile criminology were reflected inter alia in the *Children Act, 1960*.

The rule of law in a Welfare State has to be operational and, if the State, after a make-believe legislative exercise, is too insouciant even to bring it into force by a, simple

notification, or renew it after its one year brevity, it amounts to a breach of faith with the humanism of our supreme lex, an abandonment of the material and moral well-being promised to, the children of the country in Art.39(f) and a subtle discrimination between child and child depending on the State where it is tried. We hopefully speak for the neglected child and wish that Bihar and, if there are other States placed in a similar dubiety or dilemma, they too-did make haste to legislate a *Children Act*, set up the burial and other infrastructure and give up retributivism in favour of restorative arts in the jurisdiction of young deviants. Often, the sinner is not the boy or girl but the broken or indigent family and the indifferent and elitist society. The law has a heart-or, at least, must have. Mr. Justice Fortas, speaking for the U.S. Supreme Court in *Kent v. United States*, said "There may be grounds of concern that the child receives the worst of both worlds; that he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children." [383, U.S. 541, 556 (1966), quoted in Siddique, *supra*, p. 149]

The Indian child must have a new deal. ...

The absence of a *Children Act* leads to a search for the probation provisions as alternative methods of prophylaxis and healing. In 1951, the UNESCO recommended a policy of probation as a major instrument of therapeutic forensics.

We have to turn to correctional and rehabilitative directions while confirming the four-year term. We affirm the period of the sentence since there is no particular reason why a very short term should be awarded. When a young person is being processed correctionally, a sufficient restorative period to heal the psychic wounds is necessary. However, the more sensitive question turns on how, behind the prison walls, behavioral techniques can be built in to repair the distortions of his mind. Stressologists tell us, by scientific and sociological research, that the cause of crime in most cases is inner stress, mental disharmony and unresolved tension. In this very case, the lad of twelve was tensed into irresponsible sword play as a result of fraternal provocation and paternal injury. It is, therefore, essential that the therapeutic orientation of the prison system, vis a vis the appellant, must be calculated to release stresses, resolve tensions and restore inner balance.

This is too complicated a question and, in some measure, beyond the judicial expertise, so that we have to borrow tools and techniques from specialists, researchers and sociologists. The ancient admonition of the Rigveda, ('Let noble thoughts come to us from every side-Rigveda 1-89-i) is a good guideline here. From Lenin and Gandhi to leading sociologists,

criminologists and prison-management officials, it is established that work designed constructively and curatively, with special reference to the needs of the person involved, may have a healing effect and change the personality of the quondam criminal. The mechanical chores and the soulless work performed in jail premises under the coercive presence of the prison warden and without reference to relaxation or relish may often be counter-productive. Even the apparel that the convict wears burns into him humiliatingly, being a distinguishing dress constantly reminding him that he is not an ordinary human but a criminal. We, therefore, take the view that within the limits of the prison rules obtaining in Bihar, reformatory type of work should be prescribed for the appellant in consultation with the medical officer of the jail. The visiting team of the Central Prison will pay attention to see that this directive is carried out. The appellant, quite a young man, who was but a boy when the offence was committed, shall not be forced to wear convict costume provided his guardians supply him normal dress. These harsh obscurantism must gradually be eroded from our jails by the humanizing winds that blow these days. We mentioned about stressfully. One method of reducing tension is by providing for vital links between the prisoner and his family. A prisoner insulated from the world becomes bestial and, if his family ties are snapped for long, becomes de-humanised. Therefore we regard it as correctionally desirable that this appellant be granted parole and expect the authorities to give consideration to paroling out periodically prisoner-,, particularly of, the present type for reasonable spells, subject to sufficient safeguards ensuring their proper behavior outside and prompt return inside.

More positive efforts are needed to make the man whole, and this takes us to the domain of mind culture. Modern scientific studies have validated ancient vedic insights bequeathing to mankind new meditation, yogic and other therapeutics, at once secular, empirically tested and trans-religious. The psychological, physiologic and sociological experiments conducted on the effects of Transcendental Meditation (TM, for short) have proved that this science of creative intelligence, in its meditational applications, tranquillises the tense inside, helps meet stress without distress, overcome inactivations and instabilities and by holistic healing normalises the severed and fatigued man. Rehabilitation of psychiatric patients, restoration of juvenile offenders, augmentation of moral tone and temper and, more importantly, improvement of social behaviour of prisoners are among the proven findings recorded by researchers. Extensive studies of TM in many prisons in the U.S.A. Canada, Germany and other countries are reported to have yielded results of improved creativity, higher responsibility and better behaviour. Indeed, a few trial courts in the, United States have actually prescribed(1) TM as a recipe for rehabilitation. As Dr. M.P. Pai, Principal of the Kasturba Medical College, Mangalore, has put down "Meditation is a

science and this should be learnt under guidance and cannot be just picked up from books. Objective studies on the effects of meditation on human body and mind is a modern observation and has been studied by various investigation at MERU- Maharishi European Research University. Its tranquillising effect on body and mind, ultimately leading to the greater goal of Cosmic Consciousness or universal awareness, has been studied by using over a hundred parameters. Transcendental Meditation practised for 15 minutes in the morning and evening every day brings about a host of beneficial effects. To name only a few :

1. Body and mind gets into a state of deep relaxation.
2. B. M. R. drops, less oxygen is consumed.
3. E.E.G. shows brain wave coherence with 'alpha' wave preponderance.
4. Automatic stability increases.
5. Normalisation of high blood pressure.
6. Reduced use of alcohol and tobacco.
7. Reduced stress, hence decreased plasma cortisol and blood lactate.
8. Slowing of the heart etc.

The self of every man has been found to be his consciousness, and its full potential is found in the state of least excitation of consciousness, which is the most simple of awareness.

...

Even so, it is not for the court, at the present stage, to prescribe what the prison authorities should do with the appellant while he is in their charge. Nevertheless, we emphasize how important it is for the prison department to explore, experiment and organize gradually some of these reformative exercises in order to eliminate recidivism and induce rehabilitation. We make these observations in the expectation that, facilities being available and the prisoner's consent being forthcoming, he will be given, under proper initiation and medical authorisation, courses which will refine his behaviour, develop his full potential and thereby justify the justice of his forced tenancy for four years.

Within the limits of the Prison Act and rules, there is room for reform of the prisoner's progress. And the court, whose authority to sentence deprives the sentence of his constitutional freedoms to a degree, has the power-indeed, the duty to invigorate the

intramural man-management so that the citizen inside has spacious opportunity to unfold his potential without over such inhibition or sadistic overseeing. No traditional judicial hand off doctrine nor Prison department's Monroe doctrine can dissuade or disentitle this Court from issuing directives, consistently with law, for the purpose of compelling the institutional confinement to conform to the spirit and standards of the fundamental rights which belong to the man walled off. We cannot, in all conscience, order him to be shut up and forget about him. The breeding presence of judicial vigilance is the institutional price of prison justice.

...

Counsel for the State drew our attention to the vintage measures lost in the statute book like the Reformatory Schools Act as well as the Borstal Schools Act, apart from the *Probation of Offenders Act* and the rules under these laws. This study has served only to convince us that, while statutory guidelines to fix the quantum of punishment are marked by uncanalised fluidity, the court's correctional role in meaningful sentencing is marginal, justifying judge Marvin E. Frankel's cynical expression-Criminal Sentences : Law without Order. The Rai prisons continue gerentologically in their grimy grimness; the dress, diet, bed, drill, Organisation and discipline why, even the philosophy and fears-have hardly responded to rehabilitative penology or humane decency. Indeed, it is still an attitude of 'lock them up and throw away the key', save for some casual 'open Jail' experiments and radical phrases in academic literature. We omit the Chambal oasis where changes are being tried out. And this is a startling anti-climax when we remember that our Freedom Struggle had found nearly all post-Independence leaders in wrathful incarceration and most India Ministers, now and before, had been no strangers to prison torments. The time, has come, for reform of the sentencing process with flexibility, humanity, restoration and periodic review informing the system and involving the court in the healing directions and corrections affecting the sentence where judicial power has cast into the 'cage'. For the nonce, however, we, as judges, have to work within the law as it now stands. And we cannot impose what is not sanctioned or is not accepted by the State. So we have couched what would have been binding man dates in terms of hopeful half-imperatives. Subject to the observations regarding imprisonment and parole treatment of the appellant, we dismiss the appeal.

**Supreme Court of India
1994 (3) SCC 394**

P. Rathinam

vs

Union of India

B. L. HANSARIA, R.M.SAHAI, JJ.

Gandhiji once observed:

"Death is our friend, the trust of friends. He delivers us from agony. I do not want to die of a creeping paralysis of my faculties-- a defeated man".

The English poet William Ernest Henley wrote:

"I am the master of my fate, I am the captain of my soul."

2. Despite the above, Hamlet's dilemma of "to be or not to be" faces many a soul in times of distress, agony and suffering, when the question asked is "to die or not to die". If the decision be to die and the same is implemented to its fructification resulting in death, that is the end of the matter. The dead is relieved of the agony, pain and suffering and no evil consequences known to our law follow. But if the person concerned be unfortunate to survive, the attempt to commit suicide may see him behind bars, as the same is punishable under Section 309 of our Penal Code.
3. The two petitions at hand have assailed the validity of Section 309 by contending that the same is violative of Articles 14 and 21 of the Constitution and the prayer is to declare the section void. The additional prayer in Writ Petition (Crl.) No. 419 of 1987 is to quash the proceedings initiated against the petitioner (Nagbhusan) under Section 309.
4. The judiciary of this country had occasion to deal with the aforesaid aspect; and we have three reported decisions of the three High Courts of the country, namely, Delhi, Bombay and Andhra Pradesh on the aforesaid question. There is also an unreported decision of the Delhi High Court. It would be appropriate and profitable to note at the threshold what the aforesaid three High Courts have held in this regard before we apply our mind to the issue at hand.
5. The first in point of time is the decision of a Division Bench of Delhi High Court in *State v. Sanjay Kumar Bhatial* (1985 Cri LJ 931) in which the Court was seized with

the question as to whether the investigation of the case under Section 309 should be allowed to continue beyond the period fixed by Section 368 CRPC. Some loud thinking was done by the Bench on the rationale of Section 309. Sachar, J., as he then was, observed for the Bench:

"It is ironic that Section 309 IPC still continues to be on our Penal Code. ... Strange paradox that in the age of votaries of Euthanasia, suicide should be criminally punishable. Instead of the society hanging its head in shame that there should be such social strains that a young man (the hope of tomorrow) should be driven to suicide compounds its inadequacy by treating the boy as a criminal. Instead of sending the young boy to psychiatric clinic it gleefully sends him to mingle with criminals.... The continuance of Section 309 IPC is an anachronism unworthy of a human society like ours. Medical clinics for such social misfits certainly but police and prisons never. The very idea is revolting. This concept seeks to meet the challenge of social strains of modern urban and competitive economy by ruthless suppression of mere symptoms this attempt can only result in failure. Need is for humane, civilised and socially oriented outlook and penology.... No wonder so long as society refuses to face this reality its coercive machinery will invoke the provision like Section 309 IPC which has no justification to continue to remain on the statute book."

6. Soon came the Division Bench decision of Bombay High Court in *Maruti Shripati Dubal v. State of Maharashtra* (1987 Cri LJ 743) in which the Bench speaking through Sawant, J., as he then was, on being approached for quashing a prosecution launched against the petitioner under Section 309 of the Penal Code on the ground of unconstitutionality of the section, took the view and that the section was ultra vires being violative of Articles 14 and 21 and was therefore struck down. We would note the reasons for the view taken later.
7. Close on the heels was the decision of a Division Bench of Andhra Pradesh High Court in *Chenna Jagadeeswar v. State of A.P.* (1988 Cri LJ 549) in which on the High Court being approached against the conviction of the appellants under Section 309, inter alia, on the ground of the section being violative of Articles 14 and 21 of the Constitution, the Bench held that the section was valid as it did not offend any of these articles. The Bombay view was dissented to; the reasons of which also we shall advert to later.
8. The unreported decision of the Delhi High Court has been noted in the articles of Shri B.B. Pande, Reader in Law, University of Delhi, as published in Islamic and Comparative Law Quarterly [Vol. VII(1), March 1987 at pp. 112 to 120] and of Shri Faizan Mustafa, Lecturer, Department of Law, Aligarh Muslim University [(1993) 1 SCJ Journal Section at pp. 36 to 42]. That decision was rendered in a suo motu proceeding

titled as *Court on its own Motion v. Yogesh Sharma* (Registered as Cri. Revision No. 230 of 1985). The decision was rendered by Sachar, C.J. The Court once again pointed out the futility of creating criminal liability in suicide cases, but instead of striking down the section or declaring it invalid, what the learned Chief Justice did was to quash all the 119 proceedings pending in the trial courts on the ground that dragging of the prosecutions for years when the victims have had enough of misery and the accused also belonged to poorer section which added further insult to the injury, would be abuse of the process of the court. Being of this view, each of the accused was directed to be acquitted.

...

15. We may now note the reasons given by the Bombay High Court in *Shripati's case* (1987 Cri LJ 743) for striking down the section as violation of Article 21. These reasons are basically three:

- (1) Article 21 has conferred a positive right to live which carries with it the negative right not to live. In this connection it has been first stated that the fundamental rights are to be read together as held in *R. C. Cooper v. Union of India* ((1970) 2 SCC 298). Mention was then made of freedom of speech and expression, as to which it was observed that the same includes freedom not to speak and to remain silent. Similarly, about the freedom of business and occupation, it was stated that it includes freedom not to do business.
- (2) Notice was then taken of the various causes which lead people to commit suicide. These being mental diseases and imbalances, unbearable physical ailments, affliction by socially-dreaded diseases, decrepit physical condition disabling the person from taking normal care of his body and performing the normal chores, the loss of all senses or of desire for the pleasures of any of the senses, extremely cruel or unbearable conditions of life making it painful to live, a sense of shame or disgrace or a need to defend one's honour or a sheer loss of interest in life or disenchantment with it, or a sense of fulfilment of the purpose for which one was born with nothing more left to do or to be achieved and a genuine urge to quit the world at the proper moment.
- (3) The Bench thereafter stated that in our country different forms of suicide are known. These being: Johars (mass suicides or self-immolation) of ladies from the royal houses to avoid being dishonoured by the enemies; Sati (self-immolation by the widow on the burning pyre of her deceased husband); Samadhi (termination of one's life by self-restraint on breathing); Prayopaveshan (starving unto death); and

Atmarpana (self-sacrifice). It was also observed that the saints and savants, social, political and religious leaders have immolated themselves in the past and do so even today by one method or the other and society has not only not disapproved of the practice but has eulogised and commemorated the practitioners. It may be pointed out that the Bench made a distinction between “suicide” and “mercy-killing”; so also, between suicide and aiding or abetting the same.

16. The Bombay High Court held Section 309 as violation of Article 14 also mainly because of two reasons. First, which act or acts in series of acts will constitute attempt to suicide, where to draw the line, is not known some attempts may be serious while others non-serious. It was stated that in fact philosophers, moralists and sociologists were not agreed upon what constituted suicide. The want of plausible definition or even guidelines, made Section 309 arbitrary as per the learned Judges. Another reason given was that Section 309 treats all attempts to commit suicide by the same measure without referring to the circumstances in which attempts are made.
17. The first of the aforesaid reasons is not sound, according to us, because whatever differences there may be as to what constitutes suicide, there is no doubt that suicide is intentional taking of one's life, as stated at p. 1521 of Encyclopaedia of Crime and Justice, Vol. IV, 1983 Edn. Of course, there still exists difference among suicide researchers as to what constitutes suicidal behaviour, for example, whether narcotic addiction, chronic alcoholism, heavy cigarette smoking, reckless driving, other risk-taking behaviours are suicidal or not. It may also be that different methods are adopted for committing suicide, for example, use of firearms, poisoning especially by drugs, overdoses, hanging, inhalation of gas. Even so, suicide is capable of a broad definition, as has been given in the aforesaid Webster's Dictionary. Further, on a prosecution being launched it is always open to an accused to take the plea that his act did not constitute suicide whereupon the court would decide this aspect also.
18. Insofar as treating of different attempts to commit suicide by the same measure is concerned, the same also cannot be regarded as violative of Article 14, inasmuch as the nature, gravity and extent of attempt may be taken care of by tailoring the sentence appropriately. It is worth pointing out that Section 309 has only provided the maximum sentence which is up to one year. It provides for imposition of fine only as a punishment. It is this aspect which weighed with the Division Bench of Andhra Pradesh High Court in its aforesaid decision to disagree with the Bombay view by stating that in certain cases even Probation of Offenders Act can be pressed into service, whose Section 12 enables the court to ensure that no stigma or disqualification is attached to such a person. (See para 32 of the judgment.)

19. We agree with the view taken by the Andhra Pradesh High Court as regards Section 309 qua Article 14. But the Bombay Bench itself was more involved with Article 21 and violation of it by Section 309, the reasons whereof have been noted. Whether these are sound and tenable, would be our real consideration.
20. The Bombay High Court's decision led some thinkers to express their own views. We have noted who they were. The broad points of their objection/criticism were these:
 - (1) suicide is an act against religion;
 - (2) it is immoral;
 - (3) it produces adverse sociological effects;
 - (4) it is against public policy (This has also been the main argument of the counsel of Union of India before us.);
 - (5) it damages monopolistic power of the State, as State alone can take life; and
 - (6) it would encourage aiding and abetting of suicide and may even lead to 'constitutional cannibalism'.
21. We shall in due course see whether the aforesaid objections raised against the Bombay judgment are valid. Concerned as we are with the broad contention that Section 309 is violative of Article 21, we shall first inform ourselves as to the content and reach of this article and then answer in a general way as to whether a person residing in India has a right to die. Section 309 being a part of our enacted law, we would desire to know what object a law seeks to achieve. This section having made attempt to commit suicide an offence, we shall ask the question as to why is a particular act treated as crime and what acts are so treated. We shall then apply our mind to the purposeful query as to how a crime can be prevented. Being seized with the crime of 'attempted suicide', we shall apprise ourselves as to why suicides are committed and how can they be really prevented. We would also desire to know what type of persons have been committing suicides and what had been their motivations. We would then view the act of committing suicide in the background of our accepted social ethos. Having done so, we shall take up the points of criticism noted above one by one and express our views on the same.
22. Having known that the Law Commission of India had in its 42nd Report of 1971 recommended deletion of Section 309, we shall put on record as to why was this recommendation made and how was the same viewed by the Central Government; and what steps, if any, were taken by it to implement the recommendation. What is the present thinking of the Union of India shall also be taken note of.

23. Finally, we shall open our mental window a little to allow breeze to come from other parts of the world, inter alia, because Gurudev (Rabindranath Tagore, the Nobel Laureate) wanted us to do so. Globalisation has, in any case, been accepted by us in some other fields of our activities. We have stated opening of this window "a little" because we propose to confine ourselves to know whether attempt to commit suicide is presently a crime only in two other countries of the globe they being United Kingdom and United States of America. The reasons for our selecting these two countries shall be indicated when we shall advert to our 'global view' query. It may only be stated here that we are opening the window only a little, as, the little air that would pass through the little aperture would be enough, in our view, to enable us to have broad knowledge of global view on the subject under consideration.
24. The aforesaid mental odyssey would take us through a long path before we would reach our destination, our conclusion. Finale would, however, come after we have answered or known the following:
- (1) Has Article 21 any positive content or is it merely negative in its reach?
 - (2) Has a person residing in India a right to die?
 - (3) Why is a law enacted? What object(s) it seeks to achieve?
 - (4) Why is a particular act treated as crime/What acts are so treated?
 - (5) How can crimes be prevented?
 - (6) Why is suicide committed?
 - (7) Who commits suicide? Secularisation of suicide?
 - (8) How suicide-prone persons should be dealt with?
 - (9) Is suicide a non-religious act?
 - (10) Is suicide immoral?
 - (11) Does suicide produce adverse sociological effects?
 - (12) Is suicide against public policy?
 - (13) Does commission of suicide damage the monopolistic power of the State to take life?
 - (14) Is apprehension of 'constitutional cannibalism' justified?
 - (15) Recommendation of the Law Commission of India and follow-up steps taken, if any.
 - (16) Global view? What is the legal position in other leading countries of the world regarding the matter at hand?

25. The aforesaid questions, which have been framed keeping in mind the information we thought necessary to enable us to decide the important matter at hand to our satisfaction, have been listed as above keeping in view their comparative importance for our purpose the most important being he first and so on; and we propose to answer them in the same sequence.

26. Has Article 21 any positive content or is it merely negative in its reach?

(1) This question is no longer res integra inasmuch as a Constitution Bench of this Court in *Unnikrishnan v. State of A.P.* (1993) 1 SCC 645) [in which right to receive education up to the primary stage has been held to be a call of Article 1] has virtually answered this question. This would be apparent from what was stated by Mohan, J. in paragraph 19 and by Jeevan Reddy, J. in paragraph 170. In paragraph 30, Mohan, J. has mentioned about the rights which have been held to be covered under Article 21. These being:

- (a) The right to go abroad. *Satwant Singh Sawhney v. D. Ramarathnam APO, New Delhi* (AIR 1967 SC 1836).
- (b) The right to privacy. *Gobind v. State of M.P.* ((1975) 2 SCC 148) In this case reliance was placed on the American decision in *Griswold v. Connecticut* ((1965) 381 US 479).
- (c) The right against solitary confinement. *Sunil Batra v. Delhi Administration* (AIR 1978 SC 1675).
- (d) The right against bar fetters. *Charles Shobraj v. Supdt., Central Jail* (AIR 1978 SC 1514).
- (e) The right to legal aid. *M.H. Hoskot v. State of Maharashtra* (AIR 1978 SC 1548).
- (f) The right to speedy trial. *Hussainara Khatoon v. Home Secretary, State of Bihar* (AIR 1979 SC 1360)
- (g) The right against handcuffing. *Prem Shankar Shukla v. Delhi Administration* (AIR 1980 SC 1535).
- (h) The right against delayed execution. *T. V. Vatheeswaran v. State of T. N.* [AIR 1983 SC 361 (2)].
- (i) The right against custodial violence. *Sheela Barse v. State of Maharashtra* (AIR 183 SC 378).
- (j) The right against public hanging. *A.G. of India v. Lachma Devi* (AIR 1986 SC 467).

- (k) Doctor's assistance. *Paramanand Katra v. Union of India* (AIR 1989 SC 2039)
- (l) Shelter. *Shantistar Builders v. N.K. Totame* (AIR 1990 SC 630).
- (2) The aforesaid is enough to state that Article 21 has enough of positive content in it. As to why the rights mentioned above have been held covered by Article 21 need not be gone into, except stating that the originating idea in this regard is the view expressed by Field, J. in *Munn v. Illinois* (1876) 94 US 113, in which it was held that the term 'life' (as appearing in the 5th and 14th amendments to the United States Constitution) means something more than 'mere animal existence'. This view was accepted by a Constitution Bench of this Court in *Sunil Batra v. Delhi Administration* AIR 1978 SC 1675 (paras 56 and 226), to which further leaves were added in *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkami* AIR 1983 SC 109 (para 13); *Vikram Deo Singh Tomar v. State of Bihar* AIR 1988 SC 1782 (para 5); and *Ram Sharan Autyanuprasi v. Union of India* AIR 1989 SC 549 (para 13). In these decisions it was held that the word 'life' in Article 21 means right to live with human dignity and the same does not merely connote continued drudgery. It takes within its fold "some of the finer graces of human civilization, which makes life worth living", and that the expanded concept of life would mean the "tradition, culture and heritage" of the person concerned.
- (3) It would be relevant to note the decision in *State of Himachal Pradesh v. Umed Ram Sharma*, AIR 1986 SC 847. It was observed there in paragraph 11 that the right to life embraces not only physical existence but the quality of life as understood in its richness and fullness by the ambit of the Constitution; and for residents of hilly areas access to road was held to be access to life itself, and so necessity of road communication in a reasonable condition was held to be a part of constitutional imperatives, because of which the direction given by the Himachal Pradesh High Court to build road in the hilly areas to enable its residents to earn livelihood was upheld. What can be more positive and kicking?
- (4) We may also refer to the article of Dr M. Indira and Dr Alka Dhal under the caption "Meaning of Life, Suffering and Death" as read in the International Conference on Health Policy, Ethics and Human Values held at New Delhi in 1986. This is what the learned authors stated about life in their article:

"Life is not mere living but living in health. Health is not the absence of illness but a glowing vitality the feeling of wholeness with a capacity for continuous intellectual and spiritual growth. Physical, social, spiritual and psychological well-being are intrinsically interwoven into the fabric of life. According to Indian philosophy that which is born must die. Death is the only certain thing in life."

- (5) May it be said that in *CESC Ltd. Vs. Subhas Chandra Bose*, (1992) 1 SCC 441: (1992 AIR SCW 202); it has been opined by Ramaswamy, J. (who is, of course, a minority Judge) that physical and mental health have to be treated as integral part of right to life, because without good health the civil and political rights assured by our Constitution cannot be enjoyed.

27. Has a person residing in India right to die?

- (1) If a person has a right to live, question is whether he has right not to live. The Bombay High Court stated in paragraph 10 of its judgment that as all the fundamental rights are to be read together, as held in *R.C. Cooper v. Union of India*, AIR 1970 SC 1318, what is true of one fundamental right is also true of another fundamental right. It was then stated that it is not, and cannot be, seriously disputed that fundamental rights have their positive as well as negative aspects. For example, freedom of speech and expression includes freedom not to speak. Similarly, the freedom of association and movement includes freedom not to join any association or move anywhere. So too, freedom of business includes freedom not to do business. It was, therefore, stated that logically it must follow that the right to live will include right not to live, i.e., right to die or to terminate one's life.
- (2) Two of the abovenamed critics of the Bombay judgment have stated that the aforesaid analogy is "misplaced", which could have arisen on account of superficial comparison between the freedoms, ignoring the inherent difference between one fundamental right and the other. It has been argued that the negative aspect of the right to live would mean the end or extinction of the positive aspect, and so, it is not the suspension as such of the right as is in the case of 'silence' or 'non-association' and 'no movement'. It has also been stated that the right to life stands on different footing from other rights as all other rights are derivable from the right to live.
- (3) The aforesaid criticism is only partially correct inasmuch as though the negative aspect may not be inferable on the analogy of the rights conferred by different clauses of Article 19, one may refuse to live, if his life be not according to the person concerned worth living or if the richness and fullness of life were not to demand living further. One may rightly think that having achieved all worldly pleasures or happiness, he has something to achieve beyond this life. This desire for communion with God may very rightly lead even a very healthy mind to think that he would forego his right to live and would rather choose not to live. In any case, a person cannot be forced to enjoy right to life to his detriment, disadvantage or disliking.

- (4) From what has been stated above, it may not be understood that according to us the right encompassed or conferred by Article 21 can be waived. Need for this observation has been felt because it has been held by a Constitution Bench in *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180 that a fundamental right cannot be waived. A perusal of that judgment, however, shows that it dealt more with the question of estoppel by conduct about which it can be said that the same is a facet of waiver. In the present cases, we are, however, not on the question of estoppel but of not taking advantage of the right conferred by Article 21.
- (5) Keeping in view all the above, we state that right to live of which Article 21 speaks of can be said to bring in its trail the right not to live a forced life.
- (6) In this context, reference may be made to what Alan A. Stone, while serving as Professor of Law and Psychiatry in Harvard University stated in his 1987 Jonas Robitscher Memorial Lecture in Law and Psychiatry, under the caption "The Right to Die : New Problems for Law and Medicine and Psychiatry". (This lecture has been printed at pp. 627 to 643 of Emory Law Journal, Vol. 37, 1988). One of the basic theories of the lecture of Professor Stone was that right to die inevitably leads to the right to commit suicide.

28. Why is a law enacted? What object(s) it seeks to serve?

- (1) Section 309 being a part of our enacted law, let it be known as to why a law is framed or is required to be framed. To put it differently, what objects are sought to be achieved by framing laws. For our purpose it would be enough if what has been stated by Shri M. Ruthnaswamy in Chapters 5 and 6 of his book *Legislation: Principles and Practice* (1st Edn., 1974) (the Chapter headings being "Principles of Legislation in History" and "Contemporary Principles of Legislation"), is noted. The learned author has within a short compass brought home the different principles which had held sway in different parts of the world at different points of time. Ruthnaswamy starts in Chapter 5 by saying that it is from the time of the Renaissance and the Reformation when men, as a result of these great revolutionary movements broke away from rule of custom and tradition, that legislation began its career as an instrument of social and political, and even religious, change. The readers are then informed as to what Richard Hooker (1554-1600) thought on the question of law which, according to him, has to be influenced by experience and supported by reason.

- (2) The next important thinker of England after Hooker was the famous Francis Bacon (1561-1626). In his 'Essays' (the most popular of his works) we find his views on legislators and legislation. Bacon stood out for progress and utility and was of the view that it was not good to try experiments in legislation. As against Bacon there was Sir Edward Coke, who was a defender of the rights of the Parliament. Mention is then made about John Locke (1632-1704) according to whom the laws made must respect the right to liberty and property; and laws must be made for the good of the people.
- (3) Ruthnaswamy then takes the reader to France and mentions about Montesquieu (1689-1755), who in his famous Spirit of Laws published in 1748, which has been regarded as a great classic of political and legal literature, rendered immemorial service to legislation and legislatures. In this monumental work, he insists that laws and legislation should be in conformity with the spirit of the people, if its traditions, its philosophy of life, even the physical surroundings of the people, including the climate. The journey is then to Germany, where Leibnitz (1646-1717), a philosopher, mathematician and adviser of kings and princes in Germany and Europe, took the view that greatness of law is proved by the fact that great rulers were also great law-givers. Names of Augustus, Constantine and Justinian are mentioned in this regard. The German philosopher further said that the law must serve morality, because what is against morals is bad law.
- (4) Readers then find themselves in Italy and they are acquainted with Beccaria (1739-1794), who through his pamphlet under the title Delict and Crimes published in 1766 brought a revolution in the theory and practice of punishment, because, according to him, punishment of crime must be used only for the defence of the State and the people and not for retribution and revenge which principles were holding the field then.
- (5) As per sequence of time, the next writer to be mentioned is Edmund Burke (1727-1797), who was a parliamentarian, statesman and political thinker. According to him the main essential of good laws and legislation is that the same should be fit and equitable, so that the legislature has a right to demand obedience. He would say there are two fundamental principles of legislation equity and utility.
- (6) Blackstone is a name which is immortal in the world of legal jurisprudence. It is his Commentaries on the Laws of England (1765) which has made him so. He emphasised on the inviolability of common law, freedom of persons and property. After Blackstone, came Bentham (1748-1832) and the Utilitarians.

- (7) Ruthnaswamy has also acquainted the readers about the views of Plato, Aristotle, Cicero and Thomas Aquinas, so also what Voltaire (1694-1773) had to say. We do not propose to burden this judgment with their views; but what was said by Macaulay (1800-1859) has to be noted, because it is he who had drafted our Penal Code. Macaulay believed in the efficacy of law in improving people and their character. He wrote:

"When a good system of law and police is established, when justice is administered cheaply and firmly, when idle technicalities and unreasonable rules of evidence no longer obstruct the search for truth, a great change of the better may be expected which shall produce a great effect on the national character."

- (8) In Chapter 6 of the book, Runthnaswamy has stated that after the principles of Benthamism and utilitarianism, reason, utility and individual liberty had exhausted themselves, humanitarianism occupied the field and it is this principle which has seen the enactments of statutes like Workmen's Compensation Act, Factories Act and various other statutes dealing with public health, sanitation and weaker sections.
- (9) We do not propose to dive further and would close this discussion by referring to what was stated by Ihering (1818- 1892) in his "Geist Des Romisches Rechts" (The Spirit of Roman Law), which has been accepted as a legal classic. According to Ihering, law is a means to an end. He laid down the following general principles of legislation:
- a. *Laws should be known to be obeyed.*
 - b. *Laws should answer expectations.*
 - c. *Laws should be consistent with one another.*
 - d. *Laws should serve the principle of Utility.*
 - e. *Laws should be methodical.*
 - f. *Laws must be certain to be obeyed, must not become a dead letter.*
 - g. *Laws are necessary to ward off the danger of the operations of egoism or self-interest, the ordinary motives of human action.*
 - h. *Law and legislation must aim at justice which is that which suits all.*
 - i. *Laws are interconnected "laws like human beings lean on one another."*

- (10) That humanitarianism is the throbbing principle of legislation presently has also been highlighted by Kartar Singh Mann in his article "Working of Legislatures in the matter of Legislation" appearing at pp. 491 to 495 of the Journal of Parliamentary Information, Vol. 33, 1987. What has been stated by Mann at p. 493 is relevant for

purpose the same being:

"In the historical perspective, one can easily appreciate the complexities and intricacies of legislation which the present legislatures are to face. Besides the ordinary laws which safeguard the rights and liberties of the individual, there are certain fundamental laws which ordinary legislation may not change. In countries like France, Germany and India which are having their written Constitutions their fundamental laws are embodied there itself. The fundamental principles on which the political life of the people is based are individuality, equality and justice. After securing the life and liberty of the State and of the individual, laws and legislations take on the task of serving and promoting the good life of the State and the people. For good life, morality is necessary and to maintain morality legislation is a must. Legislation is the framework which is required to be made for good life."

- (11) What was opined by Ian Temy, Q.C., Director of Public Prosecution in his article 'Euthanasia - Is It murder?' [as printed at pp. 2 to 7 of Australian Journal of Forensic Sciences, Vol. 21 (1), September 1988] is also relevant for our purpose. That article was concluded at p. 7 in these words:

"I have necessarily spoken about the law as it is. There is nothing immutable about it. To the extent it does not meet social needs and a strong consensus emerges to that effect, the law can and should be changed....."

- (12) The aforesaid show that law has many promises to keep including granting of so much of liberty as would not jeopardise the interest of another or would affect him adversely, i.e., allowing of stretching of arm up to that point where the other fellow's nose does not begin. For this purpose, law may have "miles to go". Then, law cannot be cruel, which it would be because of what is being stated later, if persons attempting suicide are treated as criminals and are prosecuted to get them punished, whereas what they need is psychiatric treatment, because suicide basically is a "call for help", as stated by Dr (Mrs) Dastoor, a Bombay Psychiatrist, who heads an Organisation called "Suicide Prevent". May it be reminded that a law which is cruel violates Article 21 of the Constitution, a la, *Deena v. Union of India*, AIR 1983 SC 1155.

29. Why is a particular act treated as crime? What acts are so treated?

- (1) Earliest reference to the word "crime" dates back to 14th century when it conveyed to the mind something reprehensible, wicked or base. Any conduct which a sufficiently powerful section of any given community feels to be destructive of its own interest, as endangering its safety, stability or comfort is usually regarded as heinous and it is sought to be repressed with severity and the sovereign power

is utilised to prevent the mischief or to punish anyone who is guilty of it. Very often crimes are creations of government policies and the Government in power forbids a man to bring about results which are against its policies.

- (2) In a way there is no distinction between crime and tort, inasmuch as a tort harms an individual whereas a crime is supposed to harm a society. But then, a society is made of individuals, harm to an individual is ultimately harm to society.
- (3) A crime presents these characteristics:
 - a. it is a harm, brought about by human conduct which the sovereign power in the State desires to prevent;
 - b. among the measures of prevention selected is the threat of punishment; and
 - c. legal proceedings of a special kind are employed to decide whether the person accused did in fact cause the harm, and is, according to law, to be held legally punishable for doing so. (See pp. 1 to 5 of Kenny's Outlines of Criminal Law, 19th Edn., for the above propositions.)
- (4) Protection of society is the basic reason of treating some acts as crime. Indeed it is one of the aims of punishment. Where there is no feeling of security, there is no true freedom. What is the effect of the same cannot be described better than what was stated by Hobbes in Leviathan, which is:

"There is no place for industry, because the fruit thereof is uncertain; and consequently no culture of the earth; no navigation nor use of the commodities that may be imported by sea; no commodious building; no instrument of moving and removing such things as require much forces; no knowledge of the face of the earth; no account of time; no arts, no letters; no society; and which is worst of all continual fear and danger of violent death; and the life of a solitary, poor, nasty, brutish and short."

- (5) As constitutionality of Section 309 has been assailed as being violative of Article 21 which protects life and personal liberty, it would be in fitness of things to note what J.S. Mill had to say about making an act relatable to personal liberty punishable. This is what Mill had said in this connection in his famous tract 'on liberty':

"The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised

community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others to do so would be wise, or even right. These are good reasons for remonstrating with him or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he does otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone, for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign." (emphasis supplied)

- (6) The very definition of 'crime' depends on the values of a given society. To establish this what has been stated by Justice Krishna Iyer in his book on '*Perspectives in Criminology, Law and Social Change*' (1980) at pp. 7 and 8 may be noted:

"What is a sex crime in India may be sweetheart virtue in Scandinavia. What is an offence against property in a capitalist society may be a lawful way of life in a socialist society. What is permissible in an affluent economy may be a pernicious vice in an indigent community. Thus, criminologists must have their feet all the time on terra firma."

- (7) Not only this, crimes can also be created or abolished with the passage of time, as stated at page 7 of R.S. Cavan's '*Criminology*' (2nd Edn.). This has been elucidated by the author by stating that in democracy where individual opinion can express itself freely through speaking, writing and elections, public opinion becomes the final arbiter in placing the opprobrium of crime upon a specific type of behaviour and when a law is not accepted the police may attempt to enforce it against public opinion, but gradually the police yield to the pressure of public opinion, which they perhaps share. The law may remain on the statute books but be ignored by all. Whereas when the public opinion supports the law, many pressures of an informal nature are brought against the violators to aid and lessen the police action.

30. How can crimes be prevented?

- (1) The aforesaid subject is too wide and cannot be discussed meaningfully within the parameters available to us in this judgment. The treatise on Crime and its Prevention edited by Stephen Lewin, Editor, World Week Magazine, would show how complicated the subject is. At p. 217 of the 3rd printing (1973) mention has been made about seven steps for combating a crime. We may not go into the details. Sufficient to say that the steps relate to different disciplines.

- (2) Professor Dr N.V. Paranjape, Professor and Head of the Department of Postgraduate and Research in Law and Dean Faculty of Law, Jabalpur University, in his book Criminiology and Penology has something to say in Chapter VI about causes of crime, knowledge of which is necessary to combat and prevent the same. Dr Paranjape states that in the absence of a single theory of crime-causation, criminologists have offered different explanations to justify their own theory as an explanation of delinquent behaviour. There are, however, some writers who seem to be convinced that no single theory of crime can fully explain the causes of crime. They therefore prefer a multiple approach to criminal behaviour which suggests that crime is generated not as a result of one solitary factor but as a consequence of a combination of such factors.
- (3) Justice Krishna Iyer also in his aforesaid book has dealt with this aspect in Chapter 2 captioned "The Pathology of Indian Criminology". In his usual inimitable style, he has painted the crime scenario on a broad canvas and has mentioned about various factors which lead to commission of crimes.
- (4) Reference may also be made to the White Paper presented to the Parliament by Her Majesty's Government in 1990 on the subject of "Crime, Justice and Protecting the Public", published as Cm. No. 965. The White Paper has summarised main proposals as below:

"A coherent legislative framework for sentencing with the severity of the punishment matching the seriousness of the crime and a sharper distinction in the way the courts deal with violent and non-violent crimes;

New powers for the Crown Court to impose longer sentences for violent and sexual offences, if this is necessary to protect the public from serious harm;

New powers for all courts to combine community service and probation and to impose curfews on offenders so that more offenders convicted of property crimes can be punished in the community;

Reducing the maximum penalties for theft and burglary, except burglaries of people's homes, which can be a very serious matter;

Requiring the courts to consider a report by the probation service before giving a custodial sentence and to give reasons for imposing a custodial sentence, except for the most serious offences;

Encouraging more use of financial penalties, especially compensation to victims and fines which take account of offenders' means;

Making the time actually served in prison closer to the sentence ordered by the court, replacing the present system of remission and parole by new arrangements which ensure that all prisoners serve at least half their sentences in custody;

prisoners serving sentences of 4 years or more would not get parole if this would put the public at risk; New powers for the courts to return released prisoners to custody up to the end of their sentence, if they are convicted of a further imprisonable offence;

All prisoners serving sentences of a year or more to be supervised by the probation service on release, with new national standards for supervision;

Wider powers for the courts to make parents take more responsibility for crimes committed by their children;

More flexible powers for the courts to deal with 16 and 17 year old offenders;

Changing the juvenile courts to youth courts, to deal with defendants under the age of 18."

- (5) It would be of some interest in this connection to point out that as late as 1991 a need was felt by the British Government to issue a Royal Warrant for issuing a commission to examine the effectiveness of the criminal justice in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who were innocent. For this purpose, the Royal Warrant wanted the commission to make its recommendation on various aspects of the criminal justice. The commission submitted its report in July 1993 and it contains recommendations which number 352 and have been mentioned at pp. 188 and 219 of the Report issued by Her Majesty's Stationery Office.
61. The difficult task of crime prevention would not therefore permit the solution to be put into a strait-jacket; it has to be modulated and moulded as per time and clime.

Effect of Punishment

- (6) The aforesaid is not enough for our purpose. We have also to know as to whether infliction of punishment can be said to have a direct relation with the reduction of criminal propensity. It would be enough in this context to state that it has been seriously doubted whether imposition of even death sentence has been able to reduce the number of murders. Bhagwati, J. as he then was, in his dissenting judgment in the case of *Bachan Singh v. State of Punjab*, AIR 1982 SC 1325 has brought home well this aspect of the matter.
- (7) While on the question of sentencing it would be rewarding to note that sentencing has been regarded as a subtle art of healing, and the legal and political people uninstructed in the humanist strategy of reformation, fail even on first principles. Justice Iyer in his aforesaid book has further stated at p. 47 that it puzzles a Judge or a Home Secretary to be told in Shavian paradox:

"If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him. And men are not improved by injuries."

- (8) What was said by Victor Hugo in his *Les Miserables* is instructive:

"We shall look upon crime as a disease. Evil will be treated in charity instead of anger. The change will be simple and sublime. The cross shall replace the scaffold, reason is on our side, feeling is on our side and experiment is on our side."

- (9) This is not all. It would be wrong to think that a person attempting to commit suicide does not get punished. He does. The agony undergone by him and the ignominy to be undergone is definitely a punishment, though not a corporal punishment; but then, Section 309 has provided for a sentence of fine also. Agony and ignominy undergone would be far more painful and deterrent than a fine which too may not come to be realised if the person concerned were to be released on probation.

31. Why is suicide committed?

- (1) "Suicide, the intentional taking of one's life, has probably been a part of human behaviour since pre-history. Many ancient texts including the Bible, the Koran and the Rig Veda, mention suicide. Because the act of self-destruction represents an attack on some of our presumptions that life is to be lived and death feared responses to suicide have involved a variety of emotionally-charged attitudes. These have ranged from approbation accorded to it by the ancient Greek stoics to, more typically, the fear and superstition that led 18th century Europeans to drive stakes through the hearts of those who had committed suicide." [Encyclopaedia of Crime and Justice (1 983), Vol. 4, p. 5 20]
- (2) The change in social thinking in this regard can be best illustrated by the view taken by the conservative English society where to start with suicide itself was regarded as a felony requiring burial in a public highway, followed by forfeiture of all the properties of the deceased to the Crown. Presently, the Suicide Act, 1961 does not even regard attempt to suicide as an offence.
- (3) Various social forces like the economy, religion and socioeconomic status are responsible for suicides. There are various theories of suicide, to wit, sociological, psychological, biochemical and environmental (*Ibid*, pp. 1523-24).
- (4) The causes of suicides are many and varying inasmuch as some owe their origin to sentiments of exasperation, fury, frustration and revolution; some are the result of feeling of burden, torture, and sadness. Some are caused by loss of employment, reversal of fortune, misery due to illness, family trouble and thwarted love.

Sometimes killing is in opposition to society and sometimes in opposition to particular persons. This happens when the person committing suicide nurses a feeling of unjust treatment, maltreatment and cruelty. [See the Causes of Suicide by Maurice Halbwachs (translated by Harold Goldblatt).] The Bombay judgment has mentioned many causes in paragraph 12 of its judgment which have been noted in paragraph 15 above. The same may not be repeated.

32. Who commits suicide? Secularisation of suicide?

- (1) Suicide knows no barriers of race, religion, caste, age or sex. In a study undertaken in United States, to which reference has been made at p. 14 of '*Suicidology: Contemporary Developments*' by E.S. Scheneidman, (1976), it was found that both Roman Catholics and Protestants were equally susceptible to commission of suicide. It is because of this that it has been felt in the United States that there is '*secularisation of suicide*'. In our country also Hindus, Muslims, Sikhs, Christians, Buddhists, Jains and Parsis are known to have been committing or attempting suicides. Though there has been no particular study as to the religious faith of the persons committing 419 suicide or attempting to commit suicide, it can safely be stated that there is '*secularisation of suicide*' in our country also.
- (2) While on the question 'who commits suicide', it would be relevant to state that there has been great increase in the number of commission of suicides. In his aforementioned article, Shri Faizan Mustafa pointed out that the number of suicides by the youths below 18 in 1986 was 7545. But out of about 60,000 persons who committed suicide in 1990 nearly half of them were aged between 18 to 25, which is generally considered to be the best period of a person's life.
- (3) As per the report published in Indian Express of 31-10- 1984, in Ahmedabad city 5 suicide cases had occurred during 24 hours immediately preceding 30th October. In a write-up as published in India Today of 15-10-1984 under the caption 'Bangalore: The Suicide City', it has been stated that Bangalore which had earned the title of 'Boom City' nearly a year ago, could more appropriately be described as 'Doom City' by last month. The figures collected for the first half of the year shocked the members of the State Legislature because of incredible 664 suicidal deaths over a six-month period, which was higher than the total combined figures for Calcutta and Hyderabad in the last three years.

33. How suicide-prone persons should be dealt with?

- (1) We now come to the question relating to the treatment to be given to the persons who attempt to commit suicide. Do they deserve prosecution because they had

failed? is the all important question. The answer has to be a bold 'NO'. The reasons are not far to seek. Let us illustrate this first by referring to the case of those 20 persons who committed suicide in Tamil Nadu distressed as they felt because of prolonged illness of Chief Minister, M.G. Ramachandran. That this had happened was published in the Indian Express of 28-10-1984. Question is whether these persons would have deserved prosecution had they failed in their attempt? The answer has to be that there can be no justification to prosecute such sacrificers of their lives. Similar approach has to be adopted towards students who jump into wells after having failed in examinations, but survive. The approach cannot be different qua those girls/boys who resent arranged marriages and prefer to die, but ultimately fail.

- (2) Let us come to the case of a woman who commits suicide because she had been raped. Would it not be adding insult to injury, and insult manifold, to require such a woman in case of her survival, to face the ignominy of undergoing an open trial during the course of which the sexual violence committed on her which earlier might have been known only to a few, would become widely known, making the life of the victim still more intolerable. Is it not cruel to prosecute such a person?
- (3) We would go further and state that attempt to commit suicide by such a woman is not, cannot be, a crime. What is crime in such a case is to prosecute her with a view to get her punished. It is entirely a different matter that at the end of the trial, the court may impose a token fine or even release the convict on probation. That would not take care of the mental torture and torment which the woman would have undergone during the course of the trial. Such a prosecution is, therefore, par excellence persecution. And why persecute the already tormented woman? Have we become soulless? We think not. What is required is to reach the soul to stir it to make it cease to be cruel. Let us humanise our laws. It is never late to do so.
- (4) Suicide, as has already been noted, is a psychiatric problem and not a manifestation of criminal instinct. We are in agreement with Dr (Mrs) Dastoor that suicide is really a 'call for help' to which we shall add that there is no 'call for punishment' in it. Mention may also be made about what was observed in '*The Attitudes of Society towards Suicide*', a xerox copy of which is a part of written submissions filed on behalf of Respondent 2 (State of Orissa) in W.P. No. (Crl.) 419 of 1987. It has been stated in this article at p. 9 that shortly after passing of the Suicide Act, 1961 (in England), the Ministry of Health issued recommendation advising all doctors and authorities that attempted suicide was to be regarded as a 'medical

and social problem', as to which it was stated that the same was 'more in keeping with present-day knowledge and sentiment than the purely moralistic and punitive reaction expressed in the old law'.

- (5) So what is needed to take care of suicide-prone persons are soft words and wise counselling (of a psychiatrist) and not stony dealing by a jailor following harsh treatment meted out by a heartless prosecutor.

34. Is suicide a non-religious act?

- (1) Every individual enjoys freedom of religion under our Constitution, vide Article 25. In a paper which Shri G.P. Tripathi had presented at the World Congress on Law and Medicine held at New Delhi under the caption "Right to die", he stated that every man lives to accomplish four objectives of life: (1) Dharma (religion and moral virtues); (2) Artha (wealth); (3) Kama (love or desire); and (4) Moksha (spiritual enjoyment). All these objectives were said to be earthly, whereas others are to be accomplished beyond life. When the earthly objectives are complete, religion would require a person not to cling to the body. Shri Tripathi stated that a man has moral right to terminate his life, because death is simply changing the old body into a new one by the process known as Kayakalp, a therapy for rejuvenation.

- (2) Insofar as Christians are concerned, reference may be made to what Pope John Paul 11 stated when he gave his approval to the document issued by the sacred congregation stating:

"When inevitably death is imminent in spite of the means used, it is permitted in conscience to take decision to refuse forms of treatment that would only secure precarious and burdensome prolongation of life, so long as the normal care due to sick person in similar cases is not interrupted....."

- (3) In the '*Encyclopaedia of Religion*', Vol. 8 (1987), mention has been made at pp. 541 to 547 as to how 'life' has been understood by different religions. After discussing the subject as understood by the primitive societies, Judaism, Christianity, Hinduism and Buddhism, the discussion has been included by stating that the very act of posing the question 'What is life?' produces an initial sense of bafflement and perplexity. It has been stated thereafter that a precise, distinct and universally acceptable concept does not accompany the use of the word 'life'; and that posing of the above query brings in its wake a sense that life is an 'inexhaustible storehouse of mysteries, a realm of endlessly self-perpetuating novelties, in which the solution to any given problem gives rise to a plethora of

other questions that beckon the always restless, never contended mind of Homo Sapiens to seek further for additional answers or, at least, to search out more intellectually refined, morally elevating, and spiritually salutary ways of pursuing the quest'. So, life does not end in this world and the quest continues, may be after the end of this life. Therefore, one who takes life may not really be taken to have put an end to his whole life. There is thus nothing against religion in what he does.

- (4) Insofar as our country is concerned, mythology says Lord Rama and his brothers took Jalasamadhi in river Saryu near Ayodhya; ancient history says Buddha and Mahavira achieved death by seeking it; modern history of Independence says about various fasts unto death undertaken by no less a person than Father of the Nation, whose spiritual disciple Vinoba Bhave met his end only recently by going on fast, from which act (of suicide) even as strong a Prime Minister as Indira Gandhi could not dissuade the Acharya.
- (5) The aforesaid persons were our religious and spiritual leaders; they are eulogised and worshipped. Even the allegation against them that they indulged in a non-religious act, would be taken as an act of sacrilege. So, where is non-religiosity in the act of suicide so far as our social ethos is concerned? And it is this ethos, this social mores, which our law has to reflect and respect.

35. Is suicide immoral?

- (1) Law and morals often intersect and there can be no doubt that historically at least law and morals were closely related and that in many areas the law continues to look upon its function as the enforcement of morals, the reinforcement of moral standards in society, and the punishment of moral depravity, as noted at p. 19 of Burton M. Leiser's *Liberty, Justice and Morals* (1973). The Constitution of United States contains a number of provisions embodying moral judgments, one of which is prohibition against 'cruel and unusual punishment'. As to due process clause, it was stated by Justice Frankfurter in *Solesbee v. Balkcom* (1949) 339 US 9 that it 'embodies a system of rights based on moral principles ... which comports with the deepest notions of what is fair and right and just.'
- (2) If, however, the law be unjust would a person not be entitled to disobey it? The civil disobedience movement organised by leaders like Gandhiji shows that there can be clash of law and morality, which can be on the battlefield of man's conscience. It is this which agitated the mind of Socrates when he was in jail. He was advised to escape and was assured that it would be a safe escape. He refused saying that

having devoted his life to teach the importance of doing justice and respecting the laws, it would be rank hypocrisy for him to violate his principles when the laws had been turned against him. Being of this view, instead of breaking law, he took poison. But then, at times an individual would be between two horns of dilemma when confronted with the question of obeying an unjust and pernicious law. The theories of Divine Law and Natural Law were evolved to take care of this dilemma and French Declaration of Rights of Men and American Declaration of Independence are based on these laws.

- (3) In the aforesaid work of Burton, this aspect of the matter has been concluded at p. 353 by stating as below:

"It is right to be law-abiding. But there may be times when it is not wrong to break the law. There are no easy rules or recipes to guide us in making our choices. Some people, who allow themselves to be governed by expediency and narrow self-interest when they choose to disobey traffic, are indignant when their neighbours violate laws because their religious and moral convictions do not permit them to do otherwise. Anarchy is a terrible thing. It is all that Hobbes said it was. It is more likely to come from motives like those of the speeder, the drunken driver, and the one who cheats on his income tax, rather than from those of men like Gandhi, King (meaning Martin Luther King)....." (Emphasis supplied)

- (4) Though the question of morality normally arises with laws relating to sex and acts evincing moral depravity like cheating, but as the question of birth and death has also moral significance, as opined by Mary Warnock, whose views in this regard have been noted at p. 86 of Simon Lee's Laws and Morals (1986), we may briefly advert to the moral aspect as well relating to suicide. It is the sanctity of human life which is said to be defaced when one commits suicide and the question of morality, therefore, arises. We would have occasion later to refer to the enactment of Suicide Act, 1961 by the British Parliament, when the related Bill was taken up for consideration in the House of Lords, the Lord Bishop of Carlisle had raised objection on the ground of morality by saying that sanctity of human life was being destroyed. But the Bill was passed, nonetheless.
- (5) A reference to Simon Lee's above work shows there is no unanimity regarding the moral object which law should try to achieve. Simon Lee has mentioned at p. 90 about three theories prevalent in England in this regard, one of whose propounder was Mill, according to whom 'harm-to-others' is what ought to be prevented by law. Devlin would have liked that law should aim to establish minimum and not maximum standards of behaviour showing respect for tolerance and privacy. Hart's approach was that only "the universal values" merited legal support and

not those which fluctuate according to fashion, unless harm is caused to others. [See H.L.P. Hart's '*Law, Liberty and Morality*' (1982) also particularly pp. 30 and 31.]

- (6) It would be apposite, while on the question of morality, to refer to the Constitution Bench decision of this Court in *Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881, in which the question examined was whether the novel of D.H. Lawrence 'Lady Chatterley's Lover' could be regarded as 'obscene' within the meaning of Section 292 of the Penal Code. The Constitution Bench speaking through Hidayatullah, J., as he then was, stated in paragraph 9 that the question of obscenity depends upon the mores of the people and it is always a question of degree and where the line is to be drawn. After going through the case law and what Lawrence might have had in mind in writing the book, the Bench unanimously came to the conclusion that Lawrence was probably unfolding his philosophy of life and the urges of the unconscious, which caused no loss to the society if there was a message in the book. After examining the contents of the book from this standard it was held it contained no obscenity. The importance of this decision for our purpose is that the aforesaid book was regarded as morally objectionable at one point of time even in England, where moral standard relating to sex is on a lower key compared to ours.
- (7) The above shows that morality has no defined contours and it would be too hazardous to make a bold and bald statement that commission of suicide is per se an immoral act. If human beings can be treated inhumanly, as a very large segment of our population is, which in a significant measure may be due to wrong (immoral) acts of others, charge of immorality cannot be, and in any case should not be, levied, if such human beings or like of them, feel and think that it would be better to end the wretched life instead of allowing further humiliation or torture. Those who demand virtue must do virtue and should see that others too do the same.

36. Does suicide produce adverse sociological effects?

- (1) One of the points raised against suicide is that the person who had so done might have been the sole bread-earner of the family, say a husband, a father, because of whose death the entire family might have been left in lurch or doldrums, bringing in its wake untold miseries to the members of his family. It is therefore stated that suicide has adverse effects on the social setup. No doubt, the effects of suicide in such cases are quite hurting; but then, it is a matter of extreme doubt whether by

booking a person who had attempted to commit suicide to trial, suicides can be taken care of. Even imposition of death sentences has not been able to take care of commission of murders, as mentioned earlier.

- (2) Further, the aforesaid adverse sociological effects are caused by the death of the person concerned, and not by one who had tried to commit suicide. Indeed, those who fail in their attempts become available to be more or less as useful to the family as they were. So the person to be punished is one who had committed suicide; but, he is beyond the reach of law and cannot be punished. This can provide no reason to punish a person who should not be punished.

37. Is suicide against public policy?

- (1) The basic argument of Shri Sharma, learned counsel for the Union of India, was that allowing persons to commit suicide would be against public policy. Though which public policy would be so affected was not spelt out by the learned counsel, we presume that the public policy to be so jeopardised is one which requires preservation of human life. One of the objects of punishment to be inflicted when an offence is committed is protection of society from the depredations of dangerous persons, as mentioned at p. 198 of Burton M. Leiser's '*Liberty, Justice and Morals*'. But insofar as suicide is concerned, this object does not get attracted because there is no question of protection of the society from depredation of dangerous persons, who by the very nature of things have to be those who cause harm to others and not to themselves. Of course, we would concede that one of the interests of the State has to be preservation of human life.
- (2) The concept of public policy is, however, illusive, varying and uncertain. It has also been described as 'untrustworthy guide', 'unruly horse' etc. The leading judgment describing the doctrine of public policy has been accepted to be that of Parke, B. in *Egerton v. Brownlow* (1853) 4 HLC 1 in which it was stated as below at p. 123, as quoted in paragraph 22 of *Gherulal Parakh v. Mahadeodas Maiya*, AIR 1959 SC 781 (793):

"Public policy' is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean 'political expedience' or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education habits, talents and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman

and not the lawyer, to discuss, and of the Legislature to determine what is best for the public good and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes; the unwritten or common law from the decisions of our predecessors and of our existing courts, from text writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised law, and we are therefore bound by them, but we are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise."

- (3) In the aforesaid case a three-Judge Bench of this Court summarised the doctrine of public policy by stating at p. 795 that public policy or policy of law is an illusive concept; it has been described as 'untrustworthy guide', 'variable quality', 'uncertain one', 'unruly horse' etc.
- (4) Different High Courts of the country have had also occasion to express their views on this concept in their judgments in *Bhagwant Genuji Girme v. Gangabisan Ramgopal*, AIR 1940 Bom 369; *Mafizuddin Khan Choudhury v. Habibuddin Shekh*, AIR 1957 Cal 336; *Kolaparti Venkatareddi v. Kolaparti Peda Venkatachalam*, AIR 1964 Andh Pra 465, and *Ratanchand Hirachand v. Askar Nawaz Jung*, AIR 1976 Andh Pra 112. In *Kolaparti's* case, it was stated that the term public policy is not capable of a precise definition and whatever tends to injustice of operation, restraint of liberty, commerce and natural or legal rights; whatever tends to the obstruction of justice or to the violation of a statute and whatever is against good morals can be said to be against public policy. These decisions have also pointed out that the concept of public policy is capable of expansion and modification. In *Ratanchand's* case (AIR 1976 Andh Pra 112), a Bench of Andhra Pradesh High Court speaking through Chinnappa Reddy, J. as he then was, quoted at p. 117 a significant passage from Professor Winfield, '*Essay on Public Policy in the English Common Law*' (42 Harvard Law Review 76). The same is as below:

"Public policy is necessarily variable. It may be variable not only from one century to another, not only from one generation to another but even in the same generation. Further it may vary not merely with respect to the particular topics which may be included in it, but also with respect to the rules relating to any one particular topic.... This variability of public policy is a stone in the edifice of the doctrine and not a missile to be flung at it. Public policy would be almost useless without it."

- (5) As to how the ‘unruly horse’ of public policy influenced English law has been narrated by W. Friedman in his ‘Legal Theory’: (5th Edn.) at p. 479 et seq in Part 111, Section 2 titled as ‘*Legal Theory, Public Policy and Legal Evaluation*’. As to the description of public policy as ‘unruly horse’, it may be stated that there have been judges not to shy away from unmanageable horses. Lord Denning is one of them. What this noble judge stated in *Enderby Town Football Club Ltd. v. Football Association Ltd.*, (1971) Ch. 591 at p. 606 is “With a good man in the saddle, the unruly horse can be kept in control. It can take jump over obstacles.” (See para 93 of *Central Inland Water Transport Corporation Ltd. v. Brajo Nath Ganguly*, AIR 1986 SC 1571. But how many judges can be anywhere near Lord Denning? He is *sui generis*.
- (6) The magnitude and complexity of what is or is not public policy or can be a part of public policy, would be apparent from bird’s eye view of what has been stated regarding this at pp. 454 to 539 of Words and Phrases (Permanent Edn., Vol. 35, 1963). To bring home this a few excerpts would be enough. It has been first stated under the sub-heading “In general” as below at pp. 455 and 456:

“‘Public policy’ imports something that is uncertain and fluctuating, varying with the changing economic needs, social customs, and moral aspirations, of the people. Barwin v. Reidy, 307 P. 2d 175, 181, 62 N.M. 183.

‘Public policy’ is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been let loose and free from definition in the same manner as fraud. Pendleton v. Greever, j193p 885, 887, j80 Ok1, 35, 17 ALR 317.

‘Public policy’ is a term that is not always easy to define and it may vary as the habits, opinions and welfare of a people may vary, and what may be the public policy of one State or country may not be so in another. Franklin Fire Ins. Co. V. Moll , 58 NE 2nd 947, 950, 951, 115 Ind. App. 289.’

- (7) In the aforesaid work under the sub-heading ‘*Government by Constitution, Laws or Judicial Decisions*’, the following finds place at p. 481 under the further sub-heading ‘In general’:

“Public policy’ is a variable quantity and is manifested by public acts, legislative and judicial, and courts will not hold a contract void. Draughton v. Fox Pelletir Corporation, 126 SW 2d 329, 333, 174 Tenn. 457.

In a judicial sense, public policy does not mean simply sound policy, or good policy, but it means the policy of a State established for the public weal, either by law, by courts, or general consent. Clough v. Gardiner, 182 NYS 804, 806, 111 Mis. 244.”

- (8) From the above, it can safely be said that it would be an uninformed man in law who would say with any degree of definiteness that commission of suicide is against public policy; and, as such, a person attempting to commit it acts against public policy.

38. Does commission of suicide damage the monopolistic power of the State to take life?

- (1) The aforesaid point is not required to be gone into detail, because nobody can claim to have monopoly over a human life. It is God alone who can claim such a power. If a person takes his life, he is taking his own life, and not the life of anybody else; and so, the argument that State's monopolistic power of taking life is taken away by the person who attempts to commit suicide has no legs to stand on.

39. Is apprehension of "constitutional cannibalism" justified?

- (1) This is one of the criticisms which has been advanced in one of the aforesaid articles relating to the Bombay judgment. This contention has been advanced because if the negative aspect of right to life, i.e., to destroy it can be read in Article 21, the State can 'easily embark upon a policy to encourage genocide on the plea that proper management of resources are vital and necessary for the upkeep of life with vigour and dignity in the wake of geometrical progression of population growth'. The critic has stretched this argument so much to come to the conclusion of 'constitutional cannibalism' that we may almost leave it unanswered, as there is a gulf of difference between taking of one's own life and allowing the State to go in for genocide. They are not only poles apart but miles apart.
- (2) The Editor of Calcutta Weekly Notes in his comments at pp. 37 to 40 of [(1986-87) 91 CWN (Journal Section)] has observed that the distinction made by the Bombay High Court between "suicide" and "euthanasia" appears logically inconsistent. According to the Editor, the rationale of the judgment would necessarily permit euthanasia as legal. This comment may not be quite incorrect, because in passive euthanasia, wherever it has been accepted as legally permissible, consent of the patient, if he be in a sound mental condition, has been regarded as one of the prerequisites. So, if one could legally commit suicide, he could also give consent for his being allowed to die. But then, the legal and other questions relatable to euthanasia are in many ways different from those raised by suicide. One would, therefore, be right in making a distinction logically and in principle between suicide and euthanasia, though it may be that if suicide is held to be legal, the persons pleading for legal acceptance of passive euthanasia would have a winning point.

For the cases at hand, we would remain content by saying that the justification for allowing persons to commit suicide is not required to be played down or cut down because of any encouragement to persons pleading for legalisation of mercy-killing.

- (3) May we hasten to observe that as regards the persons aiding and/or abetting suicide, the law can be entirely different, as indeed it is even under the Suicide Act, 1961 of England. Bombay judgment has rightly made this distinction. It is for this reason that the apprehension raised by the Andhra Pradesh High Court in its judgment in Jagadeeswar (1988 Cr. LJ 549) does not seem to be justified. We do not agree with the view of the Andhra Pradesh High Court in that if Section 309 were to be held bad, it is highly doubtful whether Section 306 could survive, as self-killing is conceptually different from abetting others to kill themselves. They stand on different footing, because in one case a person takes his own life, and in the other a third person is abetted to take his life.

40. Recommendation of the Law Commission of India and follow-up steps taken, if any.

- (1) The Law Commission of India in its 42nd Report (1971) recommended repeal of Section 309 being of the view that this penal provision is '*harsh and unjustifiable*' (see paragraph 16.33 of the Report). In taking this view, the Law Commission quoted the following observations made by H. Romilly Fedden in 'Suicide' (London, 1938) at page 42:

"It seems a monstrous procedure to inflict further suffering on even a single individual who has already found life so unbearable, his chances of happiness so slender, that he has been willing to face pain and death in order to cease living. That those for whom life is altogether bitter should be subjected to further bitterness and degradation seems perverse legislation."

- (2) After the aforesaid Law Commission's Report became available, the recommendation was accepted by the Government of India and the Indian Penal Code (Amendment) Bill, 1972 was introduced in the Rajya Sabha to repeal Section 309. The Bill was referred to a Joint Committee of both the Houses and after receipt of its report, the Bill was passed with some changes by the Rajya Sabha in November 1978. The Bill so passed was pending in the Sixth Lok Sabha when it was dissolved in 1979, because of which the Bill lapsed.
- (3) In the counter-affidavit filed by the Union of India in Writ Petition (Crl.) No. 409 of 1986, it has been further stated that a proposal for reintroducing legislation in Parliament on the lines of the lapsed Bill is under consideration. It has been

admitted in this affidavit that Section 309 is harsh, and so, the intention of the Government is more or less to repeal that section.

41. Global view: What is the legal position in other leading countries of the world regarding the matter at hand?

- (1) We propose to refer to two leading countries only in this regard they being United Kingdom and United States of America. We have selected them because the first is a conservative country and the second a radical; the first is first in point of time as regards democratic functioning and the second is being regarded as a serious human rights' protagonist.
- (2) At English Common Law suicide was taken as felony as much so that a person who had met his end after committing suicide was not allowed Christian burial, but would have to be so done in a public highway. Not only this, the property of the person concerned used to get forfeited to the Crown. [See pages 290 to 207 of Law and Morality edited by Louis Bloom Cooper and Gravin Drewry (1976), which pages also contain the speeches made by the Lord Bishop of Carlisle and Lord Denning in the House of Lords during second reading of The Suicide Bill, 1961.]
- (3) Times changed, notions changed and presently, even attempt to commit suicide is not a criminal offence, as would appear from Suicide Act, 1961. Though Section 1 of this Act has only stated that the "rule of law whereby it is a crime for a person to commit suicide is hereby abrogated", it has been made clear in the second para of 'General Note' below this section, as finding place in the xerox copy of this Act enclosed with the written submissions filed on behalf of the State of Orissa, Respondent 2 in Writ Petition (Crl.) No. 419 of 1987 that attempted suicide is not a crime. This note reads as below:

"Attempted Suicide

An attempt to commit suicide was a common law misdemeanour. Section 1 does not specifically say that attempted suicide is no longer a crime, but it must follow irresistibly from the fact that the completed act is no longer a crime....."

- (4) In the United States by early 1970's comparatively small number of States (9) listed suicide as a crime, although no penalties (such as mutilation of bodies or forfeiture of estates) were exacted. In such States suicide attempts were either felonies or misdemeanours and could result in ail sentences, although such laws were selectively or indifferently enforced. Two of such States repealed such laws, stating in effect that although suicide is "a grave social wrong", there is no way to punish it. Eighteen States had no laws against either suicide or suicide

attempts, but they specified that to aid, advise or encourage another person to commit suicide is a felony. In more than 20 other States, there were no penal statutes referring to suicide. [See pp. 16 and 17 of '*Suicidology: Contemporary Developments*' by E.S. Scheneidman (1976).]

- (5) The latest American position has been mentioned as below at p. 348 of Columbia Law Review, 1986:

"Suicide is not a crime under the statutes of any State in the United States. Nor does any State, by statute, make attempting suicide a crime. In twenty-two States and three United States territories, however, assisting suicide is a crime. If an assistant participates affirmatively in the suicide, for instance by pulling the trigger or administering a fatal dose of drugs, courts agree that the appropriate charge is murder."

42. Conclusion: On the basis of what has been held and noted above, we state that Section 309 of the Penal Code deserves to be effaced from the statute book to humanise our penal laws. It is a cruel and irrational provision, and it may result in punishing a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide. Then an act of suicide cannot be said to be against religion, morality or public policy, and an act of attempted suicide has no baneful effect on society. Further, suicide or attempt to commit it causes no harm to others, because of which State's interference with the personal liberty of the persons concerned is not called for.
43. We, therefore, hold that Section 309 violates Article 21, and so, it is void. May it be said that the view taken by us would advance not only the cause of humanisation, which is a need of the day, but of globalisation also, as by effacing Section 309, we would be attuning this part of our criminal law to the global wavelength.
44. The writ petitions stand allowed by declaring Section 309 of the Penal Code as unconstitutional and hence void. The proceedings in GR Case No. 177 of 1984 (*State v. Nagbhushan Patnaik*) pending in the Court of Sub-Judge, Gunpur in the District of Koraput, Orissa stands quashed.
45. Before parting, we should like to observe that what we have sought to do through this judgment may be said to be an attempt to "search for the social dynamics of criminal law, the functional theory of sentencing and the therapeutic reach of punitive arts, to catch up with social sciences relevant to criminal justice and to link up prison jurisprudence with constitutional roots", of which Justice Krishna Iyer has mentioned in his preface (styled Krishna Iyerishly as 'A Word in Confidence') to his

aforementioned book. Whether we have succeeded or not; and, if so, to what extent is for others to judge.

46. I desire to place on record (though it would sound unusual to some and may be to many) my appreciation for the assistance I had received from Shri Satish Chandra, Joint Registrar (Library) of the Court, in supplying me promptly very useful and varied materials for preparing this judgment, as and how required by me.

Conclusion

The problem with the judicial system in India is that many judges at the district and lower levels of the system do not give the required importance and time to understand the surrounding circumstances of every case. This is due to various factors like the large amount of case-laws pending before the court, incompetence of the advocates representing the accused, undue delay in the proceedings, etc. It is necessary for them to understand that passing sentences of a humane nature is vital and imperative for delivering accurate justice. Mostly the appeals for humane sentencing are taken to higher courts. Judges at the lower level need to be given proper jurisprudential training in order to understand the nature and necessity of humane sentencing.

JUVENILE PRISONERS

Introduction

The Juvenile Justice (Care & Protection) Act, 2000 was although a positive step taken by the Indian legislature towards protecting the rights of juveniles in custody of the police or an investigative authority, yet the attributes of the Act have failed to ensure total protection to juvenile offenders. Juvenile offenders are persons below the age of 18 and have been convicted for committing crimes. These minors are usually sent to *Borstal Schools* which are specially designed for them in order to avoid any possibility of them being prone to various forms of abuses. There are a total number of ten such schools in India. Majority of the States in India have passed special legislations to ensure that the institutions where juveniles are held are of a reformatory and educational nature. As per reliable statistics juveniles/minors/young prisoners consist of 0.1% of prison population in India.

The international standards delineating the terms for juvenile offenders are composed in the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, 1990. The rules laid down by the UN have been designed to safeguard the juveniles from the harsh conduct and atmosphere of prisons. The cases mentioned below show the principles laid down by the judiciary to protect juveniles in prisons.

Juvenile undertrials were the subject of *Sanjay Suri's* petition (AIR 1988 SC 414). Many children were sent to jail despite the prohibition in the Children's Act. Juveniles were kept together with habitual and other adults who brutalized them and forced them to cook, clean and perform other distasteful tasks.

The Court directed Magistrates issuing warrants of detention to specify the age of the person detained and authorized jail officials to refuse to honour the warrant unless the age is thus entered. Juvenile prisoners were to be segregated. The jail warders were to be shifted every three years. The Visitors Board should consist of a cross-section of society, social activists, journalists, jurists and government officials, the Court held.

Overcrowding in jail, the Court observed, was a regular feature. Against a sanctioned capacity of 2023, Tihar housed 4000 prisoners.

In *Sanat Kumar Sinha v. State of Bihar* (1989 Patna LJR 1024) the Bihar High Court was shocked by the horrendous state of juveniles languishing in prisons for many years. Deplored the pathetic indifference of the State, the Court ordered the quashing of prosecution in certain cases and their release from custody. Trials of juveniles, the Court

observed, generally ought to be finished in one year. The Court also suggested that the juveniles thus released should be put into proper schools at Government expense. The Court also formed a Committee to visit the institutions and submit a report.

In *Sanat Kumar Sinha v. State of Bihar (II)* (1990 BBCJ 357) the Committee visited, as earlier directed, and submitted a report. The After Care Home for Women was found to be in subhuman conditions. The treatment meted out to the inmates was brutal. The Court found the Home worse than a brothel. So too the juvenile homes. Males and females were mixed. Juveniles were mixed with convicts and undertrials. The inmates were found seriously ill with the doctors uncaring. The District Judges had not done their duty by visiting, inspecting and reporting. Directions were issued by the Bihar High Court for the case of the inmates of the After Care Home and for juveniles.

In *Jaya Mala's* case (AIR 1982 SC 1297) the Supreme Court held that the detention of a minor under preventive detention was wholly unwarranted and deserved to be quashed.

In *Cri. Reference no. 3 of 1991* (1993 (3) CRI. 57) the Kerala High Court held that the crucial date to decide whether the accused is to be tried by the Children's Court or not is the age of the accused on the date on which the offence was committed.

In the case of *Bhola Bhagat and another v. State of Bihar* (1997 (8) SCC 720) when a plea is raised on behalf of an accused that he was a "child" within the meaning of the definition of the expression under the Act, it becomes obligatory for the court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination of the question of age of the accused or cause an enquiry to be held and seek a report regarding the same, if necessary, by asking the parties to lead evidence in that regard. The court must hold an enquiry and return a finding regarding the age, one way or the other.

The Court in the case of *Santenu Mitra v. State of West Bengal* (1998 (5) SCC 697) held that it is nobody's case that the entry in the Register of Births and Deaths is not a genuine entry, even though it was recorded on a later date rather than on the date of birth. Once that entry was recorded by an official in performance of his duties, it cannot be doubted on the mere argument that it was not contemporaneous with the date of the suggested date of birth of the appellant.

In the case of *Umesh Singh & Anr. v. State of Bihar* (2000 (6) SCC 89) the Supreme Court allowed the plea of child status to be raised although it had not been raised in the Trial Court or the High Court.

In *Umesh Chandra v. State of Rajasthan* (1982 (3) SCR 583), the Supreme Court considered three main issues:

- (i) Whether the accused was below the age of 16 years at the time of the occurrence?
- (ii) Whether the Rajasthan Children's Act enacted in 1970 was applicable in the case of the appellant? and
- (iii) The relevant date for applicability of the Act?

While considering the issue of determining the exact date of birth of the appellant, the Court held that when in the instant case there are two documents of two different schools showing the age of the accused-appellant as below 16 years and both these documents have been signed by his father and were in existence ante litem motam, hence, there could be no ground to doubt the genuineness of these documents. Under S. 35 of the Evidence Act, all that is necessary is that the document should be maintained regularly by a person whose duty it is to maintain the document and there is no legal requirement that the document should be maintained by a public officer only.

With regard to the applicability of the Rajasthan Children's Act, 1970, the Court held that since the Act has now been enforced in the entire State, an accused, who is found to be a child, has to be forwarded by the Sessions Court to the Children's court which can pass appropriate sentence. Where however proceedings against a child are pending before Sessions Judge, S. 26 of the Act enjoins a duty on the Court in which the proceeding in respect of the child is pending on the date on which the Act is extended to the area to proceed with the trial and record a finding as if the Act does not apply. But after concluding the trial and recording a finding that the child had committed an offence, the Court cannot pass any sentence but the Court is under a statutory obligation to forward the child to the Children's court which shall pass orders in respect of that child in accordance with the provisions of the Act, as if it has been satisfied on inquiry under the Act that the child has committed the offence.

On the question as to what is the material date which is to be seen for the purpose of application of the Act, the Court held that so far as the age of the accused, who claims to be a child, is concerned, is the date on which the offence takes place and not the date of the trial. Children's Act was enacted to protect young children from the consequences of their criminal acts on the footing that their mind at that age could not be said to be mature for imputing mens rea as in the case of an adult. It is quite possible that by the time the case comes up for trial, growing in age being an involuntary factor, the child may have ceased to be a child.

The review petition, *Arnit Das v. State of Bihar* (2001 (7) SCC 657) was referred to a Constitutional Bench as in an earlier order passed in *Arnit Das v. State of Bihar* (2000 Cri LJ 2971), the Division Bench had held that the crucial date of determining whether the accused is juvenile or not under the Juvenile Justice Act, 1986 is the date on which the accused first appears in the Court in inquiry proceedings. This order was in conflict with the earlier view of a three judge bench in *Umesh Chandra v. State of Rajasthan* (1982 (3) SCR 583), wherein it had been held that crucial date in such cases is the date on which the offence was committed and not when the accused first appears before the Court in inquiry proceedings. However, since in the present case the findings of an inquiry conducted under S. 32 of the Act that on the date of the offence the accused was not a juvenile had been affirmed right upto the Supreme Court, therefore the question being purely of an academic interest, the Bench declined to answer an academic question only.

In *Pratap Singh v. State of Jharkhand & Another* (2005 (3) SCC 551) the matter was again referred to a five judge Bench on the same issue. The Supreme Court considered the following two questions:

- (a) Whether the date of occurrence will be the reckoning date for determining the age of the alleged offender as Juvenile offender or the date when he is produced in the Court/competent authority?
- (b) Whether the Juvenile Justice Act of 2000 will be applicable in the case a proceeding initiated under the 1986 Act and pending when the Act of 2000 was enforced with effect from 1.4.2001?

Answering the first question, the Court held that the law laid down by the three judge Bench in *Umesh Chandra* is the correct law and that the decision rendered by a two-Judge Bench of this Court in *Arnit Das* (2000 Cri LJ 2971) is not a good law, and the crucial date for determining whether an accused was juvenile or not is the date of occurrence and not the date on which he is produced in the court. The Court held that a conjoint reading of Sections 3 and 26, preamble, and aims and objects of the 1986 Act leaves no matter of doubt that the legislature intended to provide protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication thereof, and therefore such provisions should be liberally and meaningfully construed so as to advance the object of the Act.

With regard to the second question, it was observed that the only striking distinction between the 1986 Act and the 2000 Act pertained to the definition of juvenile. Under the 1986 Act a juvenile means a male juvenile who has not attained the age of 16 years and

a female juvenile who has not attained the age of 18 years. In the 2000 Act no distinction has been drawn between the male and female juvenile and the limit of 16 years in 1986 Act has been raised to 18 years in the 2000 Act. It was held that the provisions of the 2000 Act would be applicable to those cases initiated and pending trial/inquiry for the offences committed under the 1986 Act provided that the person had not completed 18 years of age as on 1.4.2001.

In the case of *Rajinder Chandra v. State of Chattisgarh & Another* (2002 (2) SCC 287) the Court held that while dealing with the question of determination of age of the accused for the purpose of finding out whether he is juvenile or not, a hyper-technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the said evidence, the Court should lean in favour of holding the offender to be a juvenile in borderline cases.

In *Babloo Pasi v. State of Jharkhand & Another* (2008 (13) SCALE 137) the Court observed that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. The Medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence. The orders of the Board were set aside on the ground that it had mechanically accepted the entry in Voters List as conclusive without appreciating its probative value in terms of the provisions of Section 35 of the Indian Evidence Act, 1872. The Court held that a mere production of Voters List, though a public document, in terms of Section 35, in the absence of evidence to show on what material the entry in the Voters List was made, was not sufficient to prove the age of the accused.

In the case of *Hari Ram v. State of Rajasthan* (2009 (6) SCALE 695) the Supreme Court settled the issue of the change of the age of Juvenile from 16 years in Juvenile Justice Act of 1986 to 18 years in Juvenile Justice Act, 2000 and its effect. It was held that a juvenile who had not completed 18 years on the date of commission of the offence was also entitled to the benefits of the Juvenile Justice Act, 2000, as if the provisions of Section 2(k) had always been in existence even during the operation of the 1986 Act.

Supreme Court of India
AIR 1988 SC 414

Sanjay Suri and Another

vs

Delhi Administration, Delhi and Another

Ranganath Misra, M.M. Dutt, JJ.

1. These two applications under Article 32 of the Constitution are in the nature of a public interest litigation. A news reporter and a trainee sub-editor have moved this Court for appropriate directions to the Delhi Administration and the authorities of the Central Jail at Tihar, pointing out features of maladministration within the jail relating to juvenile undertrial prisoners. During the pendency of the proceedings, the Court made several orders with reference to juvenile prisoners and undertrials. On 8th October, 1983 this Court directed:

"When these writ petitions came up for hearing before us we had certain hesitation in entertaining them because another petition was pending in the High Court of Delhi in regard to juvenile prisoners in Tihar Jail where some directions had been given by the High Court and we were anxious to avoid a parallel investigation particularly since in matters of this kind it is desirable that the High Courts should be activated. But since no inquiry into the conditions prevailing in the Tihar Jail, in so far prisoners in the juvenile ward are concerned, had been ordered and what was ordered was only a limited inquiry relating to medical examination of 7 juvenile prisoners who were directed to be produced in court, we thought that we would be failing in our constitutional duty if we do not take judicial action and direct the District Judge to visit Tihar Jail for making inquiry into the conditions prevailing in the Tihar Jail in so far as the prisoners in the juvenile ward are concerned. We decided to entrust this task to the District Judge because he is even otherwise visitor at the Tihar Jail and we thought it would be better to send an officer who is ultimately responsible for ensuring proper conditions in the Tihar Jail rather than entrust this work to an outside organisation or agency. We are glad that we made this order because the Report made by the District Judge discloses a shocking state of affairs in so far as juvenile prisoners are concerned. The District Judge has interviewed some of the juvenile prisoners in regard to whom he learnt, as a result of the inquiry made by him, that they had been subjected to sexual assault by the adult prisoners. The juvenile prisoners who made statements before the District Judge have expressed apprehension that they might get into difficulties and be victimised if their names are disclosed and the District Judge has also suggested in his Report that either the names should not be disclosed or if the names of these juvenile

prisoners are disclosed, adequate protection should be granted to them. We do not think it would be right not to disclose the names of these juvenile prisoners while supplying copies of the Report of the District Judge to the advocates of the parties but we do think it necessary to provide adequate protection to them. We would, therefore, direct that the following undertrial juvenile prisoners, namely shall be released immediately in the course of the day on their executing a bond of Rs.500 each before the superintendent of Tihar Jail. There are also three convicted juvenile prisoners in the Tihar Jail, namely who have given statements to the District Judge They should be released forthwith on parole for a period of one month on their executing a bond for Rs.500 each before the Superintendent of Tihar Jail that they will surrender themselves to the jail authorities on the expiration of the period of one month The release of these three convicted juvenile prisoners on parole will also be done in the course of the day. We may make it clear that we are making this order for release of the aforementioned juvenile prisoners- undertrial as well as convicted-only with a view to protecting them and we are, at the present moment, not passing upon the correctness or otherwise of the statements made by them.

The learned Additional Solicitor General on behalf of the respondents states that Munshi Rajinder Singh alias Raju will be forthwith transferred from the Tihar Jail and that in any other jail to which he is transferred, it will be ensured that he does not have anything to do at all with juvenile prisoners. This transfer shall also be carried out forthwith. Meanwhile, the Superintendent of Tihar Jail will take steps to ensure that Munshi Rajinder Singh alias Raju is not allowed any access to the juvenile ward and is also not allowed to come into contact in any manner what-soever with the prisoners in the juvenile ward and this will be the personal responsibility of the Superintendent of Tihar Jail. So far as the warden Onkar Singh (who has also been referred to in the report of the District Judge) is concerned, the learned Additional Solicitor General appearing on behalf of the respondents states that immediate steps will be taken to place him under suspension and in the meanwhile, he will not be allowed to go inside the premises of Tihar Jail. The Superintendent of Tihar Jail will also ensure that no juvenile prisoner is directed to go to the cell of any adult prisoner or prisoners or to do any work for them including cooking or cleaning.

The learned Additional Solicitor General states on behalf of the respondents that there are a number of juvenile undertrial prisoners whose cases require to be considered for the purpose of releasing them on bail and that he would prepare a chart setting out the names and particulars of these undertrial prisoners and place such chart before the court on 31st October, 1983 for passing appropriate orders"

2. On the 31st October, 1983, the Court made a further order to the following effect:
".... The learned counsel for the respondents will intimate to the Court as to which of the 131 juvenile prisoners confined in Tihar Jail whose names are mentioned in the Chart handed over by the learned Additional Solicitor General appearing on behalf of the respondents are to be released on bail, having regard to the nature of the offences

alleged to have been committed by them and other relevant circumstances which have already been set out by this Court in Hussainara Khatoon's case. We would also like to know as what is the procedure being followed by the Courts of Metropolitan Magistrates in Delhi when a young accused is produced before them for the purpose of ascertaining whether he is a child or not within the meaning of the Children's Act and if he is not a child and is sent to judicial custody then what is the procedure being followed by the Superintendent of the Tihar Jail for determining whether he is juvenile within the meaning of Jail Manual where a juvenile is defined as a prisoner who has not attained the age of 18 years. We are anxious to ensure that no child within the meaning of the Children's Act is sent to the jail because otherwise the whole object of the Children's Act of protecting the child from bad influence of jail life would be defeated. It is also a matter of anxiety for us to see that juveniles between the age of 16 to 18 years who are put in custody in the jail are being kept in separate ward and are allowed to intermingle with adult prisoners because that would also expose them to mal-influences which may prevent their proper rehabilitation .. ".

3. Several other interlocutory orders and directions were given and the Sessions Judge was requested to visit the jail on more than one occasion under order of the Court. He made very useful reports. As a result of these exercises taken during the pendency of the writ petitions, one substantial achievement has been that Tihar Jail no more accommodates juvenile delinquents and their jail has been separated. On account of the repeated directions from this Court the jail administration has now been obliged to undertake erection of a separate jail as an additional place for housing juvenile prisoners and undertrials and the construction is coming up, as reported. On account of the exposure, the Jail administration has been obliged to place the administrating of the jail in the hands of a superior officer.
4. Monitoring the affairs of a jail is a difficult job for this Court but on account of the fact that the Tihar Jail is in the Capital of the country and on account of the advantages of publicity available through the media and otherwise, affairs of the jail have received due publicity over the last four years where these matters have been pending before this Court and it is time that we should dispose them of finally.
5. We had called upon counsel for the parties to furnish their suggestion for improvement of the jail administration and pursuant to this direction counsel for the petitioners has given certain suggestions on two instalments. Learned Additional Solicitor General has also joined her in making certain suggestions in that regard. Before we refer to them we think it appropriate to emphasise that those who are incharge of the jail administration from bottom to top must develop the proper approach to deal with the prisoners and undertrials. It is true that a considerable number of hardened prisoners

live in the jail and those who have a longer term of sentence to suffer stay on for quite a part of their life behind the prison bars. Longer stay at one place brings in familiarity and familiarity generates a number of human reactions. There is no provision in the jail manuals and, perhaps it is difficult as a rule to adopt, that the long-term prisoners should keep on shifting from jail to jail. Whatever may have been the philosophy of punishment in the past, today the prison house is looked upon as a reformatory and the years spent in the jail should be with a view to providing rehabilitation to the prisoner after the sentence is over. That would not be possible over-night and, therefore, cannot be deferred to materialise on the date of release. The wrong side has to be given up and the virtuous way of living has to be acquired. Both are difficult processes. Therefore, the prison house, in case the true purpose is to be achieved, has to provide the proper atmosphere, leadership, environment, situations and circumstances for the regeneration. Members of the staff of the jail from bottom to top (we have purposely not said top to bottom) must be made cognizant of this responsibility and that awareness must be reflected in their conduct. Judicial notice can be taken of prevailing conditions in our jails and what we have stated above is still utopian. But if a change has to brought about it has to start from somewhere and Tihar Jail, in our opinion, is probably most suited for that purpose being located at the seat of the national capital and being under the direct management of the Union of India (through, of course, the Delhi Administration). This can be the institution to set the move in motion.

6. The work load of superintendence should be distributed in a graded way and the officers should have the direct charge of such divided responsibilities. It is necessary that a large dose of good living should be introduced into jail life. Ordinarily religious teaching would carry a level of elevation in that regard. Ours being a Secular State there may perhaps be in immediate counter-reaction to religion being tolerated anywhere but we never intend to speak of that religion which is enigmatic to the concept of secularism. We refer to the essence of all religions-a factor common to every religion humanism-which is so much necessary for good living. We hope and trust that the jail administration and in particular the Administrator take into consideration this aspect and try to generate a sense of humanism in these officers and those in the ranks below them so that the prisoners should have direct contact with them and benefit by every contact with those officers in getting round to the right approach in life.
7. It is time to turn to brass facts. We have come across cases where the warrant, be it for the undertrial or the prisoner, when sent by the court does not indicate the age

of the prisoner authorised to be detained in the jail. This is a very wrong practice and is obviously in breach of the direction issued by this Court. We call upon every Magistrate or trial Judge authorised to issue warrants for detention of prisoners to ensure that every warrant authorising detention specifies the age of the person to be detained. Judicial mind must be applied in cases where there is doubt about the age—not necessarily by a trial—and every warrant must specify the age of the person to be detained. We call upon the authorities in the jails throughout India not to accept any warrant of detention as a valid one unless the age of the detenu is shown therein. By this order of ours, we make it clear that it shall be open to the jail authorities to refuse to honour a warrant if the age of the person remanded to jail custody is not indicated. It would be lawful for such officers to refer back the warrant to the issuing court for rectifying the defect before it is honoured. Since it will create problems in keeping the undertrial or the prisoner during the intervening period, the judicial officer should realise his responsibility in accepting this direction and giving full effect to it. In exceptional cases, when the warrant is referred back for rectification, the person covered by the warrant may be kept at the most for a week pending rectification, and taking responsibility of the situation. On the basis of the age indicated in the warrant, it shall be the obligation of the jail authorities to find out, so far as Delhi is concerned, whether the prisoner covered by the warrant should be detained in the Tihar Jail or in the Juvenile Jail.

8. Though the place of stay has now been segregated, there is possibility of contact between the hardened criminals and the juvenile delinquents if there is no proper segregation in assignment of work. We direct that due care shall be taken to ensure that the juvenile delinquents are not assigned work in the same area where regular prisoners are made to work. Care should be taken to ensure that there is no scope for their meeting and having contacts.
9. We direct that steps should be taken to shift the warders at the end of every three years. This is a principle which had been accepted in the Punjab Jail Manual (Chapter VI, Rule 273). Delhi Administration has a difficulty in doing so in a real way because it has only one jail and may have one more when the other jail under construction comes up, but there is no other place to which warders can be transferred. The Administration should take note of the situation; the rules should be changed and the warders may either be inter-changed with some other category of service working outside the jail or a common Union Territory service could be set up to permit the same. Such transfer will indeed be helpful in restoring discipline in the jail.

10. The Visitors' Board should consist of cross sections of society; people with good background, social activists, people connected with the news media, lady social workers, jurists, retired public officers from the Judiciary as also the Executive. The Sessions Judge should be given an acknowledged position as a visitor and his visits should not routine ones. Full care should be taken by him to have a real picture of the defects in the administration qua the resident prisoners and undertrials.
11. Over-crowding in jails is a regular feature. As against a sanctioned capacity of 2,023, on the average 4,000 prisoners are lodged in the Tihar Jail. We hope and trust that this aspect will be kept in view, though from a practical point over-crowding may to a reasonable aspect, have to be tolerated. We hope with the commissioning of the new jail, pressure in this regard to some extent would be reduced.
12. The writ petitions are disposed of with these directions.

Patna High Court
AIR 1989 Patna LJR 1024
Sanat Kumar Sinha
vs
State of Bihar and Others

S.S. Hasan and S.H.S. Asioi, JJ.

Order

1. What numerous agencies enjoined upon this task have failed to do has been done by the petitioner of this application in the form of a public interest petition under Articles 226 and 227 of the Constitution of India. The Court in Bihar - the prosecuting and defence agencies and the accused thus have been quite oblivious of the benefits flowing to a juvenile accused in criminal prosecution endowed by the Juvenile Justice Act, the decision of the Supreme Court in numerous Gases including one in AIR 1986 SC 1773 (*Sheela Barse and another Vs. Union of India and others*) and several decisions of this 'Court reported in 1984 BBCJ 749 (*The State of Bihar Vs. Ramdaras Ahir and others*) 1985 PLJA 946 (*The State of Bihar Vs. Maksudan Singh*), 1986 PLJ A 767 (*Madheshwardhari Singh and another Vs. The State of Bihar*), and 1989 PLJA 507 (*Krishna Bhagwan Vs. The State of Bihar*) three of which are now subject to scrutiny by the Apex Court before a Constitutional Bench at the instance of the State of Bihar. There is no manner of doubt that speedy disposal is the *sine qua non* of all proceedings - whether civil or criminal in a Court of law. Whatever the system - Roman, Anglo-Saxon, Shastriya or Shariat, the basic element in all is that a wrong doer should be indicted - tried if found guilty - punished - if found innocent delivered of his sufferings. In India, delay in criminal trials has, by itself, assumed the character of punishment with all concerned - if I may say so with apology - contributing to it. In spite of the well known legal situation, it was left to the petitioner to bring to the notice of this Court with the amicus curiae assistance of certain lawyers endowed with zeal and fervour to bring justice to the door of the poorest and the helpless juveniles offenders who are victims of judicial apathy and whose cases are pending in numerous Courts of Bihar and are in custody or in detention or detained in large numbers beyond the period required by law.

2. It is indeed sad, if we may say so with apology, that inspite of numerous legal pronouncements the Courts have also not controlled the proceedings in the manner required by law and this state of affairs was not discovered and remedied inspite of continuous watch by the District Judges concerned.
3. We have, therefore, no option but to act in a drastic manner as is being crone by us in this application.
4. By order dated 30.3.1989, we called for a list of cases from all the District Judges of Bihar pending in their districts under Section 27 (3) of the Juvenile Justice Act, 1986, including the list of accused persons in the case with their ages. They have arrived from a large number of judgeships. The facts reveal horrendous and utterly shocking state of affairs in regard to such persons who may one day be the future flower of the garden of India but are about to be blighted by the indifference of our society in all sphere. This judgement is our minor contribution towards protecting the buds of our garden from whithering away before they bloom.
5. From the facts culled out from the reports received from various Courts by the efficient efforts of the counsels appearing in this case, it appears that not only in some cases investigations are pending but trials are going on for a period extending upto five years and in large number of cases juveniles are still in prisons. This state of affairs indicates a pathetic indifference to all concerned. We, therefore, direct that all criminal trials pending since three years or more be quashed to the extent as far as the trials of juveniles in custody are concerned and they are directed to be acquitted. They be released forthwith from custody or detention, as the case may be. Further, in relation to trials that are pending since less than three years, the Court should act in accordance with the provision's of the Juvenile Justice Act and dispose them of, in relation to cases where punishment is upto seven years, in accordance with direction of the Supreme Court in *Sheela Barse's* case (*supra*). In other cases, the Court concerned should, after giving the prosecuting agency final opportunity to procure evidence as also to the defence to lead evidence should close the case and proceed to dispose the~ of in accordance with law. All unnecessary adjournments which will cause delay in the trial should be avoided and trials where juveniles are involved be concluded as early as possible but definitely within one year from today in any event. It is also saddening to find that the juveniles are languishing in jail for a considerable period. Necessary orders in regard to their release on bail during the trial must be passed by the Court concerned in accordance with this order.

6. The District Judges concerned should send a report to this Court within three months from today in regard to the implementation of this order. Let a copy of this Order be sent to all the District Judges concerned for communication to the respective Courts. Let this matter be listed again before us in chambers, if we are not sitting together in the last working week of December, 1989.
7. Before parting, we would like to mention that there is a very important aspect of the matter which cannot be ignored either by us or the authorities and the society at large. Are these juveniles, who are being released from custody or may be released in future, going to go back to the streets of towns and cities to be picked up by professional rouges and Fagins to be used in their nefarious design of committing crimes through these protected species? Or, the State in the Welfare Department will see that they are resurrected from the pit of destruction and ultimate annihilation. The answer can come only from the Government and the private social welfare agencies. We can only suggest that these boys should be picked up by the Government and put into proper schools in boarding like Central Schools at the cost of the Government so that they may start living in normal environment and may receive education in proper surroundings.

**Patna High Court
1990 BBCJ 357**

**Sanat Kumar Sinha
vs**

The State of Bihar through Chief Secretary and Others

S.S. Hasan and S. H.S. Abioi, JJ.

1. S. Shamsul Hasan, J. This application was filed by a public spirited individual who desires to invoke the jurisdiction of this Court for trying to ameliorate the appalling condition of the various institutions for women and children which have been established by the Government of Bihar in the Welfare Department. To these homes are consigned the unfortunates - both women and children - due to the vagaries of misfortunes that befall them in their journey of life. This Court by an order dated 20-3-1989 had constituted a committee consisting of the Registrar (Judicial) of the High Court, the Additional Advocate General Mr. Jagdish Pandey, Mr. Ram Suresh Roy, Advocate, Mr. Ashok Priyadarshi, Advocate and Mr. Lata Kailash Bihari Prasad, Advocate. This committee was directed by this Court to visit the institutions concerned and submit its reports. We had also directed the Welfare Department to provide adequate funds and facilities to enable the Committee to perform its self-imposed and voluntary public duty at great personal sacrifice which we commend and record our appreciation. Although money was provided, though not very easily, little was done by way of providing basic comforts, like boarding and lodging, in Government accommodations. In spite of this, the team went through its arduous tasks and had consequently produced reports in relation to the following institutions:

	Name of the Institutions	Kept at flag (H.C. File)
1.	Senior Remand Home for Boys at Patna.	'A'
2.	After Care Home for women, Patna.	'B'
3.	Remand Home at Muzaffarpur.	'H'
4.	Remand Home at Hazaribaug.	'Q'
5.	Remand Home at Bettiah.	'W'

6.	Remand Home (Observation Home) Darbhanga.	'80'
7.	Reports re two Homes for children & girls, Gaya.	'85'
8.	After Care Home for Women, Patna (Surprise Visit).	'95'
9.	Remand Home at Deoghar.	'96'
10.	Remand Home at Bhagalpur.	'97'
11.	Remand Home at Munger.	'98'
12.	Remand Home at Dumka.	'99'
13.	Report of the Registrar, Patna High Court in regard to After Care Home at Patna in pursuance of the order of this Court dated	'100'
14.	Special Home at Ranchi.	'110'
15.	Special Home at Chaibasa.	'111'
16.	Juvenile Home, Katihar.	'112'
17.	Special Home, Dhanbad.	'113'

2. Since the dawn of civilization, women have always been subject of varied interest of men and the society. They have also been subjected to multifaceted treatment at all times. Women have been worshipped, adored, respected, honoured, loved, cared for and subjected to tender care but the same woman, at the same time, has been subjected to ill-treatment, humiliation, degradation, hatred and even harmed physically and mentally after facing inhuman treatment. They have been, in the process, treated like transferable commodities on sale for whom bargains were struck in favour of die hard flesh traders. Now, however, social and human rights imperatives require that a woman be endowed with unflinching attention, care, honour, affection and kindness and given proper status in a society of male chauvinism. Our Constitution, the Government of this Country, the Governments all over the world and the international community and organizations have laid great stress on the rights of a woman and have always striven to provide her with her rightful place in the society being equal to that of a man in all social, cultural, political and commercial spheres. Flesh trade in woman and the institution as old as the time itself, is now abhorred and an all out crusade has been launched everywhere to prevent and eradicate it. Opportunities are being created for women to move and exist side by side with men in varied fields all over the world.

3. Similarly, children have also been receiving the greatest attention by the world community in general and the Government of this country in particular. There is an all-out endeavour to ensure that children are no longer subjected to the treatment meted out to them by Fagins of our society who exploit innocent children for the nefarious purposes of making easy money. Not only this, poverty also leads to the abandonment of such children who at an age when they should have been free from the problems meant for adults to solve are thrown away and they have to enter into the premature foray for making a living in this unconcerned world. They start begging for money when they should be receiving education and care. These children in spite to being the future hope of any country in all likelihood, become the future die hard criminals in the society they live in. For this purpose, several institutions have been set up with the task of resurrecting the children from their present state of degradation and horror and to restore to them the world that is their in view of their age.
4. In India, in order to accomplish all this, one of the steps taken has been the creation of the Department of Welfare in the Centre and the States with the main purpose of looking after the interest of women and children in India This department has set up the aforesaid institutions in various districts in Bihar including the Patna After Care Home for women. Since all of them are facing the same sort of problems and difficulties, we are proceeding in what have to say hereafter by making Patna After Care Home as an example. However, whatever we say will be of universal application to all the aforesaid institutions because from a careful examination of the reports filed by the Committee the condition of all these institutions is by and large the same as in Patna, there being only few here the condition though appear very satisfactory, is really not as bad as in the rest of the institutions.
5. We are anguished and distressed to state straightway that the After Care Home for Women at Patna and all the other institutions mentioned above are neither a Home nor do they provide care for any women or children who have been ill-fatedly consigned to these institutions after being supposedly rescued from a cruel and unhappy situation Within the family or outside or from a prostitute's den or from their own homes and hearts after being subjected to brutal and inhuman treatment by those who are to love them, cherish them or protect them or as a result of men's brutal treatment in cruel satisfaction of his carnal desire thus being left abandoned. The woman finds herself within the horrendous confine of an institution which instead of ameliorating her situation, consigns to a snakepit existence of dishonour

and degradation and for physical discomforts, uncared for, unattended to and completely forgotten. One would expect that once a woman, being the unfortunate victim of circumstances is brought to this institution, she will be relieved of her physical and mental agony provided with sympathy, affection, kindness and, above all, a respectable and comfortable existence and reasonably decent abode to live in with congenial surroundings provided by feeling of sympathy, kindness and understanding. It would also be expected that opportunities for rehabilitating these unfortunate women would be created. But what a victim woman faces there is entirely different, The so called Homes are structures in utter dilapidation making the existence entirely perilous and where the basic necessities of life are entirely inadequate and in some cases even absent. Basic commodities that any human being would need in course of everyday existence is inadequate. Food, clothes, beddings, medical attention and the like are at places totally absent and at any rate entirely inadequate. There is no arrangement for providing education to the illiterates, to equip them with the capacity to obtain jobs and employment or for providing vocational training which would make them adequately equipped to earn their own livelihood leading to love, living with dignity and honour in a hostile society and is weak enough to shun them but not strong enough to lift them from the situation they have fallen into. No health care is provided to the inmates of these institutions which is a matter of prime importance in any place where human beings are living ostensibly for being cared for and looked after. I shall deal with this part separately later.

6. Sufficiently put, if these were not enough, there are also reports of inhuman and brutal treatment of the inmates, by the very persons in whose care the inmates have been put and their cohorts which at times extends to forcing them into a situation from which they have been rescued. If we may say so, the After Care Homes and the other institutions, as they stand today, are perhaps much worse than the brothel and streets from which most of them are supposed to have been resurrected and the jail where a large number of prisoners are either undertrial or are facing their punishment; or the streets of cities from where they have been picked up. Here the inmates are virtually consigned to the limbo and forgotten like lost tribe to be dealt with as if they were animals sold in a fare or even subjected to the very treatment from which they have been resurrected. From all counts, there appears to be no end of their misery. It will be correct to say that for them life is-form here to

eternity - and that too without raising a demur, a protest and a cry for help. All this for fear of reprisal and harsh treatment.

7. Similar is the condition in the institutions set up for juveniles. The situation is *pari materia* the same. Juveniles are not provided basic human necessities, proper medical care or environment conducive to their health. Facilities for education are provided on paper in some institutions which are meant for reforming the juveniles, often accused of a crime or those lifted from the streets of cities, were found themselves being inducted into a life of crime and dangerous existence by complete neglect. There are instances in which children are being misused by those who have been designated with task of protecting them. Life to them is the same from which they have been rescued, There are institutions where adults have been inducted as borders without any authorization who treat these juveniles as their chattels. There are some institutions in which male juveniles are living with female inmates. There are many who are undertrials or those who have been convicted. After being acquitted or after their release in pursuance of the legal situation now existing by virtue of statutory pronouncement and the decisions of the apex Court and this Court, there is once again no future for these juveniles. Once again they are placed in the same situation and the environment which brought them in this institution. No attention is being paid by the Government to all this.

We are also constrained to observe that the concerned departments and such persons who are entrusted with the task of exercising supervision and control over these institutions have singularly failed in their duty to do what is required of them in regard to these institutions. We are anguished to observe that not only the official machinery is completely indifferent to the situation, even the basic human feelings towards human trapped in these homes is non-existent. Immediate attention is now required to be paid by the Government, the concerned departments and social and welfare organizations and individuals if it ~ intended to remedy the situation and bring about a radical change for ameliorating the condition of these institutions.

8. **Medical Care :** In this connection, we had called for reports from the Civil Surgeons of all the districts where such institutions are situate. The reports, to describe them succinctly, are tardy attempt to avoid confessions of negligence which, if objective reports had been given, would be writ large. In most cases, Civil Surgeons have stated about the condition of the building

and the lack of facilities to the inmates and have only given vague facts about the health of the inmates without any specific details in regard to anyone as described by us. What they say, however, is enough to indicate that medical care is totally absent. The inmates are suffering from skin diseases, malnutrition, anaemia serious affliction:" like tuberculosis, general disease etc. In the Patna After Care Home, an adult inmate and a child lost their lives due to the reasons unknown from the records. Regretfully, no case was instituted. In fact police was not informed and one wonders how an infant child was found there to loose its life. Others will also die if the attitude of the Civil Surgeons continue to be what it is. In fact, it is only due to our instructions that a rare visit has been made to the institution by the doctors. Perhaps, due to the paucity of fund or misuse of fund, even basic medicines have not reached the inmates.

9. **Judiciary:** The district judiciary has also failed to take both judicial as well as social interest in the matter. Firstly, the District Judges on the basis of the Supreme Court decisions, referred to above, should have inspected the institutions and should not have rested if they have done so merely having done so and they should have reported the matter to the proper authorities if they found during their visit that the situation was such that deserved the attention of the authorities. The Court in which the inmates of these institutions are either accused or are vagrant on remand, should have also seen that their efficient interest is shown in the early disposal of these cases in trying to find the places or individuals to whom such inmates, as is possible are handed over. Recently, in C.W.J.C. No. 89 of 1989, we had in our judgement given specific instructions in relation to the cases concerning juveniles. We have received reports and we have sought another set of report from the District Judges. The reports were utterly unsatisfactory and we have not been yet furnished complete materials to satisfy ourselves whether, our orders have been obeyed. We direct the District Judges of the judgeships concerned to inspect these institutions in their jurisdiction in accordance with direction of the Supreme Court and send reports of those institutions to this Court in this application so that they may be examined here. They should also send monthly report to this Court in this Application in regard to the case pending and their stage of proceeding and the result in which juveniles and other inmates of the institution are involved. We direct the State Government to implement the decision of the Supreme Court reported in 1988 PLJR 93 (SC) (*Vikarmdeo Singh*

Tomar Vs. State of Bihar) and we direct also to take further steps in line with the direction of the Supreme Court reported in (1986) 4 SCC 106 (*Dr. Upendra Baxi Vs. State of Uttar Pradesh*).

10. It appears now necessary that specific and appropriate directions are issued by us to the concerned authorities in our bid to ensure that the After Care Homes for Women ail over Bihar and the institutions set up for the juveniles are maintained and run like institutions meant for human beings and not sub human and their inmates are provided with the relief that will rescue them from their unhappy existence to which fortunes and, perhaps, their own conduct has consigned them. This we do in fulfilment of our desire of seeing that Victims of momentary misfortune should not be subjected to eternal misfortune in these institutions. We, therefore, issue the following directions in regard to the inmates of all the After Care Homes for Women and other institutions. Compliance of these directions will be closely watched by us and we will be constrained to take stringent legal measure to enforce them, should anyone be found lacking in performance of his duty because until now we have found that the State officials have, instead of trying to cooperate with us in solving the problems which are more human and social than anything else, have always tried to create obstructions and present unjustified explanations or showing tardy and incomplete implementations to cover up a patently undesirable situation. Even the directions given by the apex Court in the cases aforementioned" have been ignored by the powers that be.

11. We direct as follows :

(i) The Secretary, Welfare; the Director, Welfare; the Secretary, Building Construction and Development Department; the Commissioner, Human Resources Department; Health Commissioner-cum-Secretary; and the Finance Commissioner; Government of Bihar, Patna, are all directed to provide adequate finances for immediate renovation and future repairs of all the buildings in the State of Bihar in which these institutions are situate. It would be advisable if the Government itself constructs its own buildings for this purpose but till then these buildings must be kept in proper repair and maintenance and provided with necessary facilities that are required for any residence. This must be accomplished within four months definitely and positively;

- (ii) The conduct of the matrons and the superintendents as well as of those class III and IV employees posted in these institutions should be kept under strict surveillance and such persons should also be subjected to frequent transfer to avoid and misuse of position by them. Unnecessary staff should be removed and persons, whose presence can be useful in the institutions, be posted. Care should be made to find persons dedicated to the spirit of public service and not those who treat these institutions as avenues for self aggrandisement;
- (iii) Immediate steps should be taken to provide such personnel who can impart education and vocational training to the inmates. This should be done forthwith. We feel that these institutions should be converted into small schools and vocational centres in line with other schools so that the inmates may, if they have to stay there for some time, be imparted educational and vocational training;
- (iv) The Civil Surgeons of the Districts and the Assistant Civil Surgeons, qualified for specific kind of ailment, must visit the institutions every two weeks, give a complete check up to each of the inmates and prepare a report which should be maintained in a register signed by the doctor and the inmate both in regard to each of the inmates. In fact, it will be more advisable if Assistant Civil Surgeons are posted specifically in each of such institutions or one for two institutions if there are two in one city. If any emergent treatment is necessary, it should be provided for immediately by an expert. All necessary medicines must be provided immediately when required. Civil Surgeons of the district will be personally responsible for the observance of these instructions;
- (v) Adequate fund should be made available for providing food, wearing apparels, bedding etc. and toilet requisites for each of the inmates forthwith. We clarify - sufficient funds should be made available to each of the institutions so that an inmate is provided with three square meals per day. Each meal should consist of the barest minimum food at least wholesome that can keep body and soul together. Rice and chapatis sufficient for human requirements must be provided with dal and vegetables at two meals, that is, lunch and dinner and a breakfast of tea and bread. If any inmate, indisposed, requires special diet, that should be provided. Wearing apparels of at least four saries, four blouses, petticoat etc, and similarly payjama, kurta etc. for juveniles and shawls and coats"for winter must be provided to the inmates. Each 'of the inmates must be provided with two blankets, three bedsheets and one pillow with pillow cover. In fact, we feel that

all similar facilities given to A class prisoners in jail should be provided on regard to those inmates;

- (vi) Efforts should be made immediately by communicating with the parents or husbands or relations, as the case may be, of each of the inmates, so that if occasion arises then these inmates after following the procedures required by law and our directions that we propose to give hereafter, can be handed over to such persons;
- (vii) If any of the persons categorised above and if any person of any other categories disown the inmates then we direct the District Magistrate of the district concerned, the Superintendent of Police of that district and the Director, Welfare, to find suitable employments for these inmates in Class III or Class IV cadre of the Government in the Collectorate or in the Police Service. They should be given preference when appointments are made and in fact they should be given ad hoc appointments immediately. Efforts should also be made to provide domestic employments for such inmates by way of advertisement and interview by desirable persons and individuals who may desire the services of these adult inmates as domestics. Even in case of juveniles, attempts should be made to get them adopted by suitable persons or institutions. Assistance should be rendered to any of the inmates who desire to settle down as a housewife married to a suitable person. This should be done after following the prescribed procedure of informing the Court concerned and getting its approval. For this purpose also, advertisement should be made. While effecting such marriages, care should be taken, firstly, to ensure that the man wanting to marry is suitable, the 'environment in his home is conducive and his relations proper. Care should, also be taken that an inmate is married to a man of the same faith except in cases where both the man and the woman though of different faiths, agree to the marriage;
- (viii) If any inmate is an accused in a criminal case then the Court concerned is directed to dispose of such cases with the greatest of expedition by giving top priority and in the case of juveniles following the directions given by us in the case of *Sanat Kumar Sinha Vs. State and others* (1989 PLJR 1024) and by the Supreme Court in the cases reported in 1988 PLJR 93 (SC) (supra) and (1986) 4 SCC 106 (supra). We are not possessed of any details. The district judge of the district concerned is directed to see that the Courts in which cases, involving women and juveniles are pending, are disposed of with the greatest of expedition in accordance with the statute and decisions of the Supreme Court. We have already asked for the reports

from all the District Judges in regard to the cases pending in their judgeships. In future, the District Judges are directed to send monthly progress report of such cases to the Hon'ble Inspecting Judge of the judgeship concerned;

- (ix) Such inmates who are witnesses in criminal cases either as eye witness and/or as victims themselves should be produced by the authorities concerned before the Chief Judicial Magistrate or *any* other Court concerned within 15 days from the receipt of the communication of this order and that Court should, after recording their statement under Section 164Cr. P. C., if already not recorded, and after obtaining P. R. bonds, for ensuring their appearance as witness, release them forthwith from the remand home and hand them over to their parents or have them sent to the places and the persons they want to go by Government expenses and under proper police escort. Such transfer of custody must be properly monitored by the Court concerned to ensure that it is not misused in transit. In case of such inmates who have been put in the remand homes on the complaint of the father of having fled away with the man they love and in some cases, married, such inmates should be forwarded to the Courts by the Remand Home authorities immediately and the Court concerned should release them from the custody of the Home forthwith, if they are 18 years of age, after informing the persons where these inmates want to go and in case they are under 18 years of age, to their parents. If those girls are shunned by both their husbands and parents, then they should, after reporting the matter to this Court, be remanded to the Home where suitable arrangements should be made in accordance with law on the directions issued from this Court for the purposes of their rehabilitation.
 - (x) We would like also to draw the attention of the aforesaid authorities of the institutions provided for juveniles children both as remanded children or as undertrial prisoners. Their problems are identical. The treatment meted out to the inmates is as bad as ever. By this order we direct the concerned Government authorities as aforesaid, to endow these institutions with their attention and to make provisions to ensure that these institutions also are restored to the position that they may be useful for those who are consigned to them.
12. The above directions must be followed Without any delay by the concerned authorities in letter and spirit without giving any occasion to us to enforce them by stringent measure. This is only a small effort to rectify things and to ensure that there is harmony between moral and deed. Where we talk of women lib; where we celebrate women's year; where we reserve seats for women in various institutions - political, social and

cultural; and where the women are now becoming active in all spheres of life-social, political and cultural, the existence of the situation created by such institutions is utterly desirable and is a complete negation of all that we stand for. Similarly, where efforts are being made by the international community and the national institutions for the protection of the children from diseases, pestilences and the like and have provided them with everything that would ensure for them a future which in most cases they are deprived of yet the institutions for children in Bihar are completely in antithesis to the prevailing efforts of the international world community and national institutions. Those who have been responsible for creation of such situation will be held responsible to the society at large and those who are responsible will be required to be dealt with severely unless things are put in proper order. In fact, we have already directed the Central Bureau of Investigation to institute cases on the basis of the reports submitted.

13. In this connection, attention is drawn to decision of the Supreme Court in the case of *Vikarmdeo Singh Tomar Vs. the State of Bihar* (supra). The directions given in this decision have been flagrantly violated and disobeyed. We have, therefore, no option but to convey these facts to the Supreme Court. We, therefore, direct that the copy of this judgement, the entire order sheet and the copies of the reports be forwarded to the Registrar of the Supreme Court for drawing the attention of that Court.
14. In course of hearing of this application, we have passed numerous orders giving specific directions. They relate to finding out the persons to whom the inmates could be handed over, training out the juveniles to be sent and even restoring a child to his father and wives to husbands. We have also in another application (Cr. W.J.C. 89 of 1989) given specific directions in regard to cases in which juveniles are involved. We have so far succeeded in a very small measure, Therefore, we direct that this application should be kept on the record and the Committee formed by this Court should continue to exist subject to any change in its composition that may be effected by this Court as and when necessary. We also direct the authorities to afford full facility to this Committee in the line suggested by us in order to enable them to visit any of the institutions and submit periodical reports to this Court in this application and obtain necessary directions in relation to the compliance of our order and for any future exigency. Whenever such an exigency arises, this matter should be listed before a Bench presided over by Hon'ble Mr. Justice S. H. S. Abidi.

15. We are gratified for having done to in our bid for the fructification and success of our endeavour. We wait in expectant silence in hesitant disquiet and with an apparent uncertainty because of the belief that human feelings are not yet entirely dead in the hearts of those at the helm of affairs and sense of rectitude still prevails.

Let history not say that the women and the children of the institutions in Bihar could not, while the world holds symposium and seminars, get the professed determination to perform the miracle of resurrecting the women and the children from their dead existence. Lest history not say that these inmates have been laid down by indifference, inefficiency, lack of humanity and above all unwarranted exploitation.

16. S.H.S. Abidi, J.I agree.

17. Order accordingly.

Supreme Court of India
AIR 1982 SC 1297

Jaya Mala
vs
Home Secretary, Government of
Jammu and Kashmir and Others

D.A. Desai, P.N. Bhagwati, JJ.

1. On May 6, 1982, we made the following order:

"This is a petition for writ of habeas corpus for release of Riaz Ahmed who has been detained under the Public Safety Act, 1978. The petition has been brought by the petitioner for release of Riaz Ahmed from the detention on various grounds set out in the writ petition. We are of the view for the reasons which we shall record later that the detention of Riaz Ahmed is invalid and we accordingly allow the writ petition and direct that Riaz Ahmed be set at liberty forthwith."

Here are the reasons.

2. District Magistrate, Jammu, respondent 5 herein, made an order dated October 17, 1981, directing detention of Riaz Ahmed @ Riaz, son of Mir Mohammad, resident of Julaka Mohalla, Jammu Tawi, under Section 8 of the Jammu & Kashmir Public Safety Act, 1978 ('Act' for short). Pursuant to this order the detenu was arrested on October 18, 1981, and "detained in Sub-Jail, Rasi, but this order was modified on October 19, 1981, and the detenu was detained in Central Jail, Jammu. Grounds of detention were communicated on October 20, 1981, and were served upon the detenu on October 21, 1981. Detenu appears not to have made any representation even though it is alleged that he was advised about his right to make a representation. As required by Section 8 of the Act, respondent 1 by the order dated October 26, 1981, approved the order of detention made by respondent 5. The case of the detenu was referred to the Advisory Board on November 13, 1981, and the Advisory Board on December 10, 1981, opined that there was sufficient cause for detention of the detenu. Thereafter the Government of State of Jammu & Kashmir confirmed the order of detention under Section 17 of the Act on December 12, 1981.
3. Petitioner Jaya Mala who happens to be associated with some legal aid committee for helping needy persons from the State of Jammu & Kashmir received a letter

dated April 15, 1982, from Ayaz Khan, a student in the B.A. class of Jammu University stating that the detenu is his brother and that for the reasons set out in the letter the petitioner should move the Court for appropriate relief. Thereupon the petitioner filed the present petition.

4. This Court ordered a notice to be issued on April 29, 1982, making it returnable on May 5, 1982, and the notice carried an intimation that the matter will be finally heard on that day.
5. A return has been filed by Shri A. Sahasranaman, respondent 5, District Magistrate of Jammu, asserting that in view of the grounds served upon the detenu it became necessary for him to make the impugned order of detention. A detailed return has been filed by one Mr. K.S. Salathia, Deputy Secretary, Home Department, Jammu & Kashmir Government, to which he has annexed documents R-1 to R-7.
6. At the outset a brief reference to the two grounds by itself with out anything more would be sufficient to dispose of the petition. In ground No. 1 it is alleged that on January 10, 1981, when detenu was travelling by mini-bus, the conductor of the bus demanded fare which, the detenu refused to pay and left the bus after administering threats. Subsequently on the same day detenu along with 7-8 other persons, three of whom are named, stopped the mini-bus at Hari Chowk, Jammu and attacked the conductor Chander Shekhar with a dagger with the intention to kill him and caused injuries to his person. The second ground recites that on August 1, 1981, around 12 noon detenu in company of 3-4 other associates took lemon water from Navin Kumar Jain Rehri Walla at Mubarak Mandi and refused to pay for the same and on further demand detenu took out a dagger (khokhri) and threatened saying "By demanding money you are inviting your death."
7. In respect of each incident set out in the grounds F.I.R. has been lodged. If every infraction of law having a penal sanction by itself is a ground for detention danger looms large that the normal criminal trials, and criminal courts set up for administering justice will be substituted by detention laws often described as lawless law. There is not the slightest suggestion that witnesses are not forthcoming in respect of the alleged infraction of law. Why the normal investigation was not pursued is a question difficult to answer. If in respect of the incident of January 10, 1981, a charge could have been laid under Section 307, I.P.C., on the face of it, a serious charge, the detenu as accused could have been arrested and if he moved for bail the same could have been legally resisted. The incident dated August 1, 1981, at best discloses a threat and

the offence could at best be one under Sections 504 and 506, I.P.C. It is not made clear in the return why normal procedure of investigation, arrest and trial has not been found adequate to thwart the criminal activities of the detenu. It is not for a moment suggested that power under the preventive detention law cannot be exercised where a criminal conduct which could not be easily prevented, checked or thwarted, would not provide a ground sufficient for detention under the preventive detention laws. But it is equally important to bear in mind that every minor infraction of law cannot be upgraded to the height of an activity prejudicial to the maintenance of public order. Non-application of mind of the detaining authority becomes evident from the frivolity of grounds on which the detention order is founded.

8. But there is a greater infirmity which strikes at the root of the order. It is alleged in the petition that detenu was a minor aged about 17 years at the time of arrest and detention and that it is difficult to even conceive that this school going minor boy would indulge into such activities as to be a serious threat to the maintenance of public order. In para 7 of the petition it is alleged that the detenu was not even 17 years of age at the time of his detention. In the return filed on behalf of the State, the only assertion is that this averment is misconceived and needs no reply. But in para 2 of the return under the heading 'Paragraph-wise reply' it was denied that the detenu was a minor and it was further averred that his age was between 18 and 19 years. In support of this averment reliance was placed upon report as to the age issued by Dr. T.R. Sharma attached to Government Medical College, Jammu. Dr. Sharma appears to have examined the detenu for ascertaining his age by radiological and orthopaedic test on May 3, 1982. The relevant portion of the report reads as under;

"Epiphysis around ankle, lencem wrist, elbow and shoulder joints have appeared and completely fused. Epiphysis for iliac crest has appeared and partially fused. Radiological age is between eighteen and nineteen years."

9. Detenu was arrested and detained on October 18, 1981. The report by the expert is dated May 3, 1982, that is nearly seven months after the date of detention; Growing in age day by day is an involuntary process and the anatomical changes in the structure of the body continuously occur. Even on normal calculation, if seven months are deducted from the approximate age opined by the expert in October, 1981 detenu was around 17 years of age, consequently the statement made in the petition turns out to be wholly true. However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. Undoubtedly, therefore, the detenu was a young school going

boy. It equally appears that there was some upheaval in the educational institutions. This, young school going boy may be enthusiastic about the students' rights and on two different dates he marginally crossed the bounds of law. It passes comprehension to believe that he can be visited with drastic measure of preventive detention. One cannot treat young people, may be immature, may be even slightly misdirected, may be a little more enthusiastic, with a sledge hammer. In our opinion, in the facts and circumstances of this case the detention order was wholly unwarranted and deserved to be quashed.

Kerala High Court
1993 (3) Cri. 57

Cri. Reference no. 3 of 1991

Sreedharan and Manoharan, JJ.

ORDER

1. Manoharan, J. This reference is by the Additional Sessions Judge, Palakkad. Fourth accused in Sessions Case No. 1 of 1989 moved Cri. M.P. 583 of 1991 stating that he did not attain the age of 16 as on 23.12.1987, the date of occurrence. Learned Sessions. Judges states in his order that he (4th accused was a juvenile and hence as per Section 24 of the Juvenile Justice Act, 1986 (Act 53 of 1986) (for short 'the Act') since no juvenile, can be charged with or tried for any offence together with a person who is not a juvenile, ·fourth accused cannot be tried along with the other accused persons and that the order of committal passed by the Judicial Magistrate of First Class, Mannarghat is not in accordance with law. Consequently, the same is liable to be quashed.
2. When the matter came up for hearing before a learned Single Judge. His Lordship stating that the decision in *State of Kerala Vs. Sophiya Rose* 1988 (2) KLT 584, is doubted by a learned Judge referred the matter to the Division Bench; that is how this matter came up before us.
3. In *Sophiya Rose's* case (supra) it was held that the crucial date in order to decide whether the accused is to be tried by the Children's Court or not is the date on which the offence was committed and not the date on which the accused is placed for trial'.
4. The first question, therefore, for consideration is whether the age of an accused as on the date of the occurrence or as on the date when he appears or is brought before Court, is age for deciding whether he is a juvenile offender. This particular question primarily has to be answered with reference to the provisions in the act. 'Delinquent Juvenile' is defined under Section 2(e) of the Act to mean a juvenile who has been found to have committed an offence and subsection (h) of Section 2 of the Act defines 'Juvenile' to mean a boy who has not attained the age of eighteen years. The definition does not as such state as to whether the age of the juvenile should be determined with

reference to the date of occurrence or as on the date when he appears or is brought before Court.

5. Section 22 of the Act which by the wording has overriding effect enjoins, no delinquent juvenile shall be sentenced to death or imprisonment, or committed to prison in default of -;payment of fine or in default of furnishing security. 'Section 24 states that notwithstanding Section 223 of Cr. P.C. or any other law for the time being in force no juvenile shall be charged with or tried for any offence together with a person who is not a juvenile. And a juvenile delinquent is entitled to be dealt with only under the provisions of the Act. When does the offender acquire the said immunity and right. The answer to the said question would solve the problem whether it is age as on the date of occurrence or his age on the date when he appears or brought to Court that is material for deciding whether he is a juvenile.
6. An offence consists of the 'act', *mens rea*, and the harmful social consequence of the act which makes it culpable. Thus culpability arises on the commission of the 'act' with the necessary *mens rea*. And such 'act' since is committed on a particular date the culpability too would arise on that particular date. Thus the liability for that particular act would arise on its commission on a particular date. As a necessary corollary' liability for punishment for the offence also would arise on the date when the offence was committed. Naturally, therefore, the immunity, if any, from being sentenced, in the absence of anything to the contrary, also has to be judged with reference to the date when the offence is committed.
7. Since it is his status as a juvenile delinquent that clothes him with the immunity and privileges under the Act, he need have that status only at the commission of the offence. If he has the immunity and privileges under the Act at the incurring of the liability for punishment, viz., on the date of the commission of the offence that will not be taken away on his ceasing to be juvenile on his crossing the age of 16 pending inquiry. This is provided for the Sections 3 and 56 of the Act.
8. A reading of Section 3 of the Act also would show -that the relevant age is the age as on the date of commission of the offence. Section 3 of the Act reads :
"3. Continuation of inquiry in respect of juvenile who has ceased to be a juvenile. Where - an inquiry has been initiated against a juvenile and during the course of such inquiry the juvenile ceases to be such, then, notwithstanding anything contained in

this Act or in any other law for the time being in force, the inquiry may be continued as orders may be made in respect of such person as if such person had continued to be a juvenile." (emphasis supplied).

9. As per Section 3 of the Act, when an inquiry is initiated against a juvenile and he ceases to be a juvenile during the course of such inquiry, the inquiry can be continued as if such person had continued to be a juvenile. Thus, during the course~ of inquiry inspite of his ceasing to be a juvenile on crossing the age of 16; by a legal fiction he is treated as a juvenile in spite of the fact that he ceased to be a juvenile on crossing the age of 16. In *East End Dwellings Co. Ltd. b. Finsbury Borough Council* 1952 AC 109, Lord Asquith said :

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative, state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain of state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

10. In the decision in *State of Bombay Vs. Pandurang Vinayak* AIR 1953 SC 244, the same principle is laid down where it is stated :

"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion."

11. Thus, Section 3 of the Act mandates that the inquiry has to be continued in spite of the fact that the accused, who was juvenile on the date of occurrence ceased to be a juvenile during the course of the inquiry treating him as a juvenile. This also brings out the legislative intent that it is enough that he need be a juvenile on the date of occurrence, if he has not attained the age of sixteen years at the occurrence he will be a 'delinquent juvenile' within the meaning of the Act.

12. In the decision in *Bhoop Ram Vs. State of U. P.* AIR 1989 SC 1329, the accused who was below 16 years of age on the date of offence was convicted along with five others by the Sessions Judge under Sections 148, 302, 323 and 324 read with Section 149, I.P.C. and was sentenced to imprisonment for life besides concurrent sentence for lesser terms of imprisonment. It was contended that the said accused being a 'Child' within the meaning of Section 2(4) of the U.P. Children Act, 1951, he should have been sent to an approved school for

detention till he attained the age of 18 years instead of being sentenced to undergo imprisonment in jail. By the time when the matter reached before the Supreme Court, the accused had crossed the maximum age of detention in an approved school viz. 18 years. The Supreme Court held

"On a consideration of the matter, we are of the opinion that the appellant could not have completed 16 years of age on 3.10.1975 when the occurrence took place and as such he ought to have been treated as a 'child' within the meaning of Section 2(4) of the V.P. Children Act, 1951 and dealt with under Section 29 of the Act."

13. Since the fourth accused had crossed the maximum age of 18 for detention in an approved school while sustaining the conviction against him, quashed the sentence and directed his release forthwith. The said decision would show that the age of the child as on the date of occurrence is the age to be reckoned for judging whether he is a 'Child'. In the decision in *Gopinath Ghosh Vs. State of West Bengal* AIR 1984 SC 237, a minor accused was tried along with other accused persons for committing a murder and was sentenced to imprisonment for life. The plea that he was a minor was raised for the first time in appeal before the Supreme Court. The Supreme Court referred the specific issue as to whether he was a minor to the trial Court and the answer was returned in affirmative. The Supreme Court allowed the appeal and set aside the conviction under Section 302, I.P.C. and sentence of imprisonment for life, and the case was remitted to the Magistrate for disposal in accordance with law.
14. There is similar provision under Section 6 of the Probation of Offenders Act, 1958 which 'enjoins that when any person under twenty one years of age is found guilty of having committed an offence punishable- with imprisonment (but not with imprisonment for life), the Court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under Section 3 or Section 4. There also, the question as to whether the age at the date of occurrence or the age when he appears or brought before Court is the relevant age came up for consideration in the decision in *Musakhan Vs. State of Maharashtra* AIR 1976 SC 2566. In that case the 4th accused was 20 years in 1968 when the occurrence took place, the 7th accused was younger to the 4th accused and the 9th accused was also only 20 years at the time of occurrence. The Supreme Court allowed the appeal filed by them, their convictions and sentences were set aside and they were directed to be released on their executing a bond with two sureties of Rs. 500/- each for a period of one year in

order to keep the peace and be of good behaviour with a direction that all of them would report to the nearest probation officer in their range. The decision shows that the age on the date of occurrence is the age for the purpose of Section 6 of the Probation of Offences Act, 1958.

15. In this connection it is necessary to refer to Section 27 of the Criminal Procedure Code (for short 'the Code'). Section 27 of the Code reads:

"27. Jurisdiction in the case of juveniles. - Any offence not punishable with death or imprisonment for life, committed by any person who, at the date when he appears or is brought before the Court, is under the age of sixteen years may be tried by the Court of a Chief Judicial Magistrate or by any Court specially empowered under the Children Act, 1960 (60 of 1960), or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders."

16. Whether Section 27 of the Code governs this particular aspect is to be judged with due regard to Section 5 of the Code. Section 5 of the Code I reads:

"5. Saving - Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred or any special form or procedure prescribed, by any other law for the time being in force." (Emphasis supplied).

17. As per Section 5 of the Code the provisions in the Code will not affect any special or local law or any special jurisdiction or power conferred or any special form of procedure prescribed by such law for the time being in force. The question is whether Section 27 of the Code is a 'specific provision' within the meaning of Section 5 of the Code. Section 27 of the Code in the context would only be an enabling provision which does not express any contrary intention. In *Raghbir Vs. State of Haryana* (1981) 4 SCC 210, the appellant along with three others was convicted of the offence of murder and was sentenced to imprisonment for life. It was contended that the appellant was a child *within* the meaning of Section 2(d) of Haryana Children Act, 974, and therefore, he claimed that he is entitled to be dealt with under the provisions of the Haryana Children Act. But the same was contested on the basis of Section 27 of the Code. Reliance was also made on a Full Bench decision of the Madhya Pradesh High Court in *Devi Singh Vs. State of M. P.* 1978 Cri. LJ 585, where the majority held, the juvenile Courts constituted under the Madhya Pradesh Bal Adhiniyam have exclusive jurisdiction to try a delinquent child for all offences except those punishable with death or imprisonment for life, while the *minority* view of Verma, J. (as His Lordship then was) was to the effect that the provision in Section 27 of

the Coere is merely an enabling provision which does not express any contrary intention to undo the saving provided in Section 5 of the Code. The minority view was accepted by the Supreme Court and the Supreme Court held:

"In our opinion, Section 27 is not 'a . specific provision to the contrary', within the meaning of Section 5 of the Act; the intention of the Parliament was to exclude the trial of delinquent children for offences punishable with death or imprisonment for life, inasmuch as Section 27 does not contain any expression to the effect 'notwithstanding anything contained in any Children Act passed by any State Legislature'. Parliament certainly was not unaware of the existence of the Haryana Children Act coming into force a month earlier or the Central Children Act coming into force nearly fourteen years earlier. What Section 27 contemplates is that a child under the age of sixteen years may be tried by a Chief Judicial Magistrate or any Court specially empowered under the Children Act, 1960."

18. Once 'it is seen that Section 27 of the Code is only an enabling provision and the same IS not a specific provision to the contrary within (he meaning of Section 5 of the Code, it is clear that, whether a person is a juvenile has to be Judged with due regard to the provisions in the Act. This is in tune with the very purpose of the statute. Article 39(f) of the Constitution enjoins, it is the duty of the State that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity. There can be no doubt that atmosphere of prisons certainly would have an adverse effect in bringing up the personality of a child. The Act also is aimed at to secure conditions whereby the personality of delinquent children develops and they blossom as good citizens.
19. In the decision in *Sheela Barse Vs. Union of India* AI R 1986 SC 1773, the Supreme Court observed:

"If a child is a national asset, it is the duty of the State to look after the child with a view to ensuring full development of its personality. That is why all the statutes dealing with children provide that a child shall not be kept in jail. Even apart from this statutory prescription, it is elementary that a jail is hardly a place where a child should be kept. There can be no doubt that incarceration in jail would have the effect of dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and alienating him from the society."
20. When the provisions of the Act is understood with due regard to the object and intention of the legislature, it is clear that the age of the child as on the date of occurrence is the age to be reckoned for deciding whether he is a juvenile.

21. The question whether the age of the accused at the time of the commission of the offence is the relevant age under the West Bengal Children's Act, 1965 was considered by a Full Bench of the Calcutta High Court in *Dilip Saha Vs. State* AIR 1978 CAL 529. The Court held that the age of the accused at the time of the commission of the offence is the relevant age for attracting the provision of the West Bengal Children's Act, 1959 and not his age at the time of trial.
22. In *Krishna Bhagwan Vs. State of Bihar* AIR 1989 PAT 217, a Full Bench of the Patna High Court considered the question whether an offender who was a juvenile at the time of commission of the offence and who ceased to be a juvenile at the commencement of the trial is entitled to be dealt with under the Bihar Children Act. The Full Bench held :

"Taking into consideration the aim and intention of the Juvenile Act, the application of its provisions should not be denied to an offender where by the time the trial commences or concludes the accused ceases to be a juvenile although when the offence was committed he was a juvenile within the meaning of the Act."
23. These decisions also support the view that if an offender was a juvenile when the offence was committed, he is entitled to be dealt with under the Act.
24. Thus the view expressed in *State of Kerala Vs. Sophia Rose* (supra) that the crucial date to decide whether the accused is to be tried by the Children's Court or not is the date on which the offence was committed is the correct position of law.
25. The order of the Sessions Judge states that the occurrence was on 23.12.1987. The Act came into force on 2nd October 1987; that means the occurrence was after the commencement of the Act. Sessions Judge also states that as per the certificate produced by the 4th accused, he is a juvenile. Therefore, in view of the decision in *State of Kerala Vs. Ariffa* 1985 KLT 370 (D.B.), the order of committal passed by the learned Magistrate in relation to the 4th accused who is a juvenile is quashed. The Sessions Judge will send back the case as against the 4th accused to the Judicial Magistrate of First Class, Mannarghat for appropriate steps in accordance with provisions of the Act. The Criminal Reference is answered accordingly.
26. Before parting with the case, we place on record our gratitude and appreciation for the able and learned assistance given by Shri. M. N. Sukumaran Nair, Senior Advocate.
27. Reference answered accordingly.

**Supreme Court of India
1997 (8) SCC 720**

**Bhola Bhagat and Another
vs
State of Bihar**

A.S. Anand and K. Venkataswami JJ.

1. For an occurrence which took place at about 11.30 A.M. on 29th September, 1978, in the Bazar in village Barauli, District Gopalganj, 11 accused persons were sent up to face their trial for offences under Sections 302/149/148 IPC. The First Information Report in respect of the occurrence was lodged on 29th September, 1978 at Police Station Barauli on the statement of Paras Nath Choubey (PW-6) brother of the deceased, recorded at the hospital. The learned Additional Sessions Judge vide judgement and order dated 22nd July, 1983 acquitted Mishri Bhagat, but convicted the remaining 10 accused for offences under Sections 302/149/148 IPC. Each of the 10 accused was sentenced to undergo imprisonment for life for an offence under Sections 302/149. No separate sentence was imposed on any one of the accused for an offence under Section 148 IPC. Against their conviction and sentence, all the 10 convicts filed three different set of appeals... The Division Bench of the High Court vide Judgement and order dated 24th August, 1995 acquitted Sarwa prasad (appellant No. 5 in the High Court). The conviction and sentence of the remaining 9 convicts was, however, maintained. By Special Leave 6 of the convicts have filed three separate appeals in this Court...
4. We have heard learned Counsel for the parties at length. We find that the view taken by both the courts with regard to the involvement of the appellants in the three appeals in the commission of crime of murder of Ram Naresh Choubey on the fateful day has been established beyond every reasonable doubt..... We are not persuaded to take a view different than the one taken by the courts below in so far as the involvement of the appellants in the commission of crime is concerned. Their conviction is, therefore, well merited.
5. There is, however, one other aspect of the case which now engages our attention and that pertains to appellant No. 2, Chandra Sen Prasad, appellant No. 3, Mansen Prasad and appellant No. 10, Bhola Bhagat--(The number as given to the appellants in the High Court)

6. In March, 1983, more than four years after the occurrence, when the statements of these appellants were recorded under Section 313 Cr. P.C. they gave their age as follows:

Chandra Sen Prasad - 17 years (Appellant No. 2) Mansen Prasad - 21 years (Appellant No. 3) Bhola Bhagat - 18 years (Appellant No. 10)

7. The Trial Court recorded that in its estimation the age of Appellant No. 2 was 22 years at that time while that of appellant No. 3, 21 years and appellant No. 10, 18 years. The Trial Court, however, did not give benefit to these three appellants of the Bihar Children Act, 1970.
8. In the High Court also an argument that Chandra Sen Prasad, Mansen Prasad and Bhola Bhagat were Children as defined in the Bihar Children Act, 1970 on the date of the occurrence and their trial along with the adult accused by the criminal court was not in accordance with law was raised but was inter alia with the following observations:
Since, the alleged occurrence had taken place in September 1978 and the statements of the appellants had been recorded in February and March, 1983 it was contended that even by the estimate of the age of the appellants made by the court, all the three appellants were below 18 years of age on the date of occurrence. It appears that except for the age given by the appellants and the estimate of the court at the time of their examination under Section 313 of the CrPC, there was no other material in support of the appellants claim that they were below 18 years of age.

11. The Bihar Children Act, 1982 was already in force when the Juvenile Justice Act, 1986 was extended to all the States w.e.f. 2.10.1987. Section 32 of the Juvenile Justice Act, 1986 provides:

Section 32 Presumption and determination of age. (1) Where it appears to a competent authority that a person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile, the competent authority shall make due inquiry as to the age of that person and for that purpose shall take such evidence as may be necessary and shall record a finding whether the person is a juvenile or not, stating his age as early as may be.

- (2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile, and the age recorded by the competent authority to be the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age of that person.

This section casts an obligation on the court to make due enquiry as to the age of the accused and if necessary by taking evidence itself and record a finding whether the person is a juvenile or not.

In the instant case, however, the plea had been raised both in the Trial Court as well as in the High Court and both the Courts even considered the plea but denied the benefit to the appellants for different reasons which do not bear scrutiny....

17. The correctness of the estimate of age as given by the Trial Court was neither doubted nor questioned by the State either in the High Court or in this Court. The parties have, therefore, accepted the correctness of the estimate of age of the three appellants as given by the Trial Court. Therefore, these three appellants should not be denied the benefit of the provisions of a socially progressive statute. In our considered opinion, since the plea had been raised in the High Court and because the correctness of the estimate of their age has not been assailed, it would be fair to assume that on the date of the offence, each one of the appellants surely fell within the definition of the expression 'child'....
18. The appellants Chandra Sen Prasad, Mansen Prasad and Bhola Bhagat, shall, therefore, be released from custody forthwith, if not required in any other case. Their appeals succeed to the extent indicated above and are partly allowed.
20. Before parting with this judgement, we would like to reemphasis that when a plea is raised on behalf of an accused that he was a "child" within the meaning of the definition of the expression under the Act, it becomes obligatory for the court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination of the question of age of the accused or cause an enquiry to be held and seek a report regarding the same, if necessary, by asking the parties to lead evidence in that regard. Keeping in view the beneficial nature of the socially oriented legislation, it is an obligation of the court where such a plea is raised to examine that plea with care and it cannot fold its hands and without returning a positive finding regarding that plea, deny the benefit of the provisions of an accused. The court must hold an enquiry and return a finding regarding the age, one way or the other. We expect the High Courts and subordinate courts to deal with such cases with more sensitivity, as otherwise the object of the Acts would be frustrated and the effort of the Legislature to reform the delinquent child and reclaim him as a useful member of the society would be frustrated. The High Courts may issue administrative directions to the subordinate courts that whenever such a plea is raised before them and they entertain any reasonable doubt about the correctness of the plea, they must as a rule, conduct an inquiry by giving opportunity to the parties to establish their respective claims and return a finding regarding the age of the concerned accused and then deal with the case in the manner provided by law.

**Supreme Court of India
1998 (5) SCC 697**

Santenu Mitra

vs

State of W.B.

M. M. Punchhi, C.J., S. Saghir Ahmed and B. N. Kirpal , JJ.

1. Leave granted. Heard learned counsel.
2. This appeal is by a young man, Santenu Mitra who faces a trial under Section 302 IPC before the Court of Session. When produced before the Court, he raised the plea that he was a child on the date of the commission of the offence, i.e., 19-2-1988, and thus was entitled to the protection of the Juvenile Justice Act, 1986. His plea did not find favour with the Court of Session which led him to approach the High Court in Criminal Revision No. 922 of 1988. Orders were passed directing the Magistrate to hold an inquiry under Section 8(1) of the Juvenile Justice Act, 1986 in order to ascertain as to whether the appellant was below 16 years of age on the date of the incident (i.e. 19-2-1988).
3. The learned Magistrate received evidence and examined some witnesses produced by either side. It was maintained by the prosecution that the date of birth of the appellant was 19-11-1971 and hence he was over 16 years of age on the date of the incident. On the other hand, the plea of the appellant was that his date of birth was 19-11-1972 and was thus below 16 years of age. The appellant strongly relied upon an entry made in the Register of Births and Deaths (Ex. 3) and the supportive evidence of a clerk of the Calcutta Municipal Corporation who had brought such register to the Court. The Court observed that even though the date of birth of the appellant as recorded in the register was 19-11-1972, since the entry was made sometime between 14-8-1978 and 8-11-1978, it was not contemporaneous and thus not reliable. On that premise, other evidence of the appellant disclosing his date of birth likewise mentioned in his LIC policy and matriculate certificate were also rejected. On the other hand, evidence led by the prosecution with regard to the application form filled by the father of the appellant at the time of the latter's admission in school was held to predominate and thus the verdict on the question of age went against the appellant. The High Court on being approached again in revision rejected the plea of the appellant.

4. We are of the view that the High Court fell in error in not holding the appellant to be below 16 years of age on the date of the commission of the offence. It is nobody's case that the entry in the Register of Births and Deaths is not a genuine entry, even though it was recorded sometime between 14-8-1978 and 8-11-1978 pertaining to a date of birth of 19-11-1972. Once that entry was recorded by an official in performance of his duties, it cannot be doubted on the mere argument that it was not contemporaneous with the date of the suggested date of birth of the appellant. It cannot be forgotten that the occurrence took place much later, say 10 years. It could not have been expected on the date when the entry was made that the appellant would claim benefit thereof on the commission of some offence. That entry is not alone but added thereto is the LIC policy and the matriculation certificate likewise mentioning the date of birth of the appellant being 19-11-1972. On the basis of such overwhelming and unimpeachable evidence, the application form filled in by the appellant's father suggesting his date of birth as 19-11-1971 pales into insignificance. We, therefore, have no hesitation to upset the impugned order of the High Court declaring the appellant to be a juvenile within the meaning of the Juvenile Justice Act, 1986. The appeal is thus allowed. The trial be regulated accordingly.

**Supreme Court of India
2000 (6) SCC 89**

**Umesh Singh and Another
vs
State of Bihar**

S. Rajendra Babu and Y.K. Sabharwal, JJ.

1. On a report made by Jugeshwar Singh [PW-7] alleging that the appellants herein along with several other persons numbering about 20 came to 'Khalihan' [threshing floor] of Bhola Singh where he and other members of his family were threshing paddy. They tried to take away the paddy. Upendra Singh threatened that any resistance would be met with such action which might even result in death. Thereafter Rajendra Singh hit Bhola Singh with a lathi and Upendra Singh moved backward and fired at Bhola Singh with gun as a result of which Bhola Singh was hit and fell down writhing in pain. Saryu Singh was shot at by Rajendra Singh and Bhagwat Dayal Singh, who was also inflicted a bhala blow by Arvind Singh, appellant in the connected matter, Umed Singh and Sheonandan Singh fired at Rajdeo Singh as a result of which he fell down. When Dharmshila, wife of Bhola Singh reached the threshing floor with her child aged about one and half years old in her arm named Rinku, Sheonandan Singh snatched the child and threw the child on the ground as a result of which the child died. After investigation, the police submitted a charge sheet against seven persons named in the FIR as three of them had died during the pendency of the investigation. The trial court convicted Sheonandan Singh and Upendra Singh under Section 302 IPC and sentenced them to death, one of the accused - Satyendra Singh, was acquitted and rest of the accused persons were convicted under Section 302 IPC read with; Section 149 and sentenced for life imprisonment...On appeal to the High Court, conviction was maintained while, sentence of death on Sheonandan Singh and Upendra Singh was reduced from one of death to life Imprisonment thereafter. Appeals have been preferred before this Court.
6. So far as Arvind Singh, appellant in Crl.A. No. 659/99, is concerned, his case stands on a different footing... The only contention put forward before the court is that the appellant is born on 1.1.67 while the date of the incident is 14.12.1980 and on that date he was hardly 13 years old. We called for report on experts being placed before

the court as to the age of the appellant, Arvind Singh. The report made to the court clearly indicates that on the date of the incident he may be 13 years old. This fact is also supported by the school certificate as well as matriculation certificate produced before this Court which indicate that his date of birth is 1.1.67. On this basis, the contention put forward before the court is that although the appellant is aged below 18 years and is a child for the purpose of the Bihar Children Act, 1970 on the date of the occurrence, his trial having been conducted along with other accused who are not children is not in accordance with law. However, this contention had not been raised either before the trial court or before the High Court. In such circumstances, this Court in Bhola Bhagat v. State of Bihar [1998CriLJ390] , following the earlier decisions in Gopinath Ghosh v. State of West Bengal [1984CriLJ168] and Bhoop Ram v. State of U.P [1990CriLJ2671] and Pradeep Kumar v. State of U.P [AIR1995SC1858] , while sustaining the conviction of the appellant under all the charges, held that the sentences awarded to them need to be set aside. In view of the exhaustive discussion of the law on the matter in Bhola Bhagat case [supra], we are obviated of the duty to examine the same but following the same, with respect, we pass similar orders in the present case. Conviction of the appellant, Arvind Singh, is confirmed but the sentence imposed upon him stand set aside. He is, therefore, set at liberty, if not required in any other case.

7. The appeal filed by Arvind Singh succeeds to the extent indicated above. The appeal is allowed in part accordingly.

Supreme Court of India
1982 (3) SCR 583
Umesh Chandra
vs
State of Rajasthan

Syed Murtaza Fazalali, D.A. Desai, A. Varadarajan, JJ.

1. This appeal by special leave is directed against a judgment dated June 29, 1974 of the Rajasthan High Court overruling a preliminary objection taken by the accused before the Sessions Judge to the effect that the Sessions Judge, Tonk was not competent to try the case as the accused Umesh Chandra was a child as contemplated by the provisions of the Rajasthan Children Act, 1970 (hereinafter referred to as the 'Act') on the date of the alleged occurrence. This Act appears to have been passed by the Rajasthan Legislature, but after receiving assent of the President was enforced in various districts from time to time. Under the provisions of the Act any person below the age of 16 (sixteen) would be presumed to be a child and the trial of a delinquent child was to be conducted in accordance with the procedure laid down therein. The objection taken by the appellant was that as he was below the age of 16 at the time of the occurrence on 12.3.1973, he could not be tried by the Additional Sessions Judge, Tonk or the Additional Sessions Judge, Jaipur city, to whom the case was transferred on 17.10.73.
2. The Sessions Judge overruled the objection taken by the accused and therefore he filed a revision to the Rajasthan High Court against the order. The High Court after considering the oral and documentary evidence came to the conclusion that the Act was not applicable to the appellant for two reasons-(1) that it was not brought into force in Tonk at the time of the offence, and (2) that it was not proved by the accused that he was below the age of 16 on 12.3.1973, the date of the occurrence. The accused was charged for offences punishable under sections 364 and 302 of the Indian Penal Code. Aggrieved by the order of the High Court, the appellant moved this Court in special leave and at the time of granting special leave, this Court directed the High Court to return a finding of fact on the actual date of birth of the accused so that this Court may determine the applicability of the Act to the facts of the present case.
3. The High Court after reappraising the entire evidence- oral and documentary-by its Order dated 18.11.76 came to a clear finding that the age of Umesh Chandra at the

time when the offence was committed was 16 years 5 months and 20 days and that the exact date of birth of the appellant was proved to be 22.9.1956. After the finding of fact called for from the High Court was sent to this Court, the appeal was placed for hearing before us.

4. In support of the appeal, the learned counsel for the appellant has assailed the finding of the High Court—that the age of the appellant was above 16 years—and it was contended that the High Court has based its decision on wholly irrelevant material and has also committed errors of law in appreciating important documentary evidence. Another point that was argued before us was as to the application of the Act to Tonk, where the offence was committed. As, however, the Act has now been enforced in the entire State, this question no longer survives because where a situation contemplated by s. 26 of the Act arises, an accused, who is found to be a child, has to be forwarded by the Sessions Court to the Children's court which can pass appropriate sentence. Where however proceedings against a child are pending before Sessions Judge, s. 26 of the Act enjoins a duty on the Court in which the proceeding in respect of the child is pending on the date on which the Act is extended to the area to act in the manner therein prescribed. In this eventuality, the Court is under an obligation to proceed with the trial and record a finding as if the Act does not apply. But after concluding the trial and recording a finding that the child had committed an offence, the Court cannot pass any sentence but the Court is under a statutory obligation to forward the child to the Children's court which shall pass orders in respect of that child in accordance with the provisions of the Act, as if it has been satisfied on inquiry under the Act that the child has committed the offence. In view of this provision, s. 21 would be attracted and the Children's court will have to deal with the child under s. 21. Thus, the main point for consideration in this case is as to what is the exact date of birth of the appellant, Umesh Chandra. The High Court appears to have brushed aside the documentary evidence produced by the appellant mainly on the ground that subsequent documents clearly proved that the father of the accused had not correctly mentioned the date of birth in the previous schools attended by him (accused) and later corrected his date of birth by an affidavit which was accepted by the High Court to be the correct date. The High Court also rejected the oral evidence adduced by the appellant as also the horoscope produced by his father. We agree with the High Court that in cases like these, ordinarily the oral evidence can hardly be useful to determine the correct age of a person, and the question, therefore, would largely depend on the documents and the nature of their authenticity. Oral evidence may have utility if no documentary evidence is forthcoming. Even the horoscope cannot be reliable

because it can be prepared at any time to suit the needs of a particular situation. To this extent, we agree with the approach made by the High Court.

5. Coming now to the facts on the basis of which the appellant sought protection to be tried only under the Act; according to the testimony of the father of the appellant he was born on 22.6.57 and was aged 15 years 9 months on 12.3.1973-the date of the occurrence.
6. It is, however, not disputed that at the time when the appellant was born, his father was posted in a small village (Dausa) where the maternal grandfather of the appellant had lived and perhaps he was not meticulous enough to report the birth of his children. There is nothing to show the birth of the appellant nor any evidence has been produced on this aspect of the matter. There is also nothing to show that the dates of birth of the other children of Gopal (the father) were registered in any Municipal register or in chowkidar's register. We have mentioned this fact because the High Court seems to have laid special stress and great emphasis on the non-production of any reliable record to prove that the birth of the appellant had been entered therein. It is common knowledge that in villages people are not very vigilant in reporting either births or deaths and, therefore, an omission of this type cannot be taken to be a most damaging circumstance to demolish the case of the appellant regarding his actual date of birth. The first document wherein the age of the appellant was clearly entered is Ext. D-1 which is the admission form under which he was admitted to class III in St. Teressa's Primary School, Ajmer. In the admission form, the date of birth of the appellant has been shown as 22.6.1957. The form is signed by Sister Stella who was the Headmistress. The form also contains the seal of the school, DW, Ratilal Mehta, who proved the admission form, has clearly stated that the form was maintained in the ordinary course of business and was signed only by the parents. The evidence of Ratilal Mehta (DW 1) is corroborated by the evidence of Sister Stella (DW 3) herself who has also endorsed the fact of the date of birth having been mentioned in the admission form and has also clearly stated on oath that the forms were maintained in regular course and that they were signed by her. She has also stated that at the time when the appellant was first admitted she was the headmistress of St. Teressa Primary School, Ajmer. The High Court seems to have rejected this document by adopting a very peculiar process of reasoning which apart from being unintelligible is also legally erroneous. The High Court seems to think that the admission forms as also the School's register (Ext. D-3) both of which were, according to the evidence, maintained in due course of business, were not admissible in evidence because they were not kept or

made by any public officer. Under s. 35 of the Evidence Act, all that is necessary is that the document should be maintained regularly by a person whose duty it is to maintain the document and there is no legal requirement that the document should be maintained by a public officer only. The High Court seems to have confused the provisions of sections 35, 73 and 74 of the Evidence Act in interpreting the documents which were admissible not as public documents or documents maintained by public servants under sections 34, 73 or 74 but which were admissible under s. 35 of the Evidence Act which may be extracted as follows:

"35. Relevancy of entry in public record made in performance of duty

An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such books, register or record is kept, is itself a relevant fact."

(Emphasis ours)

7. A perusal of the provisions of s. 35 would clearly reveal that there is no legal requirement that the public or other official book should be kept only by a public officer but all that is required is that it should be regularly kept in discharge of her official duty. This fact has been clearly proved by two independent witnesses, viz., DW 1, Ratilal Mehta and DW 3, Sister Stella. The question does not present any difficulty or complexity as in our opinion the section which would assist in this behalf is s. 35 of the Evidence Act which provides for relevancy of entry in the public record. In this connection we may refer to a decision of this Court in *Mohd. Ikram Hussain v. State of U.P.*, where Hidayatullah, J. speaking for the Court, observed as under:

"In the present case Kaniz Fatima was stated to be under the age of 18. There were two certified copies from school register which show that on June 20, 1960, she was under 17 years of age. There was also the affidavit of the father (here evidence on oath) stating the date of her birth and the statement of Kaniz Fatima to the police with regard to her own age. These amounted to evidence under the Indian Evidence Act and the entries in the school registers were made ante litem motam."

8. This topic has been elaborately dealt with particularly in regard to the entries in School Register and the admission forms in the case of *Abdul Majid v. Bhargavam*. In these circumstances, the view of the High Court with regard to s. 35 is plainly untenable and ss. 73 and 74 are utterly irrelevant. Further, the High Court was of the view that as the documents produced by the Teressa Primary School were kept in loose sheets, no reliance can be placed on them. This fact is admitted but the headmistress has explained that the admission forms were bound much after the

date of birth was recorded and hence it cannot be presumed that the documents were not kept in the regular course of business. Moreover, the School where the documents were maintained was an English public school and the record maintained by it was undoubtedly unimpeachable and authentic and could not be suspected or presumed to be tampered with. At the time when the age of the appellant was first mentioned in the admission form, there was absolutely no dispute about the date of birth or for that matter the exact date on which he was born and there could not have been any motive on the part of the parents of the accused to give a false date of birth because it was his first admission to a school at a very early age. Further, the school to which the appellant was admitted being a Public School enjoyed good reputation of authenticity.

9. In *M/s. Gannon Dunkerlay & Co. Ltd. v. Their Workmen* this Court made the following observations:

"In fact, if the register had been prepared at one sitting for purposes of these cases, the Company would have taken care that no suspicious circumstance comes into existence and, if, by chance, any error was committed, it could have' prepared another register in lieu of Ext. C-1. The fact that this was not done shows that this register is the register kept in the course of business and, hence, there is no reason to doubt the entries made in it."

10. These observations fully apply to the facts of the present case because if there had been any element of suspicion in giving the date of birth, the admission register and the Scholar's register would have been corrected by the headmistress of the school. Exts. D-1 and D-2, mentioned above, are corroborated by subsequent documentary evidence. It appears that on 1.7.65, the boy was admitted to 3rd standard (equivalent to 5th class) in St. Paul's school, Jaipur after the appellant's father was transferred from Ajmer to Jaipur. Here also the document shows that the date of birth given was the same, namely, 22.6.1957.
11. Thus, consistently on two occasions, starting from 1963 and ending in 1965, the date of birth was mentioned in the relevant documents as 22.6.1957. This Court in *Mohd. Ikram Hussain v. State of U.P. & Ors.* (supra) has held that copies of school certificates or the affidavit of the father constitute good proof of age, vide observations extracted herein-before.
12. In the instant case also there are two documents of two different schools showing the age of the accused-appellant as 22.6.57 and both these documents have been signed by his father and were in existence ante litem motam. Hence, there could

be no ground to doubt the genuineness of these documents and the High Court committed a serious error of law in brushing aside these important documents. Another circumstance which weighed with the High Court was that when the boy was admitted in St. Paul's school, no transfer certificate appears to have been taken. This by itself is not sufficient to dislodge the case of the appellant unless a transfer certificate was taken and it had shown that the date of birth given there did not tally with the documents (Exts. D-1 to D-4).

13. It appears that as the father of the appellant was subsequently transferred from Jaipur sometime in June 1966 to Dausa and he was admitted to the Sanskrit Pathshala in Dausa, for the first time in this school the date of birth of the appellant was changed from 22.6.57 to 22.9.56. The explanation given by his father is that as by this time the boy had become almost 10 years of age and as clause 10 of Chapter XVIII of the Rajasthan Board of Secondary Education Regulations required that no candidate could take the Higher Secondary Examination until he had attained the age of 15 years on the 1st of October of the year in which the Examination was held, he had to give an affidavit to change this fact in order to enable his son (appellant) to appear in the Higher Secondary Examination. This position was not disputed by the State. The High Court seems to have made much of this lacuna and has gone to the extent of labelling Gopal Sharma, appellant's father, as a liar having gone to the extent of making a false affidavit. Here also, we think the High Court has taken a most artificial and technical view of the matter. In our country, it is not uncommon for parents sometimes to change the age of their children in order to get some material benefit either for appearing in examination or for entering a particular service which would be denied to a child as under the original date of birth he would be either under-aged or ineligible.
14. Thus, the appellant's father has given a cogent reason for changing the date of birth and there is no reason not to accept his explanation particularly because the offence was committed seven years after changing the date of birth, and, therefore, there could be no other reason why Gopal Sharma should have gone to the extent of filing an affidavit to change the date, except for the reason that he has given. It was also argued that in the insurance policy, the appellant's mother had shown his age as 10 years without giving the exact date of birth. The age of the appellant was given as a rough estimate in the insurance policy but as the policy was not in the name of the appellant, nothing turns upon this fact particularly because by and large giving allowance for a few months this way or that way the boy was about 10 years old when the policy was taken. The High Court, therefore, was wrong in attaching too great an

importance to this somewhat insignificant fact. For these reasons we are satisfied that these circumstances also do not put the case of the appellant out of court.

15. These are the main reasons given by the High Court for distrusting what, in our opinion, seems to be unimpeachable documentary evidence produced by the appellant to show that his exact date of birth was 22.6.57 and not 22.9.56 as altered by his father later.
16. Another question argued at the Bar was as to what is the material date which is to be seen for the purpose of application of the Act. In view of our finding that at the time of the occurrence the appellant was undoubtedly a child within the provisions of the Act, the further question if he could be tried as a child if he had become more than 16 years by the time the case went up to the court, does not survive because the Act itself takes care of such a contingency. In this connection sections 3 and 26 of the Act may be extracted thus:

"3. Continuation of inquiry in respect of child who has ceased to be child.

Where an inquiry has been initiated against a child and during the course of such inquiry the child ceases to be such, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a child.

xx xx xx

26. Special provision in respect of pending cases.

Notwithstanding anything contained in this Act, all proceedings in respect of a child pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the child has committed an offence, it shall record such finding and, instead of passing any sentence in respect of the child, forward the child to the children's court which shall pass orders in respect of that child in accordance with the provision of this Act as if it has been satisfied on inquiry under this Act that the child has committed the offence."

17. A combined reading of these two sections would clearly show that the statute takes care of contingencies where proceedings in respect of a child were pending in any court in any area on the date on which the Act came into force. Section 26 in terms lays down that the court should proceed with the case but after having found that the child has committed the offence it is debarred from passing any sentence but would forward the child to the children's court for passing orders in accordance with the Act. As regards the general applicability of the Act, we are clearly of the view that the

relevant date for the applicability of the Act is the date on which the offence takes place. Children's Act was enacted to protect young children from the consequences of their criminal acts on the footing that their mind at that age could not be said to be mature for imputing mens rea as in the case of an adult. This being the intention of the Act, a clear finding has to be recorded that the relevant date for applicability of the Act is the date on which the offence takes place. It is quite possible that by the time the case comes up for trial, growing in age being an involuntary factor, the child may have ceased to be a child. Therefore, ss. 3 and 26 became necessary. Both the sections clearly point in the direction of the relevant date for the applicability of the Act as the date of occurrence. We are clearly of the view that the relevant date for applicability of the Act so far as age of the accused, who claims to be a child, is concerned, is the date of the occurrence and not the date of the trial.

18. The High Court has failed to take notice that the Act being a piece of social legislation is meant for the protection of infants who commit criminal offences and, therefore, its provisions should be liberally and meaningfully construed so as to advance the object of the Act. Bearing this in mind we have construed the documents in the instant case.
19. We, therefore, allow the appeal to the extent that while setting aside the judgment of the Sessions Judge, as affirmed by the High Court, we direct the Additional Sessions Judge, Jaipur, to try the accused and if he gives a finding that the accused is guilty, he shall forward the accused to the Children's court for receiving sentence in accordance with the provisions of s. 26 of the Act. H.L.C. Appeal allowed.

**Supreme Court of India
2001 (7) SCC 657**

**Arnit Das
vs
State of Bihar**

Chief Justice, Mr. K.T. Thomas, R.C. Lahoti, N. Santosh Hegde and Mr. S.N. Variava, JJ.

1. In an inquiry conducted under Section 32 of the Juvenile Justice Act, 1986, (hereinafter referred to as 'the 1986 Act') the Trial Court recorded a finding to the effect that petitioner Arnit Das was not a juvenile on the date of occurrence. This finding was upheld by the learned Session Judge in an appeal filed by petitioner-Arnit Das. The High Court also dismissed revision petition filed by the petitioner against that finding. Order of the High Court was put in issue by the petition in SLP (Crl.) 729/2000. In an appeal (Criminal Appeal No. 469/2000) arising out of that special leave petition [since Arnit Das Vs . State of Bihar 2000CriLJ2971], dealing with issue, it was observed:

"24. So far as the finding regarding the age of the appellant is concerned it is based on appreciation of evidence and arrived at after taking into consideration the material available on record and valid reasons having been assigned for it. The finding arrived at by the learned ACJM has been) maintained by the Sessions Court in appeal and the High Court in revision. We find no case having been made out for interfering therewith."

2. Thus, this Court also affirmed the concurrent findings regarding the age of the petitioner and that and that on the date of the offence, the petitioner was not a juvenile within the meaning of the provision of the 1986 Act.
3. After the judgement in Crl. Appeal No. 469/2000 was delivered by this Court on 9th May, 2000, the petitioner filed a review petition seeking review of that judgement. In the memorandum of review petition, the only issue raised is to the effect that the two Judge Bench deciding Arnit Das Vs. State of Bihar (supra) while holding that crucial date of determine whether an accused is a juvenile or not under the 1986 Act is the date on which the accused first appears in the Court in inquiry proceedings, has overlooked the earlier view of a three Judge Bench in the case of Umesh Chandra Vs . State of Rajasthan [1982]3SCR583 , wherein it has been held that crucial date in such cases is the date on which offence was committed and not when the accused first appears before the Court in inquiry proceedings. The correctness of the finding that

petitioner was not a juvenile (under the 1986 Act) on the date of the offence, has not been put in issue in the memorandum of the review petition.

4. When the review petition came up for consideration on 19.1.2000, the Division bench noticed that there appeared to be an apparent conflict of opinion on the question as to whether the date of commission of offence or the date on which the accused first appears in inquiry proceedings is relevant for the purpose of determining whether or not an accused was a juvenile under the 1986 Act. The review petition was, therefore , referred to a larger Bench to resolve the conflict between the two opinions. That is, how, the matter is before us.
5. In view of the findings recorded in an inquiry conducted under Section 32of the 1986 Act, that on the date of the offence the accused-petitioners was not a Juvenile for the purpose of the 1986 Act, which finding has been affirmed right upto this Court, it is of no consequence, insofar as this petition is concerned, as to whether the crucial date for purposes of the 1986 Act is the date of commission of the offence or the date when the accused first appears in the Court in the inquiry proceedings. The reference, therefore, insofar as this petition is concerned, is only of an academic interest and we decline to answer an academic question only.
7. In this view of the matter, we find that the issue referred to the Constitution Bench does not require our consideration in this case. The review petition, which itself has been referred to the Constitution Bench, is accordingly dismissed.
8. We, however, clarify that since learned senior counsel appearing for the petitioner had reserved his argument on the applicability of Juvenile Justice (Care and Protection of Children) Act, 2000, which repealed the 1986 Act, for raising it in the Trial Court when the order of reference was made, we are not expressing any opinion on the question whether the Juvenile Justice (Care and Protection of Children), 2000 applies to the fact and circumstances of the instant case or not.
9. The review petition for what has been noticed above is dismissed.

**Supreme Court of India
2005 (3) SCC 551**

Pratap Singh

vs

State of Jharkhand and Another

N. Santosh Hegde, S.N. Variava, B.P. Singh H.K. Sema and S.B. Sinha, JJ.

1. Leave granted.
3. Briefly stated the facts giving rise to the filing of the present appeal are as follows:-

First Information Report was lodged before the police in Bokaro city registered as P.S. case No. 1/99 dated 1.1.1999 for the offence under Sections 364A, 302/201 IPC read with Section 120B IPC to the effect that on 31.12.1998 the appellant was alleged as one of the conspirators to have caused the death of the deceased by poisoning. On the basis of the FIR the appellant was arrested and produced before the C.J.M. Chas on 22.11.1999. On production, the learned CJM assessed the age of the appellant to be around 18 years old. On 28.2.2000, a petition was filed on behalf of the appellant claiming that he was a minor on the date of occurrence i.e. 31.12.1998, whereupon the learned CJM transmitted the case to the Juvenile Court. The appellant was produced in the Juvenile Court on 3.3.2000. On his production the Juvenile Court assessed the age of the appellant by appearance to be between 15 and 16 years and directed the Civil Surgeon to constitute a Medical Board for the purpose of assessing the age of the appellant by scientific examination and submit a report. No such Medical Board was constituted. Thus, the learned ACJM asked the parties to adduce evidence and on examining the school leaving certificate and mark sheet of Central Board of Secondary Education came to the finding that the appellant was below 16 years of age as on 31.12.1998 taking the date of birth of the appellant as 18.12.1983 recorded in the aforesaid certificate. The appellant was then released on bail.

4. Aggrieved thereby the informant filed an appeal before the 1st Additional Sessions Judge, who after referring to the judgement of this Court rendered in *Arnit Das v. State of Bihar* disposed of the appeal on 19.2.2001 holding that the Juvenile Court had erred in not taking note of the fact that the date of production before the Juvenile Court was the date relevant for deciding whether the appellant was juvenile or not for the purpose of trial and directed a fresh inquiry to assess the age of the appellant. Aggrieved thereby the appellant moved the High Court by filing Criminal Revision Petition. The High Court while disposing of the Revision has followed the decision rendered by this Court in *Arnit Das* (supra) and held that reckoning date is the date of

production of the accused before the Court and not the date of the occurrence of the offence.

5. The High Court held that for determining the age of juvenile, the provisions of 1986 Act would apply and not 2000 Act. The High Court, however, took the view that the date of birth, as recorded in the school and the school certificate, should be the best evidence for fixing the age of the appellant. High Court was also of the view that any other evidence in proof of age would be of much inferior quality. As the enquiry is pending, we need not delve into this question.
6. Having noticed the conflicting views in *Arnit Das v. State of Bihar*: 2000CriLJ2971 and *Umesh Chandra v. State of Rajasthan* : [1982]3SCR583, this matter has been referred to the Constitution Bench by an order dated 7.2.2003. It reads:-

"The High Court in its impugned judgement has relied on a two-Judge bench decision of this Court in Arnit Das v. State of Bihar. The submission of the learned counsel for the petitioner is that in Arnit Das (supra), the decision of this Court in Umesh Chandra v. State of Rajasthan, was not considered. The point arising is one of the frequent recurrence and view of the law taken in this case is likely to have a bearing on the new Act, that is, Juvenile Justice (Care and Protection) Act, 2000 also, the matter deserves to be heard by the Constitution Bench of this Court. Be placed before the Hon.Chief Justice of India, soliciting directions."

This is how the matter has been placed before us.

The dual questions which require authoritative decision are:

- (a) Whether the date of occurrence will be the reckoning date for determining the age of the alleged offender as Juvenile offender or the date when he is produced in the Court/competent authority.
- (b) Whether the Act of 2000 will be applicable in the case a proceeding initiated under 1986 Act and pending when the Act of 2000 was enforced with effect from 1.4.2001.

Question (a)

Whether the date of occurrence will be the reckoning date for determining the age of the alleged offender as Juvenile offender or the date when he is produced in the Court/competent authority.

7. Mr. Mishra submits that the decision in *Umesh Chandra* (supra) rendered by a three-Judge Bench of this Court has laid down the correct law and a two-Judge

Bench decision in *Arnit Das* (*supra*) cannot be said to have laid down a correct law. Mr. Mishra also submits that the decision in *Arnit Das* (*supra*) has not noticed the decision of a three-Judge Bench in *Umesh Chandra* (*supra*). Mr. Mishra also referred to the aims and objects of the Juvenile Justice Act, 1986 (hereinafter referred to as the 1986 Act) and submits that the whole object is to reform and rehabilitate the juvenile for the offence he is alleged to have committed and if the date of offence is not taken as reckoning the age of the juvenile, the purpose of the Act itself would be defeated. In this connection, he has referred to Sections 18, 20, 26 and 32 of the Act. Per contra Mr. Sharan refers to the aims and objects of the Act and various Sections of the Act and particularly emphasized the word *is* employed in Section 32 of the Act and submits that cumulative reading of the provisions as well as of the scheme of the Act would show that the reckoning date for determining the date of juvenile would come into play only when a juvenile appears or is brought before the authority/court and not the date of an offence.

9. Thus, the whole object of the Act is to provide for the care, protection, treatment development and rehabilitation of neglected delinquent juveniles. It is a beneficial legislation aimed at to make available the benefit of the Act to the neglected or delinquent juveniles. It is settled law that the interpretation of the Statute of beneficial legislation must be to advance the cause of legislation to the benefit for whom it is made and not to frustrate the intendment of the legislation.
10. We may also, at this stage, notice the definition of delinquent juvenile. Sub-section (e) of Section 2 of the 1986 Act defines the delinquent juvenile as:
(e) "delinquent juvenile" means a juvenile who has been found to have committed an offence;"
11. Sub-section (1) of Section 2 of 2000 Act defines "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence. The notable distinction between the definitions of 1986 Act and 2000 Act is that in 1986 Act "juvenile in conflict with law" is absent. The definition of delinquent juvenile in 1986 Act as noticed above is referable to an offence said to have been committed by him. It is the date of offence that he was in conflict with law. When a juvenile is produced before the competent authority and or court he has not committed an offence on that date, but he was brought before the authority for the alleged offence which he has been found to have committed. In our view, therefore, what was implicit in 1986 Act has been made explicit in 2000 Act.

12. Section 32 of the 1986 Act deals with the presumption and determination of age, which reads:

"32. Presumption and determination of age:

- (1) *Where it appears to a competent authority that a person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile, the competent authority shall make due inquiry as to the age of that person and for that purpose shall take such evidence as may be necessary and shall record a finding whether the person is a juvenile or not, stating his age as nearly as may be.*
- (2) *No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile, and the age recorded by the competent authority to be the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age of that person."*

13. Mr. Sharan stressed heavily on the word *is* used in two places of the Section and contended that the word *is* suggests that for determination of age of juvenile the date of production would be reckoning date as the inquiry with regard to his age begins from the date he is brought before the Court and not otherwise. We are unable to countenance this submission. We have already noticed that the definition of delinquent juvenile means a juvenile who has been found to have committed an offence. The word *is* employed in Section 32 is referable to a juvenile who is said to have committed an offence on the date of the occurrence. We may also notice the provisions of Section 18 of the 1986 Act. Section 18 provides for bail and custody of juveniles. It reads:-

18. Bail and Custody of Juveniles.

- (1) When any person accused of a bailable or non-bailable offence and apparently a juvenile is arrested or detained or appears or is brought before a Juvenile Court, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, be released on bail with or without surety but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral danger or that his release would defeat the ends of justice.
- (2) When such person having been arrested is not released on bail under Sub-section (1) by the officer-in-charge of the police station, such officer shall cause him to be kept in an observation home or a place of safety in the prescribed manner (but not in a police station or jail) until he can be brought before a Juvenile Court.

- (3) When such person is not released on bail under Sub-section (1) by the Juvenile Court it shall, instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order."
14. It will be noticed that the word *is* has been used in more than one place in this Section also. Often than not, an offender is arrested immediately after an offence is alleged to have been committed or some time even arrested on the spot.
15. This would also show that the arrest and release on bail and custody of juveniles, the reckoning date of a juvenile is the date of an offence and not the date of production.
16. Furthermore, Section 32 of the Act heavily relied upon by the counsel for the respondent does not envisage the production of a juvenile in the Court.
17. We may also usefully refer to Sections 3 and 26 of the Act, 1986. Sections 3 and 26 of the Act reads:-
- "3. Continuation of inquiry in respect of juvenile who has ceased to be a juvenile.-** *Where an inquiry has been initiated against a juvenile and during the course of such inquiry the juvenile ceases to be such, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a juvenile".*
- "26. Special provision in respect of pending cases.-** *Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Juvenile Court which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that the juvenile has committed the offence."*
18. The legislative intendment underlying Sections 3 and 26 read with the preamble, aims and objects of the Act is clearly discernible. A conjoint reading of the Sections, preamble, aims and objects of the Act leaves no matter of doubt that the legislature intended to provide protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication thereof. Interpretation of Sections 3 and 26 of the Act are no more res-integra. Sections 3 and 26 of the 1986 Act as quoted above are in pari materia with Sections 3 and 26 of the Rajasthan Children Act 1970 (Raj. Act 16 of 1970). A three-Judge bench of this Court in *Umesh Chandra*

(supra) after considering the preamble, aims and objects and Sections 3 and 26 of the Rajasthan Act, held that the Act being a piece of social legislation is meant for the protection of infants who commit criminal offences and, therefore, such provisions should be liberally and meaningfully construed so as to advance the object of the Act. This Court then said in paragraph 28 at 210 SCC:-

"28. As regards the general applicability of the Act, we are clearly of the view that the relevant date for the applicability of the Act is the date on which the offence takes place. Children Act was enacted to protect young children from the consequences of their criminal acts on the footing that their mind at that age could not be said to be mature for imputing mens rea as in the case of an adult. This being the intendment of the Act, a clear finding has to be recorded that the relevant date for applicability of the Act is the date on which the offence takes place. It is quite possible that by the time the case comes up for trial, growing in age being an involuntary factor, the child may have ceased to be a child. Therefore, Sections 3 and 26 became necessary. Both the sections clearly point in the direction of the relevant date for the applicability of the Act as the date of occurrence. We are clearly of the view that the relevant date for applicability of the Act so far as age of the accused, who claims to be a child, is concerned, is the date of the occurrence and not the date of the trial." (emphasis supplied)

19. As already noticed the decision rendered by a three-Judge bench of this Court in *Umesh Chandra* (supra) was not noticed by a two-Judge bench of this Court in *Arnit Das* (supra). We are clearly of the view that the law laid down in *Umesh Chandra* (supra) is the correct law and that the decision rendered by a two-Judge bench of this Court in *Arnit Das* (supra) cannot be said to have laid down a good law. We, accordingly, hold that the law laid down by a three-Judge bench of this Court in *Umesh Chandra* (supra) is the correct law.

Question No.(b):

Whether the Act of 2000 will be applicable in the case a proceeding is initiated under 1986 Act and pending when the Act of 2000 was enforced with effect from 1.4.2001.

20. On this point we have heard Mr. P.S. Mishra, learned senior counsel for the appellant, Ms. Maharukh Adenwala, counsel for the intervener and Mr. Amarendra Sharan, learned ASG for the State of Jharkhand. In fact counsel for the intervener has adopted the arguments of Mr. Mishra. Mr. Mishra would submit that any proceeding against any person pending under the 1986 Act would be covered by the 2000 Act and would extend the benefit of being a juvenile as defined under the 2000 Act if at the time of the commission of the offence he was below the age of 18 years. To buttress his point

counsel heavily relied upon the provisions contained in Section 20 of the Act and Rules 61 and 62 framed by the Central Government. Per contra Mr. Sharan counsel for the respondent would contend that the 1986 Act has been repealed by Section 69(1) of the 2000 Act and, therefore, the provisions of 2000 Act would not be extended to a case/inquiry initiated and pending under the provisions of 1986 Act the Act of 2000 being not retrospective.

21. To answer the aforesaid question, it would be necessary to make a quick survey of the definitions and Sections of 2000 Act relevant for the purpose of disposing of the case at hand.
23. The 1986 Act was holding the field till it was eclipsed by the emergence of 2000 Act w.e.f. 1.4.2001, the date on which the said Act came into force by the Notification dated 28.2.2001 in the Official Gazette issued by the Central Government in exercise of the powers conferred by Sub-section (3) of Section 1 of the Act. Section 69(1) of the Act repealed the 1986 Act. It reads:-

69. Repeal and savings:

- (1) *The Juvenile Justice Act 1986 (53 of 1986) is hereby repealed.*
- (2) *Notwithstanding such repeal, anything done or any action taken under the said Act shall be deemed to have been done or taken under the corresponding provisions of this Act.* (emphasis supplied)

24. Sub-section (2) postulates that anything done or any action taken under the 1986 Act shall be deemed to have been done or taken under the corresponding provisions of the 2000 Act. Thus, although the 1986 Act was repealed by the 2000 Act, anything done or any action taken under the 1986 Act is saved by Sub-section (2), as if the action has been taken under the provisions of the 2000 Act.
 26. The striking distinction between the 1986 Act and 2000 Act is with regard to the definition of juvenile. Section 2(h) of the 1986 Act defines juvenile as under:-
"2(h) "juvenile" means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years;"
- Section 2(k) of 2000 Act defines juvenile as under:-
"2(k) "juvenile" or "child" means a person who has not completed eighteenth year of age;"
27. Thus, the striking distinction between the 1986 Act and 2000 Act is that under the 1986 Act a juvenile means a male juvenile who has not attained the age of 16 years

and a female juvenile who has not attained the age of 18 years. In the 2000 Act no distinction has been drawn between the male and female juvenile. The limit of 16 years in 1986 Act has been raised to 18 years in 2000 Act. In the 2000 Act wherever the word "juvenile" appears the same will now have to be taken to mean a person who has not completed 18 years of age.

30. ... The proceedings in respect of a juvenile pending in any court referred to in Section 20 of the Act is relatable to proceedings initiated before the 2000 Act came into force and which are pending when the 2000 Act came into force. The term "any court" would include even ordinary criminal courts. If the person was a "juvenile" under the 1986 Act the proceedings would not be pending in criminal courts. They would be pending in criminal courts only if the boy had crossed 16 years or girl had crossed 18 years. This shows that Section 20 refers to cases where a person had ceased to be a juvenile under the 1986 Act but had not yet crossed the age of 18 years then the pending case shall continue in that Court as if the 2000 Act has not been passed and if the Court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, shall forward the juvenile to the Board which shall pass orders in respect of that juvenile.

32. Mr. Mishra placed reliance on Rules 61 and 62 framed by the Central Government. According to him, particularly Rule 62 of the Rules covers the pending cases and the appellant is entitled to the benefit of Rule 62. Rule 62 reads:-

"62. Pending Cases.-

- (1) *No juvenile in conflict with law or a child shall be denied the benefits of the Act and the rules made thereunder.*
- (2) *All pending cases which have not received a finality shall be dealt with and disposed of in terms of the provisions of the Act and the rules made thereunder.*
- (3) *Any juvenile in conflict with law, or a child shall be given the benefits under Sub-rule (1), and it is hereby clarified that such benefits shall be made available not only to those accused who was juvenile or a child at the time of commission of an offence, but also to those who ceased to be a juvenile or a child during the pendency of any enquiry or trial.*
- (4) *While computing the period of detention of stay of a juvenile in conflict with law or of a child, all such period which the juvenile or the child has already spent in custody, detention or stay shall be counted as part of the period of stay or detention contained in the final order of the competent authority."*

33. This Rule also indicates that the intention of the Legislature was that the provisions of the 2000 Act were to apply to pending cases provided, on 1.4.2001 i.e. the date on

which the 2000 Act came into force, the person was a "juvenile" within the meaning of the term as defined in the 2000 Act i.e. he/she had not crossed 18 years of age.

35. We, therefore, hold that the provisions of 2000 Act would be applicable to those cases initiated and pending trial/inquiry for the offences committed under the 1986 Act provided that the person had not completed 18 years of age as on 1.4.2001.

36. The net result is:-

- (a) The reckoning date for the determination of the age of the juvenile is the date of an offence and not the date when he is produced before the authority or in the Court.
- (b) The 2000 Act would be applicable in a pending proceeding in any court/authority initiated under the 1986 Act and is pending when the 2000 Act came into force and the person had not completed 18 years of age as on 1.4.2001.

37. The appeal stands disposed of in the above terms.

**Supreme Court of India
2002 (2) SCC 287**

Rajinder Chandra

vs

State of Chhattisgarh and Another

R.C. Lahoti and Brijesh Kumar, JJ.

2. Pranjal Tiwari, the accused respondent No.2, has been apprehended on 27.2.1997 for an offence under Section 302/ 34 IPC committed on the same day. The accused claimed himself to be a juvenile as having not attained the age of 16 years and, therefore, entitled to the benefit of the Juvenile Justice Act. 1986. An enquiry was held. The learned Judicial Magistrate First Class and the Sessions Court held the accused not be a juvenile. The accused preferred a revision in the High Court which has been allowed. The orders impugned before the High Court have been quashed and the accused has been held to be a juvenile. The complainant, father of the victim in the incident, has preferred this appeal by special leave.
3. At the enquiry, on behalf of the accused mark sheets of Class VIII and High School, birth certificate, horoscope and entry in Kotwar Book were tendered in documentary evidence... In all of these documents the date of birth of the accused is entered as 30.9.1981...The learned Magistrate and the learned Sessions Judge scrutinized the evidence adduced on behalf of the accused by applying the principle that it was the accused who was claiming the benefit of the Juvenile Justice Act, and therefore the onus lay on him to prove that he was a juvenile and in as much as the oral and documentary evidence adduced by him left open room for doubt, the onus could not be said to have been discharged...
4. The High Court, in exercise of its revisional jurisdiction, found the findings arrived at by the learned Sessions Judge and the Magistrate to be legally infirm and hence not sustainable. The High Court noticed that although in the marks sheet of Class VIII there appeared to be some over writing on the year 1981 but the same was attested by the officer who had issued it... In the birth and death register kept by Kotwar, there was some doubt whether the date of birth was recorded as 30.6.1981 or 30.9.1981 but the doubt was removed by reference to other entries in vicinity. The factum of Gopal Prasad Tiwari, father of the accused, having begotten a son was entered at sl.

- No. 29. The preceding two entries referable to other children born to others. at Sl. Nos. 27 and 28 were dated 23.8.1981 and 15.9.1981 respectively and therefore, the relevant entry at Sl. No. 29 could be of 30.9.1981 only and not of 30.6.1981. thus, in substance, the High Court has concluded that the doubts assumed to be in existence by the learned Sessions Judge were not reasonable doubts and in the light of the explanation furnished by the accused, there was hardly any room for doubt and a high decree of probability was raised that the date of birth of the accused was 30.9.1981. In our opinion, the High Court has not erred in arriving at the conclusion which it has reached and it rightly interfered with the orders of the two courts below because if allowed to stand they would have occasioned failure of justice.
5. It is true that the age of accused is just on the border of sixteen years and on the date of the offence and his arrest he was less than 16 years by a few months only. In *Arnit Das v. State of Bihar*. 2000CriLJ2971 , this court has, on a review of judicial opinion, held that while dealing with question of determination of the age of the accused for the purpose of finding out whether he is juvenile or not, a hyper-technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the said evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. The law, so laid down by this court, squarely applies to the facts of the present case.
 6. For the foregoing reasons the appeal is held devoid of any merit. It is dismissed. The order of the High Court is maintained.

**Supreme Court of India
2008 (13) SCALE 137**

**Babloo Pasi
vs
State of Jharkhand and Another**

C.K. Thakker and D.K. Jain JJ.

3. Rajesh Mahatha, the accused and respondent No. 2 in this appeal, was apprehended for having committed offences under Sections 304B and 306 of the Indian Penal Code, 1860 (for short 'I.P.C.'), in relation to the death of his wife, on the basis of the statement made to the police by the brother of the deceased, the appellant herein. It appears that when the accused was produced before the Chief Judicial Magistrate, Deoghar, he claimed himself to be a "juvenile" as having not attained the age of eighteen years and, therefore, entitled to the protection and privileges under the Act. Accordingly, he was sent to the Child Rehabilitation Centre, Dumka. Since the claim of the accused was disputed on behalf of the prosecution, on 8th February, 2006, the Chief Judicial Magistrate directed the accused to produce evidence/certificate in support of his claim, which he failed to do. It seems that without recording any opinion whether the accused was a Juvenile or not, the Magistrate referred him to the Board. Since the accused failed to produce any evidence regarding his age, the Board referred him to a Medical Board for examination and determination of his age. Taking into consideration, the documentary evidence adduced by the prosecution and observing his physical built up, the Board concluded that the accused was above eighteen years of age on the date of occurrence; was not a juvenile and, therefore, was not required to be dealt with under the Act. Accordingly, the Child Rehabilitation Centre, Dumka was directed to transfer the accused to the regular jail with a direction to its Superintendent to produce the accused before the Court of Chief Judicial Magistrate. The order passed by the Board was challenged by the accused in the High Court. The High Court was of the view that the Board had ignored the opinion of the Medical Board obtained in terms of Rule 22(5)(iv) of the Jharkhand Juvenile Justice (Care and Protection of Children) Rules, 2003 (for short 'the Rules'), wherein the age of the accused was shown as 17-18 years. Thus, exercising its revisional jurisdiction, the High Court allowed the revision petition; quashed the order of the Board and held that at the relevant time the accused was a juvenile. The brother of the victim has preferred this appeal by special leave.

5. Learned Counsel appearing for the appellant submitted that the order of the High Court having been passed without notice to the appellant, who was admittedly a party in the revision petition, is violative of the principles of natural justice as also the statutory provisions, is illegal and deserves to be set aside on this short ground alone
6. Learned Counsel appearing on behalf of the accused while strenuously supporting the order passed by the High Court submitted that since the entire relevant material was available on record, there was no necessity for the High Court to issue notice to the appellant/complainant.
9. From a bare reading of proviso to the Section, it is plain that in exercise of its revisional jurisdiction the High Court cannot pass an order, prejudicial to any person without affording him a reasonable opportunity of being heard
12. We may now take up the pivotal point, viz., whether or not the Board had applied the correct parameters for determining the age of the accused, who is claiming to be a juvenile on the date of occurrence. Determination of age of a delinquent, particularly in borderline cases, is rather a complex exercise.
13. ...it is clear that it merely provides that when it appears to the competent authority viz., the Board, that the person brought before it is a juvenile, The Board is obliged to make an enquiry as to the age of that person; for that purpose it shall take evidence as may be necessary and then record a finding whether the person in question is a juvenile or not.
17. It is well settled that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. The Medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence.
19. Bearing in mind these broad principles, we may now advert to the facts at hand. Indubitably, neither a date of birth certificate nor a matriculation or equivalent certificate from a school was produced before the Board and, therefore, the Board was required to obtain a medical opinion of a duly constituted Medical Board, which was done. The Medical Board carried out the ossification tests of the accused and opined that his age was between 17-18 years. Therefore, with a margin of one year, as stipulated in Rule 22(5)(iv), his age could also be 16 years or 19 years. In addition to the said opinion, the prosecution also placed before the Board, a Voters List of

the Constituency of Deoghar for the year 2005. In that list, the name of the accused appeared at Sl. No. 317 and his age was recorded as 20 years.

21. From the afore-extracted orders of the Board as well as the High Court, it is manifest that the question of determination of age of the accused has been decided by both the Courts in a casual manner, ignoring the principles of law on the subject.
22. Insofar as the Board is concerned, it is evident that it has mechanically accepted the entry in Voters List as conclusive without appreciating its probative value in terms of the provisions of Section 35 of the Indian Evidence Act, 1872...
23. Therefore, on facts at hand, in the absence of evidence to show on what material the entry in the Voters List in the name of the accused was made, a mere production of a copy of the Voters List, though a public document, in terms of Section 35, was not sufficient to prove the age of the accused. Insofar as the High Court is concerned, there is no indication in its order as to in what manner Rule 22(5)(iv) has been ignored by the Board. The learned Judge seems also to have accepted the opinion of the Medical Board in terms of the said Rule as conclusive. Therefore, the afore-stated ground on which the High Court has set aside the opinion of the Board and holding the accused to be a juvenile, cannot be sustained.
24. In our judgement, apart from the fact that the impugned order suffers from the basic infirmity of being violative of the principles of natural justice, it cannot be sustained on merits as well. At the same time, we are also convinced that the order of the Board falls short of a proper enquiry as envisaged in Section 49 of the Act.
25. For the aforementioned reasons, the appeal is allowed and the matter is remitted to the Chief Judicial Magistrate, Deoghar, heading the Board, with a direction to re-determine the age of the accused, as on the date of commission of the alleged offences, in accordance with law, enunciated above. In the event he is found to be a juvenile within the meaning of the Act, he shall be dealt with accordingly. However, if he is not found to be a juvenile, he would face trial under the ordinary criminal law. The inquiry shall be completed expeditiously, preferably within six months of receipt of a copy of this judgement.

**Supreme Court of India
2009 (6) SCALE 695**

**Hari Ram
vs
State of Rajasthan and Another**

Altamas Kabir and Cyriac Joseph, JJ.

2. This appeal raises certain questions which are fundamental to the understanding and implementation of the objects for which the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the 'Juvenile Justice Act, 2000') was enacted. The said law which was enacted to deal with offences committed by juveniles, in a manner which was meant to be different from the law applicable to adults, is yet to be fully appreciated by those who have been entrusted with the responsibility of enforcing the same, possibly on account of their inability to adapt to a system which, while having the trappings of the general criminal law, is, however, different therefrom. The very scheme of the aforesaid Act is rehabilitatory in nature and not adversarial which the courts are generally used to. The implementation of the said law, therefore, requires a complete change in the mind-set of those who are vested with the authority of enforcing the same, without which it will be almost impossible to achieve the objects of the Juvenile Justice Act, 2000.
3. The appellant, Hari Ram, was arrested along with several others on 30.11.1998, for the alleged commission of offences under Sections 148, 302, 149, Section 325 read with Section 149 and Section 323/149 Indian Penal Code. After the case was committed for trial, the Additional Sessions Judge, Didwana, by his order dated 3rd April, 2000, in Sessions Case No. 54 of 1999 determined the age of the accused to be below 16 years on the date of commission of the offence and after declaring him to be a juvenile, directed that he be tried by the Juvenile Justice Board, Ajmer, Rajasthan.
5. According to the appellant's father, the appellant's date of birth is Kartik Sudi 1, Samvat Year 2039, which is equivalent to 17th October, 1982, whereas the offence was alleged to have been committed on 30th October, 1998, which mathematically indicates that at the time of commission of the offence, the appellant had completed 16 years and 13 days and was, therefore, excluded from the scope and operation of the Juvenile Justice Act, 2000. Furthermore, the medical examination conducted in respect of the appellant by a Medical Board indicated that his age at the relevant

time was between 16 and 17 years. After considering the various decisions of this Court indicating the manner in which the age of a juvenile is to be determined, the High Court observed that the inescapable conclusion which could be arrived at is that on the date of the incident, the accused-appellant herein was above 16 years of age and was, therefore, not governed by the provisions of the Juvenile Justice Act, 1986 (hereinafter referred to as the '1986 Act').

6. It is the said order of the High Court which has been impugned in this appeal.
7. Appearing for the appellant, Mr. Sushil Kumar Jain, learned Advocate, submitted that the High Court had acted in a highly technical manner in holding that the appellant was not a juvenile and had in the process defeated the very object of the Juvenile Justice Act, 2000, which is aimed at rehabilitating juvenile offenders in order to bring them back to main-stream society and to give them an opportunity to rehabilitate themselves as useful citizens of the future. In fact, the definition of "juvenile" in the 1986 Act was altered in the Juvenile Justice Act, 2000, to include persons who had not completed 18 years of age. In other words, the age until which a male child in conflict with law would be treated as a juvenile was raised from 16 years to 18 years.
10. Mr. Jain emphasised that this was also a similar case in which the record, according to the date of birth indicated by his father and another witness - Narain Ram, shows that he was just 13 days older than the cut-off limit of 16 years provided in Section 2(h) of the 1986 Act.
11. Mr. Jain submitted that since the incident is alleged to have taken place as far back as on 30th October, 1998 and more than 10 years have elapsed since then and the definition of "juvenile" had since been amended to include children who had not yet attained the age of 18 years, the High Court should not have taken such a hypertechnical view and should not have interfered with the order of the Additional Sessions Judge, Didwana, declaring the appellant to be a juvenile.
12. On behalf of the respondents it was submitted that even on the basis of the age as disclosed by the appellant's father, the appellant was over 16 years of age on the date of commission of the offence and could not, therefore, be treated to be a juvenile as defined in the 1986 Act. It was submitted that the documents, which were produced in support of the appellant's claim to be a minor, show him to have crossed the age of 16 years on the date of commission of the offence and the High Court had merely corrected the error of the Additional Sessions Judge, Didwana, in calculation of the appellant's age. According to the respondents, the order of the High Court impugned in the present appeal did not call for any interference and the appeal was liable to be dismissed.

14. Section 2(k) of the said Act defines a juvenile or child as a person who has not completed eighteenth years of age. A broad distinction has, however, been made between juveniles in general and juveniles who are alleged to have committed offences. Section 2(l) defines "a juvenile in conflict with law" as a juvenile who is alleged to have committed an offence. Determination of age, therefore, assumes great importance in matters brought before the Juvenile Justice Boards. In fact, Chapter II of the Juvenile Justice Act, 2000, deals exclusively with juveniles in conflict with law and provides a complete Code in regard to juveniles who are alleged to have committed offences which are otherwise punishable under the general law of crimes.
17. Since the application of the Juvenile Justice Act, 2000, to a person brought before the Juvenile Justice Board (hereinafter referred to as 'the Board') depends on whether such person is a juvenile or not within the meaning of Section 2(k) thereof, the determination of age assumes special importance and the said responsibility has been cast on the said Board. Subsequently, after the decision of a Constitution Bench of this Court in the case of *Pratap Singh v. State of Jharkhand and Anr* 2005CriLJ3091, the legislature amended the provisions of the Act by the Amendment Act, 2006, by substituting Section 2(l) to define a "juvenile in conflict with law" as a "juvenile who is alleged to have committed an offence and has not completed eighteen years of age as on the date of commission of such offence" (emphasis supplied) and to include Section 7A which reads as follows...

18. Section 7A makes provision for a claim of juvenility to be raised before any Court at any stage, even after final disposal of a case and sets out the procedure which the Court is required to adopt, when such claim of juvenility is raised. It provides for an inquiry, taking of evidence as may be necessary (but not affidavit) so as to determine the age of a person and to record a finding whether the person in question is a juvenile or not. The aforesaid provisions were, however, confined to Courts, and proved inadequate as far as the Boards were concerned. Subsequently, in the Juvenile Justice (Care and Protection of Children) Rules, 2007, which is a comprehensive guide as to how the provisions of the Juvenile Justice Act, 2000, are to be implemented, Rule 12 was introduced providing the procedure to be followed by the Courts, the Boards and the Child Welfare Committees for the purpose of determination of age in every case concerning a child or juvenile or a juvenile in conflict with law. Since the aforesaid provisions are interconnected and lay down the procedures for determination of age, the said Rule is reproduced hereinbelow...

(4) if the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive

proof specified in Sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

- (5) Save and except where, further inquiry or otherwise is required, inter alia in terms of Section 7A, Section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

Sub-Rules (4) and (5) of Rule 12 are of special significance in that they provide that once the age of a juvenile or child in conflict with law is found to be less than 18 years on the date of offence on the basis of any proof specified in sub- rule (3) the Court or the Board or as the case may be the Child Welfare Committee appointed under Chapter IV of the Act, has to pass a written order stating the age of the juvenile or stating the status of the juvenile, and no further inquiry is to be conducted by the Court or Board after examining and obtaining any other documentary proof referred to in Sub-rule (3) of Rule 12. Rule 12, therefore, indicates the procedure to be followed to give effect to the provisions of Section 7A when a claim of juvenility is raised.

19. One of the problems which has frequently arisen after the enactment of the Juvenile Justice Act, 2000, is with regard to the application of the definition of "juvenile" under Section 2(k) and (l) in respect of offences alleged to have been committed prior to 1st April, 2001 when the Juvenile Justice Act, 2000 came into force, since under the 1986 Act, the upper age limit for male children to be considered as juveniles was 16 years. The question which has been frequently raised is, whether a male person who was above 16 years on the date of commission of the offence prior to 1st April, 2001, would be entitled to be considered as a juvenile for the said offence if he had not completed the age of 18 years on the said date. In other words, could a person who was not a juvenile within the meaning of the 1986 Act when the offence was committed, but had not completed 18 years, be governed by the provisions of the Juvenile Justice Act, 2000, and be declared as a juvenile in relation to the offence alleged to have been committed by him?
20. The said question, which is identical to the question raised in these proceedings, was considered in the case of *Arnit Das v. State of Bihar* 2000 Cri LJ 2971, wherein, in the light of the definition of "juvenile" under the 1986 Act, which was then subsisting, this Court came to a finding that the procedures prescribed by the 1986 Act were to be adopted only when the Competent Authority found the person brought before it or

appearing before it to be under 16 years of age, if a boy, and under 18 years of age, if a girl, on the date of being so brought or such appearance first before the Competent Authority. This Court also came to a finding that the date of commission of offence is irrelevant for finding out whether the person is a juvenile within the meaning of Clause (h) of Section 2 of the 1986 Act.

21. The question which fell for decision in Arnit Das's case (*supra*), once again fell for the consideration of this Court in the case of Pratap Singh's case (*supra*), where the decision of this Court in Umesh Chandra's case (*supra*), which expressed a view which was contrary to that expressed in Arnit Das's case (*supra*), was brought to the notice of the Court, which referred the matter to the Constitution Bench to settle the divergence of views. In fact, the Constitution Bench formulated two points for decision, namely,
 - (a) Whether the date of occurrence will be the reckoning date for determining the age of the alleged offender as juvenile offender or the date when he is produced in the Court/competent Authority?
 - (b) Whether the Act of 2000 will be applicable in a case where a proceeding is initiated under the 1986 Act and was pending when the Act of 2000 was enforced with effect from 1.4.2001?
22. While considering the first question, the Constitution Bench had occasion to consider the decision of the three Judge Bench in Umesh Chandra's case (*supra*), wherein it was held that the relevant date for applicability of the Act so far as age of the accused, who claims to be a child, is concerned, is the date of occurrence and not the date of trial. Consequently, the decision in Arnit Das's case (*supra*) was over-ruled and the view taken in Umesh Chandra's case (*supra*) was declared to be the correct law. On the second point, after considering the provisions of Sections 3 and 20 of the Juvenile Justice Act, 2000, along with the definition of "juvenile" in Section 2(k) of the Juvenile Justice Act, 2000, as contrasted with the definition of a male juvenile in Section 2(h) of the 1986 Act, the majority view was that the 2000 Act would be applicable to a proceeding in any Court/Authority initiated under the 1986 Act which is pending when the 2000 Act came into force and the person had not completed 18 years of age as on 1.4.2001. In other words, a male offender, who was being proceeded with in any Court/Authority initiated under the 1986 Act and had not completed the age of 18 years on 1.4.2001, would be governed by the provisions of Juvenile Justice Act, 2000.
23. ...The unanimous view of the Constitution Bench was that the provisions of the Juvenile Justice Act, 2000, have prospective effect and not retrospective effect, except

to cover cases where though the male offender was above 16 years of age at the time of commission of the offence, he was below 18 years of age as on 1.4.2001. *Consequently, the said Act would cover earlier cases only where a person had not completed the age of 18 years on the date of its commencement and not otherwise.*

24. The said decision in Pratap Singh's case (*supra*) led to the substitution of Section 2(l) and the introduction of Section 7A of the Act and the subsequent introduction of Rule 12 in the Juvenile Justice Rules, 2007, and the amendment of Section 20 of the Act.
25. Read with Sections 2(k), 2(l), 7A and Rule 12, Section 20 of the Juvenile Justice Act, 2000, as amended in 2006, is probably the Section most relevant in setting at rest the question raised in this appeal, as it deals with cases which were pending on 1st April, 2001, when the Juvenile Justice Act, 2000, came into force. The same is, accordingly, reproduced hereinbelow:
26. ... In fact, Section 20 enables the Court to consider and determine the juvenility of a person even after conviction by the regular Court and also empowers the Court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Juvenile Justice Act, 2000.
31. ...The effect of the proviso to Section 7A introduced by the Amending Act makes it clear that the claim of juvenility may be raised before any Court which shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in the Act and the Rules made thereunder which includes the definition of "Juvenile" in Section 2(k) and 2(l) of the Act even if the Juvenile had ceased to be so on or before (*emphasis supplied*) the date of commencement of the Act. The said intention of the legislature was reinforced by the amendment effected by the said Amending Act to Section 20 by introduction of the Proviso and the Explanation thereto, wherein also it has been clearly indicated that in any pending case in any Court the determination of juvenility of such a juvenile has to be in terms of Clause 2(l) even if the juvenile ceases to be so "on or before the date of commencement of this Act" (*emphasis supplied*) and it was also indicated that the provisions of the Act would apply as if the said provisions had been in force for all purposes and at all material times when the alleged offence was committed.
36. ... The law as now crystallized on a conjoint reading of Sections 2(k), 2(l), 7A, 20 and 49 read with Rules 12 and 98, places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1st April,

2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted.

38. The instant case is covered by the amended provisions of Sections 2(k), 2(l), 7A and 20 of the Juvenile Justice Act, 2000. However, inasmuch as, the appellant was found to have completed the age of 16 years and 13 days on the date of alleged occurrence, the High Court was of the view that the provisions of the Juvenile Justice Act, 1986, would not apply to the appellant's case. Of course, the High Court, while deciding the matter, did not have the benefit of either the amendment of the Act or the introduction of the Juvenile Justice Rules, 2007. Even otherwise, the matter was covered by the decision of this Court in the case of Rajinder Chandra's case (*supra*), wherein this Court, inter alia, held that when a claim of juvenility is raised and on the evidence available two views are possible, the Court should lean in favour of holding the offender to be a juvenile in borderline cases. In any event, the statutory provisions have been altered since then and we are now required to consider the question of the claim of the appellant that his date of birth was Kartik Sud 1, Samvat Year 2039, though no basis has been provided for the fixation of the said date itself in the light of the amended provisions. Often, parents of children, who come from rural backgrounds, are not aware of the actual date of birth of a child, but relate the same to some event which may have taken place simultaneously. In such a situation, the Board and the Courts will have to take recourse to the procedure laid down in Rule 12, but such an exercise is not required to be undertaken in the present case since even according to the determination of the appellant's age by the High Court the appellant was below eighteen years of age when the offence was alleged to have been committed.
39. Having regard to the views expressed hereinabove, we are unable to sustain the impugned order of the High Court in holding that the provisions of the Juvenile Justice Act, 1986, would not be applicable to the appellant's case since he was allegedly 13 days above the age prescribed.
40. In the instant case, the appellant was arrested on 30.11.1998 when the 1986 Act was in force and under Clause (h) of Section 2 a juvenile was described to mean a child who had not attained the age of sixteen years or a girl who had not attained the age of eighteen years. It is with the enactment of the Juvenile Justice Act, 2000, that in Section 2(k) a juvenile or child was defined to mean a child who had not completed eighteen years of age which was given prospective prospect. However, as indicated

hereinbefore after the decision in Pratap Singh's case (*supra*), Section 2(l) was amended to define a juvenile in conflict with law to mean a juvenile who is alleged to have committed an offence and has not completed eighteen years of age as on the date of commission of such offence; Section 7A was introduced in the 2000 Act and Section 20 thereof was amended whereas Rule 12 was included in the Juvenile Justice Rules, 2007, which gave retrospective effect to the provisions of the Juvenile Justice Act, 2000. Section 7A of the Juvenile Justice Act, 2000, made provision for the claim of juvenility to be raised before any Court at any stage, as has been done in this case, and such claim was required to be determined in terms of the provisions contained in the 2000 Act and the Rules framed thereunder, even if the juvenile had ceased to be so on or before the date of commencement of the Act. Accordingly, a juvenile who had not completed eighteen years on the date of commission of the offence was also entitled to the benefits of the Juvenile Justice Act, 2000, as if the provisions of Section 2(k) had always been in existence even during the operation of the 1986 Act.

42. In the instant case, there is no controversy that the appellant was about sixteen years of age on the date of commission of the alleged offence and had not completed eighteen years of age. In view of Sections 2(k), 2(l) and 7A read with Section 20 of the said Act, the provisions thereof would apply to the appellant's case and on the date of the alleged incident it has to be held that he was a juvenile.
43. The appeal has, therefore, to be allowed on the ground that notwithstanding the definition of "juvenile" under the Juvenile Justice Act, 1986, the appellant is covered by the definition of "juvenile" in Section 2(k) and the definition of "juvenile in conflict with law" in Section 2(l) of the Juvenile Justice Act, 2000, as amended.
44. We, therefore, allow the appeal and set aside the order passed by the High Court and in keeping with the provisions of Sections 2(k), 2(l), 7A and 20 of the Juvenile Justice Act, 2000 and Rules 12 and 98 of the Juvenile Justice Rules, 2007, hold that since the appellant was below 18 years of age at the time of commission of the offence, the provisions of the said Act would apply in his case in full force.
45. The matter is accordingly remitted to the Juvenile Justice Board, Ajmer, for disposal in accordance with law, within three months from the date of receipt of a copy of this order, having regard to the fact that the offence is alleged to have been committed more than ten years ago. If, however, the appellant has been in detention for a period which is more than the maximum period for which a juvenile may be confined to a Special Home, the Board shall release the appellant from custody forthwith.

Conclusion

The Government of India has ratified the UN Convention on the Rights of the Child of 1992. As per the Convention the Government needs to take steps in order to ensure that:

- "(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.*
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.*
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."*

Although the above judgements reflect the essence of the aforementioned principles, their stern implementation still remains an undisputed issue demanding concern.

PAROLE AND FURLOUGH

Introduction

The modern day principle of “parole”, as used in the Indian Judiciary, was generated in the 19th Century by British penal colonies. Initially parole or temporary release from the prison was granted on two fundamental conditions, which are, good conduct of the prisoner and secondly extraordinary condition necessitating the release of the prisoner for a fixed period. With the passage of time the first condition was severed from parole and was identified as an independent legal norm, namely “furlough”. In India the concepts of parole and furlough, though not defined by the legislature, have been identified and implemented via various landmark judgements and state legislations. On a broader view, parole is granted and governed by the following conditions: (a) A member of the prisoner’s family has died or is seriously ill or the prisoner himself is seriously ill; or (b) The marriage of the prisoner himself, his son, daughter, grandson, granddaughter, brother, sister, sister’s son or daughter is to be celebrated; or (c) The temporary release of the prisoner is necessary for ploughing, sowing or harvesting or carrying on any other agricultural operation on his land or his father’s undivided land actually in possession of the prisoner; or (d) It is desirable to do so for any other sufficient cause. (e) Parole can be granted only after a portion of sentence is already served. (f) If conditions of parole are not abided by the paroled he may be returned to serve his sentence in prison, such conditions may be such as those of committing a new offence. (g) Parole may also be granted on the basis of aspects related to health of convict himself. On the other hand furlough is granted on the basis of good conduct remissions procured by the prisoner through his good conduct in the prison.

The terms ‘parole’ and ‘furlough’ have not been defined by the Indian legislature. Although the CHAPTER XXII of the Criminal Procedure Code, 1973 deals with the suspension and remission of sentences, the terms parole and furlough have not been defined in the Code. To understand their meanings and in what connotations are these terms used it is necessary to rely upon the following judicial decisions of the Supreme Court of India:

In the case of *Sunil Fulchand Shah v. Union of India & Others* (2000 (3) SCC 409), the Constitutional Bench of the Supreme Court had observed that ‘parole’ is a form of “temporary release” from custody, which does not suspend the sentence or the period of detention, but provides conditional release from custody and changes the mode of undergoing the sentence. The Bench while deciding the question on calculation of the

period of parole held that if the period of detention is interrupted either by an order of provisional release made under Section 12 of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 or by an order of the Court, then the maximum period of detention to that extent gets curtailed and neither the period of parole nor the period during which the detenu was released pursuant to the order of the Court can be excluded while computing the maximum period of detention.

The Supreme Court while determining the definition of 'parole' in the case of *State of Haryana v. Mohinder Singh* (2000 (3) SCC 394) relied upon the judgment of *Sunil Fulchand Shah v. Union of India & Others* above, wherein the distinction between grant of parole and furlough had been clearly brought out and it was held that parole relates to executive action taken after the door has been closed on a convict. During parole period there is no suspension of sentence but the sentence is actually continuing to run during that period also. The Court stated that when a prisoner is on parole his period of release does not count towards the total period of sentence while when he is on furlough he is eligible to have the period of release counted towards the total period of his sentence undergone by him. The question before the Supreme Court in this case was if the prisoner, who is convicted of an offence under Section 376 of Indian Penal Code (45 of 1860), though confined in jail, is entitled to remission of his sentence when the Government circular issued under Section 432 of the Code of Criminal Procedure Code, 1973 does not grant such remission to an inmate who has been convicted under Section 376. The Supreme Court held that the benefits intended for those who are on parole or furlough cannot be extended to those who are on bail.

In *Avtar Singh v. State of Haryana & Another* (2002 (3) SCC 18), the appellant Avtar Singh, a convict undergoing the sentence of imprisonment had filed an application before the Punjab & Haryana High Court seeking for a direction to the State Government to include the period of parole availed by him in the total period of imprisonment undergone by him. The application was dismissed by the High Court holding that the period of parole cannot be counted towards the actual sentence undergone by him. The decision of the High Court was appealed before the Supreme Court on two points, firstly, since the Constitutional Bench of the Supreme Court in *Sunil Fulchand Shah* (supra) had held that the period of parole can also be counted as a period of sentence of imprisonment, therefore sub section (3) of section 3 of the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 was unconstitutional and violative of Section 21 of the Constitution. Secondly, that sub section (3) of section 3 of the Act was discriminatory inasmuch as a prisoner released temporarily under Section 3 shall not be entitled to count such period of release towards

the total period of sentence, whereas temporary release of a prisoner under Section 4 on furlough would be counted towards the total period of the sentence.

The Court rejected the first contention, noting that Section 3 had been enacted to meet certain situation of the prisoner but Section 4 had been enacted as a reformative measure as a prisoner has to show good conduct while in incarceration. Since the classification was based on rational criteria it cannot be said to be discriminatory in nature. The second contention was rejected on the grounds that the Constitutional Bench has clearly held that though ordinarily the period of temporary release of a prisoner on parole needs to be counted towards the total period of detention but this condition can be curtailed by legislative act, rules, instructions or terms of grant of parole. On the contention that sub section (3) of Section 3 of the Act is hit by Article 21 of the Constitution the Court observed that since the period of temporary release on parole has been denied while counting the actual sentence undergone by the prisoner by a valid legislative act, it cannot be said that such right of prisoner has been taken away without due process of law.

In *State of Haryana v. Nauratta Singh and Others* (2000 (3) SCC 514), the question before the court was that if the convicted person filed an appeal and got his sentence suspended by the Court and the Court confirmed the conviction and sentence after a period of 3 years, is he entitled to claim that he need not go to jail at all as he was on bail for more than 3 years during the post conviction stage also? The Court held that if the convict is entitled to such remission the criminal justice system would be reduced to a mockery. The court hence denied the claim of the respondent.

In another case *Joginder Singh v. State of Punjab and Others* (2001 (8) SCC 306) the Supreme Court while deciding a similar question as in the abovementioned case *State of Haryana v. Nauratta Singh and Others* held that if during the period of serving their sentence any fresh remission notification is issued by the concerned Government, the same will be made applicable on terms and conditions enumerated in the said notification if it is applicable to the said convicts.

In *Sharad Keshav Mehta's* case (1989 Cri LJ 681), the Bombay High Court held that the release on a furlough was a legal and substantial right of the prisoner and denial of the same must be based on material facts indicating that the same would disturb public peace and tranquility. In the present case, it was held that the rejection was misconceived.

CASE EXCERPTS

**Supreme Court
2000 (3) SCC 409**
Sunil Fulchand Shah
vs
Union of India and Others

Dr. A.S. Anand, Cji., G.T. Nanavati, K.T. Thomas, D.P. Wadhwa And S. Rajendra Babu, JJ.

1. Personal liberty is one of the most cherished freedoms, perhaps more important than the other freedoms guaranteed under the Constitution. It was for this reason that the Founding Fathers enacted the safeguards in Article 22 in the Constitution so as to limit the power of the State to detain a person without trial, which may otherwise pass the test of Article 21, by humanising the harsh authority over individual liberty. In a democracy governed by the Rule of Law, the drastic power to detain a person without trial for security of the State and/or maintenance of public order, must be strictly construed. However, where individual liberty comes into conflict with an interest of the security of the State or public order, then the liberty of the individual must give way to the larger interest of the nation;
2. That Section 10 of COFEPOSA prescribes not only the maximum period of detention but also the method of computation of that period and on a plain reading of the section, the period of detention is to be computed from the date of actual detention and not from the date of the order of detention;
3. That parole, stricto-senso may be granted by way of a temporary release as contemplated by Section 12(1) or 12(1A) of COFEPOSA by the Government or its functionaries, in accordance with the Parole Rules or administrative instructions, framed by the Government which are administrative in character. For securing release on parole, a detenu has, therefore, to approach the Government concerned or the jail authorities, who may impose conditions as envisaged by Section 12(2) etc. and the grant of parole shall subject to those terms and conditions;
4. That the Courts cannot, generally speaking, exercise the power to grant temporary release to detenus, on parole, in cases covered by COFEPOSA during the period an order of detention is in force because of the express prohibition contained in Clause (6) of Section 12. The bar of judicial intervention to direct temporary, release of a detenu would not, however effect the jurisdiction of the High Courts under Article

226 of the Constitution or of this Court under Articles 32,136,142 of the Constitution to direct the temporary release of the detenu, where request of the detenu to be released on parole for a specified reason and/or for a specified period, has been, in the opinion of the Court, unjustifiably refused or where in the interest of justice such an order of temporary release is required to be made. That jurisdiction, however, has to be sparingly exercised by the Court and even when it is exercised it is appropriate that the court leaves it to the administrative or jail authorities to prescribe the conditions and terms on which parole is to be availed of by the detenu;

5. That parole does not interrupt the period of detention and, thus, that period needs to be counted towards the total period of detention unless the terms for grant of parole, rules or instructions, prescribe otherwise;
6. The quashing of an order of detention by the High Court brings to an end such an order and if an appeal is allowed against the order of the High Court, the question whether or not the detenu should be made to surrender to undergo the remaining period of detention, would depend upon a variety of factors and in particular on the question of lapse of time between the date of detention, the order of the High Court, and the order of this Court, setting aside the order of the High Court. A detenu need not be sent back to undergo the remaining period of detention, after a long lapse of time, when even the maximum prescribed period intended in the order of detention has expired, unless there still exists a proximate temporal nexus between the period of detention indicated in the order by which the detenu was required to be detained and the date when the detenu is required to be detained pursuant to the appellate order and the State is able to satisfy the court about the desirability of 'further' or 'continued' detention;
7. That where, however, long time has not lapsed or the period of detention initially fixed in the order of detention has not expired, the detenu may be sent back to undergo the balance period of detention. It is open to the Appellate Court, considering the facts and circumstances of each case, to decide whether the period during which the detenu was free on the basis of an erroneous order should be excluded while computing the total period of detention as indicated in the order of detention though normally the period during which the detenu was free on the basis of such an erroneous order may not be given as a 'set off against the total period of detention. The actual period of incarceration cannot, however, be permitted to exceed the maximum period of detention, as fixed in the order, as per the prescription of the statute.

The above is not a summary of the judgement but shall have to be read along with the judgement.

**Supreme Court
2000 (3) SCC 394**

**State of Haryana
vs
Mohinder Singh**

G. B. Pattanaik, S.N. Phukan and S.N. Variava, JJ.

1. Leave is granted.
2. This appeal by special leave and the writ petition were heard together as the questions involved are common and, therefore, by this judgement we depose of both the appeal and the writ petition
3. The appellant - Avtar Singh, a convict, is undergoing the sentence of imprisonment. He filed an application before the Punjab & Haryana High Court seeking for a direction to the State Government to include the period of parole availed by him in the total period of imprisonment undergone by him. The application was dismissed by the impugned judgement holding that the period of parole cannot be counted towards the actual sentence undergone by him. Being aggrieved, present appeal by special leave has been filed. Avtar Singh has also filed the writ petition challenging the vires of Sub-section (3) of Section 3 of the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 (for short 'the Act') on the ground that the sub-section is arbitrary, illegal, ultra vires and unconstitutional.
4. When both the appeal and the writ petition came before a Bench of this Court, these were referred to a larger Bench with the following observations:-

"In the writ petition Section 3(iii) of the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 is challenged on the ground that it is violative of Article 14 and Article 21. In State of Haryana v. Mohinder Singh 2000CriLJ1408 and the Constitution Bench in Sunil Fulchand Shah v. Union of India and Ors. 2000CriLJ1444, this Court held that parole and furlough period can also be counted as the period of sentence of imprisonment. But in those decisions the question of validity of the impugned sub-section of the Act mentioned above has not been considered. When the constitutional validity of the said sub-section is challenged and the focus is made on Article 21, we are of the opinion that this must be heard by a larger bench. Registry will place this matter for order of the Hon'ble the Chief Justice of India."

5. That is how both the appeal and the writ petition have come up before this Bench.
6. Before we proceed further to consider the contention of the learned counsel, we extract below Section 3 and 4 of the Act:-

"3 Temporary release of prisoners on certain grounds:

- (1) *The State Government may, in consultation with the District Magistrate or any other officer appointed in this behalf, by notification in the Official, Gazette and subject to such conditions and in such manner as may be prescribed, release temporarily for a period specified in Sub-section (2), any prisoner, if the State Government is satisfied that-*
 - (a) *a member of the prisoner's family had died or is seriously ill or the prisoner himself is seriously ill; or*
 - (b) *the marriage of prisoner himself, his son, daughter, grandson, grand daughter, brother, sister, sister's son or daughter is to be celebrated; or*
 - (c) *the temporary release of the prisoner is necessary for ploughing, sowing or harvesting or carrying on any other agricultural operation on his land or his father's undivided land actually in possession of the prisoner; or*
 - (d) *it is desirable to do so for any other sufficient cause.*
- (2) *The period for which a prisoner may be released shall be determined by the State Government so as not to exceed-*
 - (a) *where the prisoner is to be released on the ground specified in Clause (a) of Sub-section (1), three weeks;*
 - (b) *where the prisoner is to be released on the ground specified in Clause (b) or Clause (d) of Sub-section (1), four weeks; and*
 - (c) *where the prisoner is to be released on the ground specified in Clause (c) of Sub-section (1), six weeks:*

Provided that the temporary release under Clause (c) can be availed more than once during the year, which shall not, however, cumulatively exceed six weeks.

- (3) *The period of release under this section shall not count towards the total period of sentence of a prisoner.*
- (4) *The State Government may, by notification authorise any officer to exercise its powers under this section in respect of all or any other ground specified thereunder.*

4. Temporary release of prisoners on furlough:

- (1) *The State Government or any other officer authorised by it in this behalf may, in consultation with such other officer as may be appointed by the State Government, by notification, and subject to such conditions and in such manner as may be prescribed, release temporarily, on furlough, any prisoner who has been sentenced to a term of imprisonment of not less than four years, and who-*

(a) has, immediately before the date of his temporary release, undergone continuous imprisonment for a period of three years, inclusive of the pre-sentence detention, if any;

(b) has not during such period committed any jail offence (except an offence punished by a warning) and has earned at least three annual goods conduct remissions:

Provided that nothing herein shall apply to a prisoner who-

(i) is a habitual offender as defined in Sub-section (3) of Section 2 of Punjab Habitual Offenders (Control and Reform) Act 1952; or

(ii) has been convicted of dacoity or such other offence as the State Government may, by notification, specify.

(2) The period of furlough for which a prisoner is eligible under Sub-section (1) shall be three weeks during the first year of his release and two weeks during each successive year thereafter.

(3) Subject to the provisions of Clause (d) of Sub-section (3) of Section 8 the period of release referred to in Sub-section (1) shall count towards the total period of the sentence undergone by a prisoner."

7. Thus it is seen that under Section 3 and 4 the legislature has made two categories of prisoners for temporary release; a prisoner released on parole under Section 3 is not entitled for counting the period of release towards the total period of sentence of imprisonment undergone by him whereas, a prisoner released on furlough, period of such temporary release shall be counted towards his total period of imprisonment.

8. Two points have been urged by the learned counsel for the appellant. Firstly, it is submitted that since the Constitution Bench of this Court in *Sunil Fulchand Shah v. Union of India and Ors.* 2000 Cri LJ 1444 has held that the period of parole can also be counted as a period of sentence of the imprisonment, Sub-section (3) of Section 3 of the Act is unconstitutional and violative of Article 21 of the Constitution. Secondly, it has been contended that Sub-section (3) of Section 3 of the Act is discriminatory inasmuch as a prisoner released temporarily under Section 3 shall not be entitled to count such period of release towards the total period of sentence, whereas temporary release of a prisoner under Section 4 such temporary period of release on furlough would be counted towards the total period of sentence.

9. In *Sunil Fulchand Shah* (supra), the Constitution Bench by a majority after considering various dictionary meaning of the word 'Parole' held that the action for grant of parole, generally speaking is an administrative action and in paragraph 27 of the judgement

it was held that parole is a form of temporary release from custody, which does not suspend the sentence of the period of detention, but provides conditional release from the custody and changes the mode of undergoing the sentence. However, in paragraph 30 of the judgement the above position of parole was further clarified as follows:-

"...Since release on parole is a temporary arrangement by which a detenu is released for a temporary fixed period to meet certain situations, it does not interrupt the period of detention and, thus, needs to be counted towards the total period of detention unless the rules, instructions or terms of grant of parole, prescribe otherwise." (emphasis supplied)

10. In the same paragraph the Bench also held that.....the period of detention would not stand automatically extended by any period of parole granted to the detenu *unless the order of parole or rules or instructions specifically indicates as a term and condition of parole, to the contrary'.* (emphasis ours)
11. Parole is essentially an executive function and now it has become an integral part of our justice delivery system as has been recognised by Courts. Though, the case of Sunil Fulchand Shah (*supra*) was a case of preventive detention, we are of the opinion that the same principle would also apply in the case of punitive detention.
12. Thus, the Constitution Bench by majority decision clearly held that the period of temporary release of a prisoner on parole is to be counted towards the total period of detention, unless it is otherwise provided by legislative act, rules, instructions or terms of the grant of parole.
13. Under Section 3 of the Act, the State Government can temporarily release a prisoner for a specified period if the Government is satisfied that (i) any member of his family had died or seriously ill or the prisoner himself is seriously ill or (ii) marriage of himself, his son, daughter, etc, is to be celebrated or (iii) such release is necessary for ploughing, sowing or harvesting or carrying on any other agricultural operation on his land or his father's undivided land actually in possession of the prisoner or (iv) is desirable to do so for any other sufficient cause. The period of release is to be determined by the State Government in accordance with Sub-section (2) and Sub-section (3) provides that period of release under this section shall not be counted towards the total period of sentence of prisoner. Under Section 4 a prisoner who has been sentenced to a term of imprisonment of not less than 4 years cannot be temporarily released on furlough unless he has undergone continuous imprisonment for a period of 3 years and has not committed any jail offence (except an offence

punished by a warning) and has also earned at least three annual good conduct remissions. This section also provides that the benefit of furlough cannot be granted to the class of prisoners mentioned in proviso to Sub-section (1). The period of such temporary release has been fixed in Sub-section (2). It is specifically provided in Sub-section (3) that period of temporary release on furlough shall be counted towards total period of sentence undergone by a prisoner.

14. Thus, the legislature for the purpose of temporary release has created two classes of prisoners. If we compare these two sections, we find that conditions of temporary release on furlough under Section 4 is more rigorous and a prisoner shall not be entitled to such temporary release unless he fulfills the conditions laid down in the said section. But in Section 3 no such rigorous condition has been imposed and only the circumstances under which the temporary release can be granted have been stated. Moreover certain classes of prisoners cannot get the benefit of furlough¹⁵. Before a Constitution Bench of this Court in *Sunil Batra v. Delhi Administration and Ord. etc.* and *Charles Gurmukh Sobraj v. Delhi Administration* MANU/SC/0184/1978 : 1978 Cri LJ 1741 and Ors. [AIR 1978 1675 : 1979 SCR (1) 392], Section 30 of the Prisons Act came up for consideration. The said section runs as follows:-

" 30. (1) Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the Jailer and all articles shall be taken from which the Jailer deems it dangerous or inexpedient to leave in his possession.

(2) Every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under the charge of a guard."

16. The gravamen of the argument in that case was that Sub-section (2) does not authorise the prison authorities in the garb of securing a prisoner under sentence of death, to confine him in cell apart from other prisoner by imposing solitary confinement upon him. This argument was rejected and it was held that it was hardly be questioned that prisoners under sentence of death form a separate class and their separate classification has to be recognised.

17. This Court in *State of Haryana and Ors. v. Mohinder Singh and Ors.* [2000 (3) 394] held that 'furlough' and 'parole' are two distinct terms now being used in the Jail Manuals or laws relating to temporary release of prisoners. In *Sunil Batra*(supra), the Constitution Bench has given recognition of creation of a separate class of prisoners undergoing death sentence. Section 3 has been enacted to meet the urgent pressing personal problem of a prisoner. As noted above, under this section any prisoner irrespective of

his period of sentence of detention can be released on parole to meet such problem, whereas the condition for releasing a prisoner on furlough under Section 4 is rigorous and such release on furlough cannot be claimed by certain classes of prisoners as mentioned in the section. On close look at both the sections it would appear that these sections operate on different fields. Section 3 has been enacted to meet certain situation of the prisoner but Section 4 has been enacted as a reformatory measures as a prisoner has to show good conduct while in incarceration. In our consideration opinion this classification is based on rational criteria and cannot be said to be discriminatory in nature. We, therefore, find no force in the first contention of the learned counsel for the appellant.

18. The second contention of the learned counsel for the appellant has also to be rejected in view of the decision of this Court in *Sunil Fulchand Shah* (supra). The Constitution Bench has clearly held that though ordinarily the period of temporary release of a prisoner on parole needs to be counted towards the total period of detention but this condition can be curtailed by legislative act, rules, instructions or terms of grant of parole
19. We also do not find force in the contention of the learned counsel for the appellant that Sub-section (3) of Section 3 of the Act is hit by Article 21 of the Constitution. By a valid legislative act the period of temporary release on parole has been denied while counting the actual sentence undergone by the prisoner. It cannot be said that such right of prisoner has been taken away without due process of law. Consequently, these contentions of the learned counsel for the appellant are rejected.
20. We, therefore, find no merit in the appeal as well as in the *writ petition* and consequently both the appeal and the writ petition are dismissed.

Supreme Court
2002 (3) SCC 18

Avtar Singh
vs
State of Haryana and Another

G. B. Pattanaik, S.N. Phukan and S.N. Variava, JJ.

3. The appellant - Avtar Singh, a convict, is undergoing the sentence of imprisonment. He filed an application before the Punjab & Haryana High Court seeking for a direction to the State Government to include the period of parole availed by him in the total period of imprisonment undergone by him. The application was dismissed by the impugned judgement holding that the period of parole cannot be counted towards the actual sentence undergone by him. Being aggrieved, present appeal by special leave has been filed. Avtar Singh has also filed the writ petition challenging the vires of Sub-section (3) of Section 3 of the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 (for short 'the Act') on the ground that the sub-section is arbitrary, illegal, ultra vires and unconstitutional.
4. In the writ petition Section 3(iii) of the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 is challenged on the ground that it is violative of Article 14 and Article 21.
7. Thus it is seen that under Section 3 and 4 the legislature has made two categories of prisoners for temporary release; a prisoner released on parole under Section 3 is not entitled for counting the period of release towards the total period of sentence of imprisonment undergone by him whereas, a prisoner released on furlough, period of such temporary release shall be counted towards his total period of imprisonment.
8. Two points have been urged by the learned counsel for the appellant. Firstly, it is submitted that since the Constitution Bench of this Court in *Sunil Fulchand Shah v. Union of India and Ors.* 2000 Cri LJ 1444 has held that the period of parole can also be counted as a period of sentence of the imprisonment, Sub-section (3) of Section 3 of the Act is unconstitutional and violative of Article 21 of the Constitution. Secondly, it has been contended that Sub-section (3) of Section 3 of the Act is discriminatory inasmuch as a prisoner released temporarily under Section 3 shall not be entitled to count such

period of release towards the total period of sentence, whereas temporary release of a prisoner under Section 4 such temporary period of release on furlough would be counted towards the total period of sentence.

14. Thus, the legislature for the purpose of temporary release has created two classes of prisoners. If we compare these two sections, we find that conditions of temporary release on furlough under Section 4 is more rigorous and a prisoner shall not be entitled to such temporary release unless he fulfills the conditions laid down in the said section. But in Section 3 no such rigorous condition has been imposed and only the circumstances under which the temporary release can be granted have been stated. Moreover certain classes of prisoners cannot get the benefit of furlough.
15. Before a Constitution Bench of this Court in *Sunil Batra v. Delhi Administration and Ord. etc.* and *Charles Gurmukh Sobraj v. Delhi Administration 1978 Cri LJ 1741 and Ors.* [AIR 1978 1675 : 1979 SCR (1) 392], Section 30 of the Prisons Act came up for consideration. The said section runs as follows:-

" 30. (1) Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the Jailer and all articles shall be taken from which the Jailer deems it dangerous or inexpedient to leave in his possession.
(2) Every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under the charge of a guard."
16. The gravamen of the argument in that case was that Sub-section (2) does not authorise the prison authorities in the garb of securing a prisoner under sentence of death, to confine him in cell apart from other prisoner by imposing solitary confinement upon him. This argument was rejected and it was held that it was hardly be questioned that prisoners under sentence of death form a separate class and their separate classification has to be recognised.
17. On close look at both the sections it would appear that these sections operate on different fields. Section 3 has been enacted to meet certain situation of the prisoner but Section 4 has been enacted as a reformatory measures as a prisoner has to show good conduct while in incarceration. In our consideration opinion this classification is based on rational criteria and cannot be said to be discriminatory in nature. We, therefore, find no force in the first contention of the learned counsel for the appellant.
18. The second contention of the learned counsel for the appellant has also to be rejected in view of the decision of this Court in *Sunil Fulchand Shah* (supra). The Constitution

Bench has clearly held that though ordinarily the period of temporary release of a prisoner on parole needs to be counted towards the total period of detention but this condition can be curtailed by legislative act, rules, instructions or terms of grant of parole.

19. We also do not find force in the contention of the learned counsel for the appellant that Sub-section (3) of Section 3 of the Act is hit by Article 21 of the Constitution. By a valid legislative act the period of temporary release on parole has been denied while counting the actual sentence undergone by the prisoner. It cannot be said that such right of prisoner has been taken away without due process of law. Consequently, these contentions of the learned counsel for the appellant are rejected.

Supreme Court
2000 (3) SCC 514

State of Haryana
vs
Nauratta Singh and Others

K.T. Thomas, J.

1. A convicted prisoner undergoing sentence of imprisonment claims that he is entitled to remission of the period during which he was on bail under orders of the Court. His claim was upheld by a learned single Judge of the Punjab and Haryana High Court. But the State of Haryana is not inclined to reconcile with the decision and hence this appeal by special leave.
2. It is necessary to set out the background in which the said claim was made by the prisoner who is a respondent herein. He was an accused in a murder case along with three others. The trial Court, as per its judgement dated 5-1-1978 convicted only one of the accused, by name Balbir, of the offence under Section 302 of the Indian Penal Code, and the respondent was acquitted of the said offence read with Section 34, IPC. However, the respondent was convicted under Section 324, IPC and he was sentenced to the period of imprisonment which he had already undergone till then, (that period was 9 months and 26 days). The State preferred an appeal against the acquittal of respondent while Balbir filed an appeal against the conviction and sentence passed on him. The High Court, which heard both the appeals together, confirmed the conviction and sentence passed on Balbir and dismissed his appeal. But the appeal filed by the State was allowed and respondent was convicted under Section 302 read with Section 34 of IPC and sentenced him to undergo imprisonment for life. The judgement of the High Court was pronounced on 23-4-1980.
3. During the pendency of the said appeal respondent was allowed to remain on bail. Pursuant to the conviction and sentence imposed on him by the High Court he surrendered to the bail on 7-6-1980. Thereafter he moved Supreme Court in appeal and during the pendency of that appeal he was released on bail as per the order passed by this Court on 2-8-1980. But this Court confirmed the conviction and sentence passed on him by the High Court and dismissed his appeal pursuant to which he was again taken back to jail on 22-8-1994. It was in the aforesaid background that respondent

moved the High Court on 14-2-1997 praying that his conviction must be treated as passed on 5-1-1978 (the date on which the trial Court passed the judgement) and hence the period during which he was on bail (from 5-1-1978 to 7-6-1980 and from 2-8-1980 to 21-8-1994) shall be included within the period of his entitlement for remission.

4. Though respondent did not specifically state the basis of his claim, both sides now agree that the said claim was based on the instructions issued by the Government of Haryana which reads thus:

Remission will be also granted to all the convicts who were on parole/furlough from the jail on 25-1-1988 subject to the condition that they surrender at the jail on the due date after the expiry of parole/furlough period for undergoing the un-expired portions of their sentences.

5. We may point out that Section 433A of the Code was introduced in the statute book on 8-12-1978 by which the power of a State Government to release a person who has been convicted and sentenced to life imprisonment of any offence punishable with death or imprisonment for life) has been curtailed by introducing the rider that such convicted person should have served at least 14 years of imprisonment. A Constitution Bench of this Court has held in *Maru Ram v. Union of India* 1980CriLJ1440 that the period of 14 years envisaged in the new provision is the actual period of imprisonment undergone by the prisoner without including any period of remission.
6. Appellant-State of Haryana had contended before the High Court that the interdict contained in Section 433A of the Code would not apply to the present case. But the learned single Judge of the High Court repelled that contention, mainly relying on another legal position declared by the Constitution Bench in *Maru Ram v. Union of India* (supra) as thus: "When a person is convicted in appeal, it follows that the appellate Court has exercised its power in place of the original Court and guilt, conviction and sentence must be substituted for and shall have retrospective effect from the date of the judgement of the trial Court; the appellant's conviction must relate back to the date of the trial Court's verdict." Appellant-State is not disputing the above legal position in this appeal. Even otherwise we have to concur with the view taken by the learned single Judge that Section 433A would not stand in the way now as the conviction of the appellant for the offence under Section 302 read with Section 34 of the IPC has to be treated as passed on 5-1-1978 when the trial Court pronounced its judgement.

7. The claim of the respondent that he is entitled to deduct the period during which lie was on bail was sought to be supported by two judgements rendered by the Punjab and Haryana High Court earlier. They are : Man Mohan Sahani v. State of Haryana(1987) 2 RCR 292 and Amrik Singh v. State of Haryana (1992) 2 RCR 138. In Man Mohan Sahani's case the prisoner was acquitted by the trial Court on 26-4-1977, but the High Court reversed the judgement and convicted him and sentenced him to imprisonment for life, to which sentence he surrendered on 28-1-1980. So he claimed the benefit of remission in respect of the said period. A learned single Judge of the High Court following the ratio laid down in Maru Ram's case 1980CriLJ1440 (supra) held that petitioner's conviction must relate back to the date of the trial Court's verdict and substituted so. There is no dispute regarding that part of the decision. But learned Judge had abruptly concluded thereafter thus:

On a parity of reasoning, in the present case too, the conviction of the petitioner by the High Court must relate back to the date of the trial Court 's verdict from which it would, therefore, follow that the petitioner, for purposes of the remission claimed, must be deemed to have been convicted and put on bail at the time of the remissions and thus entitled to the benefit thereof. The petitioner is accordingly entitled to the benefit of the remissions claimed and the authorities concerned are consequently directed to consider his case for release from jail after allowing him such benefit.

8. In Amrik Singh v. State of Haryana 1992 (2) RCR 138 (supra), another single Judge of the same High Court, following the above quoted passage from Man Mohan Sahani 1987 (2) RCR 292 observed thus:

There is no doubt left in my mind that the judgement in Man Mohan Sanhi's case (supra) is fully applicable to the facts and circumstances of the case, on hand, rather this case stands on a better footing as the petitioner was on bail by the order of the Court. He is entitled to earn the remissions earned by other detenus during the period he was on bail.

9. It is pertinent to point out that in the judgement impugned before us learned single Judge has merely followed the above two decisions as could be noticed from a passage of the impugned judgement which is extracted below:

In Amrik Singh's case, this Court held that the accused is entitled to the remission earned during the period when he was on bail. Therefore, it is clear that though the petitioner herein was first convicted u/s. 302 read with Section 34 of the Indian Penal Code, on 23-4-1980 by the High Court, which was ultimately confirmed by the Supreme Court on 27-7-94, for all intents and purposes, the petitioner must be taken to have been convicted on 5-1-1978, which is the date of the verdict of the trial Court. It is also clear that he is entitled to all the benefits of the remission even for the period during which he was on bail.

10. We have no doubt that the High Court of Punjab and Haryana has wrongly decided Man Mohan Sahani's case 1987 (2) RCR 292 and that erroneous view was wrongly followed in Amrik Singh's case 1992 (2) RCR 138 so far as the present question is concerned (relating to entitlement of remission to include the period during which the convicted person was on bail). We need only to point out that in Man Mohan Sahani's case the High Court did not advert to any reason, whatsoever, for the period during which the person was not in jail to be counted towards the period of remission of the punishment under the sentence.
11. The instructions issued by the Government of Haryana under which respondent claimed remission cannot be interpreted as to enable him to count the period during which he was on bail towards remission. The expression "parole or furlough" in the aforesaid instructions cannot, for obvious reasons be stretched to the period during which the person was enlarged on bail, during the pendency of the trial or appeal or revision. It must be remembered that no sentenced would be passed on the accused during the time he remains under trial and hence there is no question of any remission to be granted to him during that stage, except the period during which he was under detention as provided in Section 428 of the Code. If he was released on bail during the pendency of appeal or revision it is on account of the fact that the Court suspended the sentence passed on him. When the sentence stands suspended he would be released on bail on his own entitlement. But the case of parole or furlough is different from the above.
12. Section 432 of the CrPC falls within Chapter XXXII, which contains provisions regarding "execution, suspension, remission and commutation of sentences." Sub-section (1) of Section 432 empowers the appropriate Government to "suspend the execution of the sentence" or remit "the punishment to which he has been sentenced". The sub-section reads thus:

When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.
13. Suspension of a sentence is obviously different from remission of any part of the punishment to which a person is sentenced. While Section 432 of the Code deals with power of the Government to suspend the sentence, Section 389 of the Code deals with power of the Court to suspend execution of sentence pending appeal or revision. Whenever the sentence is suspended by the Court the convict is entitled to

be released on bail. The expression used in Section 432(1) of the Code for remission is "remit the punishment to which he has been sentenced". It is, therefore, clear that remission can be granted only with reference to an operative punishment. In other words, when there is no operative punishment there is no need to remit any part of such punishment.

14. Parole is defined in Black's Law Dictionary, as "a conditional release of a prisoner, generally under supervision of a Parole Officer, who has served part of the term for which he was sentenced to prison". Parole relates to executive action taken after the door has been closed on a convict. During parole period there is no suspension of sentence but sentence is actually continuing to run during that period als15. A Constitution bench of this Court has considered the distinction between bail and parole in the context of reckoning the period to which a detenu under a preventive detention order has to undergo in prison. It was in Sunil Fulchand Shah v. Union of India 2000CriLJ1444 , Dr. A. S. Anand, C. J. speaking for himself and for K. T. Thomas, D. P. Wadhwa & S. Rajendra Babu, JJ, has observed thus (para 10)

Bail and parole have different connotations in law. Bail is well understood in criminal jurisprudence and Chapter XXXIII of the CrPC contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the Court would still retain constructive control over him through the sureties.

16. After referring to the meaning given to the word "parole" in different lexicography learned Chief Justice has stated thus:

Thus, it is seen that 'parole' is a form of temporary release from custody, which does not suspend the sentence or the period of detention, but provides conditional release from custody and changes the mode of undergoing the sentence.

17. In a recent decision rendered by a two Judge Bench of this Court in State of Haryana v. Mohinder Singh etc. 2000CriLJ1408 a similar question was considered and it was held that the benefits intended for those who are on parole or furlough cannot be extended to those who are on bail. The said decision has been quoted with approval by the Constitution Bench in the majority Judgement in Sunil Fulchand Shah AIR 2000 SCW 582 (supra).

18. The clear fallacy of the approach made by the High Court can be demonstrated through an illustration. An accused was tried for an offence under Section 326 of IPC.

During trial period he was allowed to remain on bail and the trial prolonged up to, say 3 years. Finally the Court convicted him and sentenced him to imprisonment for three years. Should not the convicted person go to Jail at all on the premise that he was on bail for three years and is hence entitled to remission of that period?

19. Yet another illustration can be shown by stretching the above illustration a little further. If the aforesaid convicted person filed an appeal and got his sentence suspended by the appellate Court and the appellate Court confirmed the conviction and sentence after a period of 3 years, is he entitled to claim that he need not go to jail at all as he was on bail for more than 3 years during the post conviction stage also? If it is to be held that he is entitled to such remission, we are afraid, criminal Justice system would be reduced to a mockery. The absurdity of the claim of the respondent can thus be demonstrated.
20. In the result we allow this appeal and set aside that part of the impugned judgement by which the learned single Judge directed remission to be granted in respect Of the period during which respondent was released on bail.

Supreme Court
2001 (8) SCC 306
Joginder Singh
vs
State of Punjab and Others

U.C. Banerjee and N. Santosh Hegde, JJ.

1. Leave granted.
2. Respondent Nos. 3 to 5 in these appeals (hereinafter to be referred to as the said respondents) along with one Rachhpal Singh, their father, were convicted by the Chief Judicial Magistrate, 1st Class, Nabha on 13.8.1987 for offences punishable under Sections 326, 325, 324 read with Section 34 IPC. On an appeal filed against the said judgement and conviction, the learned Sessions Judge, Patiala, confirmed the convictions as against respondent Nos. 3 to 5 and allowed the appeal of Rechhpal Singh and acquitted him of the charges alleged against him. Against the said judgement of the appellate court, the said respondents filed a revision petition before the High Court of Punjab & Haryana at Chandigarh and the learned Single Judge who heard the revision petition, dismissed the same on 17.7.1998 upholding the conviction and sentence awarded to the said respondents.
3. It is of importance to note that during the period of trial ending with confirmation of conviction in the revision petition by the High Court, respondents 3 to 5 were almost all the time were on bail except for a period of about 2 months and 25 days when they were in jail, serving part of their sentence.
4. On the dismissal of the revision petition by the High Court, it is stated that the said respondents surrendered before the Superintendent, Central Jail, Patiala on 29.7.1998 and on the very same day they were released by the jail authorities.
5. The appellant herein who was the complainant in the original criminal case on coming to know of the release of the said respondents, filed an application before the learned Chief Judicial Magistrate, Patiala, (for short 'the CJM') contending that the said respondents who had been awarded RI for one year and six months did not undergo the actual sentence and that they had ben released by the jail authorities fraudulently because of their influence. The learned CJM on the basis of the said application called for a report from the Superintendent of the Central Jail, Patiala, respondent No.2 herein, the assign reasons why the said respondents have been

released on the very day on which they surrendered to serve their sentence. In reply to the said query of the Court, the Superintendent, Central Jail, Patiala vide his letter dated 18.9.1998 informed the Court that the said respondents had been released from jail by virtue of the benefit given to them by the Punjab Government regarding their remission of sentence as per the notifications issued from time to time between the period 13.7.1988 and 29.7.1998. The learned CJM accepting the said report closed the petition of the appellant.

6. Being aggrieved by the said closure of their petition, the appellant moved the Punjab & Haryana High Court by way of a criminal miscellaneous petition praying that the letter dated 18.9.1998 written by respondent No.2 wherein the said respondents were given the benefit of remission be quashed and that the said respondents be taken into custody for undergoing the remaining period of sentence. A learned Single Judge of the High Court as per his order dated 9.12.1999 after hearing the parties came to the conclusion that the said respondents were entitled to the remission given by the Government under various notification issued by it during the period from 13.7.1998 to 29.7.1998. According to the learned Judge, if the periods of remissions granted under various notifications are to be taken into consideration cumulatively then the said period would cover the period of sentence awarded to the said respondents and even though they had not in fact served the sentence by virtue of the fact that they were enlarged on bail, they would be deemed to have served the sentence. Hence, on that basic the criminal petition came to be dismissed. It is against that judgement of the High Court of Punjab & Haryana dated 9.12.1999 made in Criminal Miscellaneous Petition No. 32414-M/98 that these appeals are preferred. On behalf of the appellant, it is argued by Mr. Rajesh Kumar Sharma, learned counsel that the court erred in interpreting the various notification of remission issued by the State Government to mean that the remission so granted under the notifications is applicable to persons who are on bail and who have not served the sentence and has also erred in construing the various applications as giving the benefit cumulatively. According to him, an interpretation of this nature could render the punishments awarded in criminal cases nugatory. In support of his judgement, he also relied upon the judgement of this Court in State of Haryana & Ors. v. Mohinder Singh 2000CriLJ1408 , Sunil Fulchand Shah v. Union of India & Ors. 2000 3 SCC 109, State of Haryana v. Nauratta Singh & Ors. 2000CriLJ1710 and Satpal & Anr. v. State of Haryana & Anr. 2000CriLJ2297 .
7. Defending the judgement of the High Court on behalf of the said respondent, Mr. Harbans Lal, learned senior counsel representing them contended that the High Court was correct in interpreting the notification issued by the State Government remitting

the sentences as giving benefit to the person who are on bail also and the said benefit given under various notifications can be counted cumulatively for the purpose find out whether the period covered by them if taken cumulatively extinguishes the period of sentence imposed on the said respondents.

8. In our opinion, it would be appropriate for us to reproduce the arguments of the learned counsel in the manner in which it was presented before us which is as follows: According to the learned counsel for the said respondents, the Government of Punjab has issued 7 notifications between the period from 13.7.1988 to 29.7.1998 and as per these notifications the following remissions were given:

As per the notification dt. 11.11.89, the said respondents would get a remission of 4 months.

As per the notification dt 5.4.92, the said respondents would get remission of 4 months.

As per the notification dt. 27.1.94, the said respondents would get remission of 4 months.

As per notification dt. 6.3.95, the said respondents would get remission of 1 1/2 months.

As per notification dt. 18.12.96, the said respondents would get remission of 3 months.

As per notification dt. 14.2.97, the respondents would get remission for the entire unexpired period up to 1 year.

As per notification dt. 14.8.97, the respondents would get remission of 1 month.

9. Therefore, according to the arguments of the learned counsel, even without taking into consideration the notification dated 14.2.1997, the said respondents would be entitled to a total remission of 17 1/2 months. Therefore, the said respondents even though have served just 2 months and 25 days and were on bail rest of the period in view of the various notifications referred to hereinabove, it is deemed that they have served their entire period of conviction which is only for a period of 18 months [11/2 years]. So far as the 4 judgements referred to by the learned counsel for the appellants are concerned, it is contended on behalf of the said respondents that the notifications concerned in those judgements are not similar to the notification applicable to the present case. In 3 out of the 4 cases referred to hereinabove, the notifications were issued by the State Government of Haryana and in the said notification, there is no reference to the periods covered by the order of bail and it is confined only to parole/furlough whereas, according to the learned counsel, in the notification issued by the State Government of Punjab, the word 'bail' is specifically included along with the words parole and furlough. Therefore, the notification issued by the Punjab

Government grants remission even to person who are on bail irrespective of the actual period of sentence served by them. Therefore, the judgements cited by the appellants are distinguishable.

10. With respect, we are unable to agree with the learned counsel for the said respondent. In other words, acceptance of this argument, in our opinion, would reduce the criminal justice system to mockery as has been said by this Court in Nauratta Singh's case (*supra*). In the cases cited by the appellant, this Court has categorically held that there is substantial differences between the words "parole" and "furlough" on one hand and the expression "bail" on the other. These judgement have also held that person who are enlarged on bail cannot claim the benefit of the period during which they were on bail for the purpose of counting the period of sentence already undergone to apply the remission given by the Government. In view of this clear enunciation of law, in our opinion, even by the inclusion of the word "bail" in the notification of the Punjab Government an accused who has always remained on bail or has not served the substantial part of his sentence cannot take advantage of the remission notification.
11. In the case of Nauratta Singh (*supra*) which has considered the judgement of Mohinder Singh (*supra*) as well as that by the Constitution Bench in Sunil Fulchand Shah (*supra*) and held thus:

"18. The clear fallacy of the approach made by the High Court can be demonstrated through an illustration. An accused was tried for an offence under Section 326 IPC. During trial period he was allowed to remain on bail and the trial prolonged up to, say, 3 years. Finally the court convicted him and sentenced him to imprisonment for three years. Should not the convicted person go to jail at all on the premises that he was on bail for three years and is hence entitled to remission of that period?"

"19. Yet another illustration can be shown by stretching the above illustration a little further. If the aforesaid convicted person filed an appeal and got his sentence suspended by the appellate court and the appellate court confirmed the conviction and sentence after a period of 3 years, is he entitled to claim that he need not go to jail at all as he was on bail for more than 3 years during the post-conviction stage also? If it is to be held that he is entitled to such remission, we are afraid, the criminal justice system would be reduced to a mockery. The absurdity of the claim of the respondent can thus be demonstrated."
12. It is clear from the above observations of this Court that grant of any such remission would indeed reduce the criminal justice system to mockery. Therefore, we cannot be persuaded to interpret the remission notification of the Punjab Government to run counter to the judgement of this Court referred to hereinabove.

13. In Mohinder Singh (*supra*) which is followed by the Constitution Bench in Sunil Fulchand Shah (*supra*), this Court held:

"14. Parole is defined in Black's Law Dictionary as "a conditional release of a prisoner, generally under supervision of a parole officer, who has served part of the term for which he was sentenced to prison". Parole relates to executive action taken after the door has been closed on a convict During parole period there is no suspension of sentence but the sentence is actually continuing to run during that period also."

14. In view of the pronouncement of this Court also, we are of the opinion that the High Court fell in error in accepting the argument of the said respondents that they are entitled for the benefit of the period of remission given by the various notification cumulatively to be counted against the period during which they were on bail. In our opinion, while applying the period of remission granted by the Government under any remission notification the period during which an accused person was on bail cannot be taken into account.

15. For the reasons stated above, the judgement of the High Court is set aside. We allow the appeal and also set aside the letter of the 2nd Respondent herein dated 18th of September, 1998 addressed to the DJM and direct the said respondents to serve the remainder period of their sentence. We made it clear if during the period of their sentence. We make it clear if during the period of serving their sentence any fresh remission notification is issued by the concerned Government, the same will be made applicable on terms and condition enumerated in the said notification if it is applicable to the said respondents. The appeals are accordingly allowed.

Bombay High Court
1989 Cri LJ 681

Sharad Keshav Mehta
vs
State of Maharashtra and Others

M. Pendse, V. Tipnis, JJ

1. The petitioner was convicted for committing an offence under S. 302 of the I.P.C. and was sentenced to life imprisonment on October 11, 1983. The petitioner made an application for release on furlough on October 14, 1985 and that application was rejected on February 11, 1986. The prisoner applied for reconsideration on March 8, 1986 and April 21, 1986, but the earlier rejection was confirmed on July 5, 1986. The action denying furlough to the prisoner is under challenge.
2. Mr. Rane, learned counsel appearing for the prisoner, submitted that the Home Department of the State Government has framed rules relating to grant of furlough and the prisoner was denied furlough in contravention of the rules. Rules regarding grant of furlough are included in Chapter XXXVII of the Maharashtra Prison Manual, 1979. R. 3(2) inter alia prescribes that a prisoner, who is sentenced to imprisonment for a period exceeding five years, may be released on furlough for a period of two weeks at a time of every two years of actual imprisonment undergone. The second proviso to R. 2 prescribes that a prisoner sentenced to life imprisonment may be released on furlough every year instead of every two years after he completes seven years actual imprisonment. The prisoner was convicted on October 11, 1983 and had, admittedly, completed a period of two years on October 14, 1985 and was, therefore, entitled to be released on furlough. It was urged on behalf of the State Government that R. 17 prescribed that the right to be released on furlough is not a legal right conferred on the prisoner and, therefore, even if the conditions are satisfied, the Government is not bound to release the prisoner on furlough. In our judgment, the submission is entirely devoid of merit. It is not open to the Home Department of the State Government to prescribe rules giving facility of release of the prisoner on furlough by one hand and then providing that the prisoner has no legal right to be released on furlough. In our judgment, R. 17 cannot deprive the prisoner of the substantial right to be released on furlough provided the requirements of the rule are complied with. The submission

advanced on behalf of the State Government overlooks the distinction between the right to be released on parole and the right to be released on furlough. Parole is granted for certain emergency and release on parole is a discretionary right while release on furlough is a substantial right and accrues to a prisoner on compliance with certain requirements. The idea of granting furlough to a prisoner is that the prisoner should have an opportunity to come out and mix with the society and the prisoner should not be continuously kept in jail for a considerable long period. The interaction with the society helps the prisoner in realising the folly which he has committed and the liberty which he is deprived of. In modern times the effort is to improve the prisoner and the punishment is to be considered as an action for reformation of an individual. It is futile to suggest that a prisoner should be kept behind the bars continuously and should not be permitted to come out on furlough unless the authorities think it wise. In our judgment, the State Government has framed rules in exercise of the powers conferred by Clauses (5) and (28) of S. 59 of the Prisons Act, 1894 and on framing of such rules, R. 17 cannot deprive the prisoner of the right to be released on furlough. In spite of the enactment of R. 17, we hold that the right to be released on furlough is a substantial and legal right conferred on the prisoner.

3. It is then urged on behalf of the State Government that R. 4 sets out categories of prisoners who cannot be considered for release on furlough. Sub-rule (4) of R. 4 prescribes that prisoners whose release is not recommended in Greater Bombay by the Commissioner of Police and elsewhere, by the District Magistrate on the ground of public peace and tranquillity shall not be considered for release on furlough. If it was urged that the Commissioner of Police, Pune, had informed the Jailer that in case the prisoner is released on furlough, then there is likelihood of disturbance of peace and, therefore, furlough cannot be recommended. We enquired as to what is the material available for the Commissioner of Police to come to this conclusion and no material was pointed out to us. It hardly requires to be stated that it is not the sweet will of the Commissioner of Police which can be the basis for coming to the conclusion that release of the prisoner on furlough would lead to disturbance of public peace and tranquillity. Unless the Commissioner of Police has material from which a reasonable inference can be drawn, the right to release on furlough cannot be deprived by resort to R. 4. In the present case the prisoner was convicted for committing murder of his wife and it surpasses our imagination as to how the release of such person is likely to disturb public peace and tranquillity. The Commissioner of Police must apply his mind to the facts of each case and should not as a formality submit a report denying the

substantial and legal right of the prisoner. In our judgment, as the State Government has failed to point out any material to indicate that release of the prisoner on furlough would disturb public peace and tranquillity, the rejection of the application is misconceived.

4. The report made by the Commissioner of Police also indicates that the prisoner was unable to produce a relative who was willing to receive him while on furlough and ready to enter into a surety bound which is a requirement of R. 6 and Mr. Rane submits that the prisoner produced a relative who was willing to receive him and enter into a surely bond. Though Mr. Rane made a submission that the prisoner has no relation or friend, we are not inclined to accept the same. It hardly requires to be stated that the prisoner cannot claim as of right to be released on furlough without complying with the requirements of the rules framed for release of prisoner on furlough. We will not enquire as to whether the prisoner can comply with the requirements of the rules in the present proceedings. The Jailer shall release the prisoner on furlough provided the requirements of the rules are complied with. The Jailer shall not deprive the present prisoner of the advantage on the basis of the report made by the Commissioner of Police without any material.
5. Accordingly, the petition partly succeeds and the Jailer of the Yeravada Central Prison, Pune, is directed to dispose of the application for furlough filed by the prisoner in accordance with the judgment.

Conclusion

Prison administration is a function of the State Governments as per List II, Seventh Schedule of the Constitution of India. To identify, implement and govern the norms of parole and furlough many State Legislatures have passed special statutes, e.g., The Good Conduct Prisoners' Probational Release Act, 1938 (Assam), The Haryana Good Conduct Prisoners (Temporary Release) Act, 1988, The Himachal Pradesh Good Conduct Prisoners Probational Release Act, 1968, etc. Though other states have derived and implemented the legal concepts of parole and furlough as derived from The Probation of Offenders Act, 1958, It is highly advisable for every State Government to frame a separate legislation, particularly concerning temporary release for lucid administration of parole and furlough in the state.

PRESS

Introduction

The access of prisoners to the media and press revolves around three rights concerning prisoners, namely: a. Right to Speech and Expression, b. Right to Information and c. Right to Privacy.

Article 19 in Part III of the Constitution of India confers the fundamental right to speech and expression on the citizens and also the non-citizens of India. In inference, prisoners in India are not devoid of this right. The International Covenant on Civil and Political Rights, 1976, is in conformity with the grant of this right to prisoners via its Article 19(2), which states that:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The cases mentioned below present the Indian Judiciary's has acknowledged the media's right to gather information in acquiescence of the prisoners' right to expression, with the consent of the prisoner which respects their right to privacy.

In *Prabha Dutt's* case (AIR 1982 SC 6), the law point involved the right of a reporter to interview persons. The Court upheld this right provided the prisoners desired to be interviewed.

Sheela Barse's second case (1988 (1) Bom Cr. 58), deals with the rights of citizens to obtain access to information and interview prisoners. The Court began by holding that it was necessary that public gaze be directed to prison matters and that journalists be given access to information and also interview prisoners. After making these general observations the Court in effect castrated that very right by requiring that the information collected by journalists be cross checked with the authorities so that "wrong information" was not disseminated. Tape recordings were made subject to special permission. The petitioner was required to once again make an application to the authorities.

Important is the reliance of the petitioner on *S.P. Gupta's* case where using strong language the Supreme Court had affirmed the right of citizens to know how Government functions.

In *State through Superintendent, Central Jail, N. Delhi v. Charulata Joshi* (1999 CR. LJ 2273), the jurisdiction of the Additional Sessions Judge to issue permission to a newsmagazine for conducting interview of an undertrial prisoner was questioned. The Supreme Court upheld the jurisdiction of the Court in granting such permission, provided it was subject to certain conditions as laid down in the Jail Manual, the willingness of the person sought to be interviewed, and was not in violation of the sovereignty and integrity of the country, the security of the State, public order, decency and morality.

CASE EXCERPTS

Supreme Court of India

AIR 1982 SC 6

Smt. Prabha Dutt

vs

Union of India and Others

Y.V. Chandrachud, C.J., A.P. Sen and Baharul Islam, JJ.

1. This is a petition under Article 32 of the constitution by the Chief Reporter of the 'Hindustan Times', Smt. Prabha Dutt, asking for a writ of mandamus or any other appropriate writ or direction directing the respondents, particularly the Delhi Administration and the Superintendent of Jail, Tihar to allow her to interview two convicts Billa and Ranga who are under a sentence of death. We may mention that the aforesaid two prisoners have been sentenced to death for an offence under Section 302 Indian Penal Code and the petitions filed by them to the President of India for commutation of the sentence are reported to have been rejected by the President recently.
2. Before considering the merits of the application, we would like to observe that the constitutional right to freedom of speech and expression conferred by Article 19(a) of the Constitution, which includes the freedom of the Press, is not an absolute right, nor indeed does it confer any right on the Press to have an unrestricted access to means of information. The press is entitled to exercise its freedom of speech and expression by publishing a matter which does not invade the rights of other citizens and which does not violate the sovereignty and integrity of India, the security of the State, public order, decency and morality. But in the instant case, the right claimed by the petitioner is not the right to express any particular view or opinion but the right to means of information through the medium of an interview of the two prisoners who are sentenced to death. No such right can be claimed by the Press unless in the first instance, the person sought to be interviewed is willing to be interviewed. The existence of free Press does not imply or spell out any legal obligation on the citizens to supply information to the Press, such for example, as there is under Section 161(2) of the Criminal Procedure Code. No data has been made available to us on the basis of which it would be possible for us to say that the two prisoners are ready and willing to be interviewed. We have, however, no data either that they are not willing to be interviewed and, indeed, if it were to appear that the prisoners themselves do

not desire to be interviewed, it would have been impossible for us to pass an order directing that the petitioner should be allowed to interview them. While we are on this aspect of the matter, we cannot overlook that the petitioner has been asking for permission to interview the prisoners right since the President of India rejected the petition filed by the prisoners for commutation of their sentence to imprisonment for life. We are proceeding on the basis that the prisoners are willing to be interviewed.

3. Rule 549(4) of the Manual for the Superintendent and Management of Jails, which is applicable to Delhi, provides that every prisoner under a sentence of death shall be allowed such interviews and other communications with his relatives, friends and legal advisers as the Superintendent thinks reasonable. Journalists or newspapermen are not expressly referred to in Clause (4) but that does not mean that they can always and without good reasons be denied the opportunity to interview a condemned prisoner. If in any given case, there are weighty reasons, for doing so, which we expect will always be recorded in writing, the interview may appropriately be refused. But no such consideration has been pressed upon us and therefore we do not see any reason why newspapermen who can broadly, and we suppose without greater fear of contradiction, be termed as friends of the society be denied the right of an interview under Clause (4) of Rule 549.
4. Rule 559A also provides that all reasonable indulgence should be allowed to a condemned prisoner in the matter of interviews with relatives, friends, legal advisers and approved religious ministers. Surprisingly, but we do not propose to dwell on that issue, this rule provides that no newspapers should be allowed. But it does not provide that no newspapermen will be allowed.
5. Mr. Talukdar who appears on behalf of the Delhi Administration contends that if we are disposed to allow the petitioner to interview the prisoners, the interviews can be permitted only subject to the rules and regulations contained in the Jail manual. There can be no doubt about this position because, for example, Rule 552A provides for a search of the person who wants to interview a prisoner. If it is thought necessary that such a search should be taken, a person who desires to interview a prisoner may have to subject himself or herself to the search in accordance with the rules and regulations governing the interviews. There is a provision in the rules that if a person who desires to interview a prisoner is a female, she can be searched only by a matron or a female warden.

6. Taking an overall view of the matter, we do not see any reason why the petitioner should not be allowed to interview the two convicts Billa and Ranga.
7. During the course of the hearing of this petition, representatives of the Times of India, India Today, PTI and UNI also presented their applications asking for a similar permission. What we have said must hold good in their cases also and they, in our opinion, should be given the same facility of interviewing the prisoners as we are disposed to give to the petitioner in the main writ petition.
8. We therefore direct that the Superintendent of the Tihar Jail shall allow the aforesaid persons, namely the representatives of the Hindustan Times, the Times of India, India Today, the Press Trust of India and United News of India to interview the aforesaid two prisoners, namely Billa and Ranga, today. The interviews may be allowed at 4 o'clock in the evening. The representatives agree before us that all of them will interview the prisoners jointly and for not more than one hour on the whole.
9. There will be no order as to costs.
10. Mr. Lekhi who appears on behalf of the magazine, India Today as also Mr. Jain who appears on behalf of the Hindustan Times has requested us to direct the Superintendent of Jail to allow the aforesaid representatives to be present at the time of the execution of the death sentence. That is not a matter for us to decide. If such an application is made to the Superintendent of jail, he will be free to consider the same on merits and in accordance with the jail regulations.

**Supreme Court of India
1988 (I) Bom. Cr 58**

**Sheela Barse
vs
State of Maharashtra**

Ranganath Mishra and Murari Mohan Dutt JJ.

1. Ranganath, J. Petition is a Bombay based free lance journalist who had sought permission to interview women prisoners in the Maharashtra jails and on 6.5.1982. The inspector-General of Prisons of the State permitted her to do so in respect of female prisoners lodged in the Bombay Central Jail, the Yerwada Central Jail at Pune and the Kolhapur District Jail. When the petitioner started tape recording her interviews with the prisoners at the Bombay Central Jail, she was advised instead to keep notes only of interviews. When the petitioner raised objection on this score, the Inspector-General of Prisons orally indicated that he had changed his mind. Later, the petitioner was informed that grant of permission to have interview was a matter of discretion of the Inspector-General and such interviews are ordinarily allowed to research scholars only. Petitioner has made grievance over the withdrawal of the permission and has pleaded that it is the citizen's right to know if Government is administering the jails in accordance with law. Petitioner's letter was treated as a writ petition under Article 32 of the Constitution.
2. Return has been made to the rule nisi and the Inspector-General of Prisons in his affidavit has pleaded that the petitioner is a free lance journalist and is not employed by any responsible newspaper. The permission issued in favour of the petitioner was under administrative misunderstanding and mistaken belief and was in contravention of the Maharashtra Prison Manual. When this fact was discovered the permission was withdrawn. It has been pleaded that interview with prisoners is governed by the rules made in the Maharashtra Prison Manual and the petitioner does not satisfy the prescription therein so as to justify grant of permission for having interviews with the prisoners. The Inspector General wrote a letter to the petitioner on 31st May, 1982, explaining therein that normally the prison authorities do not allow interviews with the prisoners unless the person seeking interview is a research scholar studying for Ph.D. or intends to visit the prison as a part of his field work of curriculum prescribed for post-graduate course etc. The letter further indicated that there was no rule for permitting interviews except to the relatives and legal advisers for facilitating defence

of prisoners. The Inspector-General further indicated in his letter that there was no inherent right of journalists to elicit information from prisoners.

3. The counter affidavit further indicated that the State Government has prescribed a set of rules known as the Maharashtra visitors of Prisons Rules, 1962. A Board of Visitors is constituted for every jail and the Board consists of both ex-officio visitors and non-official visitors appointed by the State Government. The members of the Board are expected to inspect the barracks, cell wards, work sheds and other buildings; ascertain or make enquiries about the health, cleanliness, security of prisoners and examine registers of convicted and undertrial prisoners, punishment books, other records relating to prisoners, attend to representations objections etc. made by prisoners and make entries in the visitors book about their visits. It was finally indicated in the counter affidavit that the petitioner was an amateur journalist and had published certain articles in the newspapers and magazines without realizing the impact thereof; many of such allegations and the so-called hearsay stories said to have been collected from the undertrial were one-sided and nothing but exaggeration of facts. Such articles written by her were defamatory, irresponsible and no mature journalist would have published such reckless articles.
4. We have heard Mr. Salman Khurshid Ahmed for the petitioner and Mr. Bhasme for the State of Maharashtra and have considered the written submissions filed on behalf of both in furtherance of their submission.
5. According to the petitioner and her Counsel Articles 19(1)(a) and 21 guarantee to every citizen reasonable access to information about the institutions that formulate, enact, implement and enforce the laws of the land. Every citizen has a right to receive such information through public institutions including the media as it is physically impossible for every citizen to be informed about all issues of public importance individually and personally. As a journalist, the petitioner has the right to collect and disseminate information to citizens. The press has a special responsibility in educating citizens at large on every public issue. The conditions prevailing in the Indian prisons where both undertrial persons and convicted prisoners are housed is directly connected with Article 21 of the Constitution. It is the obligation of society to ensure that appropriate standards are maintained in the jails and humane conditions prevail therein. In a participatory democracy as ours unless access is provided to the citizens and the media in particular it would not be feasible to improve the conditions of the jails and maintain the quality of the environment in which a section of the population is housed segregated from the rest of the community.

6. On behalf of the State it has been contended that neither of the Articles is attracted to a matter of this type. The rules made by the Government are intended to safeguard the interests of the prisoners. The Board contemplated under the Rules consists of several public both executive and judicial. Apart from that there is a body of non-official visitors as provided in Rule 5 of the Maharashtra Rules. Detailed provisions have been made in the rules as to the duties of the visitors and the manner in which the visitors have to perform the same. It has been further contended that idea of segregating the prisoners from the community is to keep the prisoner under strict control and cut off from the community. If unguided and uncontrolled right of visit is provided to citizens it would be difficult to maintain discipline and the very purpose of keeping the delinquents in prison would be frustrated...
7. That Articles 19(a) of the Constitution guarantees to all citizens freedom of speech and expression is not the point in issue, but the enlarged meaning given to the provisions of Articles 21 by this Court would, however, be relevant. The meaning given to the term 'life' will cover the living condition prevailing in jails.....
8. The Constitution Bench quoted with approval from (*Munn Vs. Illinois*), 1877(94), US 113, to emphasise the quality of life covered by Article 22. The same Constitution Bench judgement further states:

It was also pointed out in this case that 'life' included the right to live with human dignity. In A.K. Roy etc. Vs. Union of India & another (1982) 2 SCR 272 the word was found:

to include the necessary of right such as nutrition, clothing, shelter over the head, facilities for reading, writing, interviews with members of the family and friends, subject, of course to prison regulation, if any.....

9. Counsel for the petitioner relied upon the observations of this Court in the case of (*S.P. Gupta & others Vs. Union of India & others*) 1982(2) SCR 365 at page 598, where it was said:

Now it is obvious from the Constitution that we have adopted a democratic form of Government. Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their Government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how Government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy. 'Knowledge', said James Madison, 'will

for ever govern ignorance and a people who mean to be their own governor's must arm themselves with the power knowledge gives. A popular Government without popular information or the means of obtaining it, is but a prologue to a farce or tragedy or perhaps both'. The citizen's right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State. And that is why the demand for openness in the Government is increasingly growing in different parts of the world.

The demand for openness in the Government is based principally on two reasons. It is now widely accepted that democracy does not consist merely in people exercising their franchise once in five years to choose their rulers, and once the vote is cast, then retiring in passivity and not taking any interest in the Government. Today it is common ground that democracy has a more positive content and its orchestration has to be continuous and pervasive. This means inter alia that people should not cast intelligent and rational votes but should also exercise sound judgement on the conduct of the Government and the merits of public policies, so that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of Government – an attitude and habit of mind. But this important role people can fulfill in a democracy only if it is an open Government where there is a full access to information in regard to the functioning of the Government.

10. We endorse these observations as a correct statement of the position. We also reiterate the view expressed in several decision of this Court that 'life' in Article 21 has the extended meaning given to the word and those citizens who are detained in prisons either as undertrials or as convicts are also entitled to the benefit of the guarantees subject to reasonable restrictions.
11. Judicial notice should be taken of the position that on account of intervention of Courts there has been a substantial improvement in the condition prevailing in jails. The provisions of Jail Manuals have undergone change, the authorities connected with the jail administration have changed their approach to administration and method of control, there has been a new awakening both in citizens in general and the people detained in jail. Indisputably intervention of the Courts has been possible on account of petitions and protests lodged from jails; news items published in the Press. We may not be taken to mean that the rule prescribed for administration of prisons are of no value at all. Yet until the appropriate attitude grows in the administrative establishment the provisions in the several manuals applicable to the jails in the country would not provide adequate safeguard for implementation of the standards indicated in judicial decisions. It is, therefore, necessary that public gaze should be directed to the matter and the pressmen as friends of the society and public spirited citizens should have access not only to information but also interviews. Prison

administrators have the human tendency of attempting to cover up their lapses and so shun disclosure thereof. As an instance, we would like to refer to incidents in the Tihar Jail located at the country's capital under the very notice of the responsible administrators.

12. In such a situation we are of the view that public access should be permitted. We have already pointed out that the citizen does not have any right either under Article 19(a) or Article 21 to enter into the jails for collection of information but in order that the guarantee of the fundamental right under Article 21 may be available to the citizens detained in the jails, it becomes necessary to permit citizen's access to information as also interviews with prisoners. Interviews become necessary as otherwise the correct information may not be collected but such access has got to be controlled and regulated.
13. We are, therefore, not prepared to accept the petitioner's claim that she was entitled to uncontrolled interviews. We agree with the submission of Mr. Bhasme for the respondent that, as and when factual information is collected as a result of interview the same should usually be cross-checked with the authorities so that a wrong picture of the situation may not be published. While disclosure of correct information is necessary, it is equally important that there should be disseminating of wrong information. We assume that those who receive permission to have interviews will agree to abide by reasonable restrictions. Most of the manuals provide restrictions which are reasonable. As and when reasonableness of restrictions is disputed it would be matter for examination and we hope and trust that such occasions would be indeed rare. We see reason in the stand adopted by Mr. Bhasme relating to the objection of his client about tape-recording by interviewers. There may be cases where such tape-recording is necessary but we would like to make it clear that tape-recording should be subject to special permission of the appropriate authority. There may be some individuals or class of persons in prison with whom interviews may not be permitted for the reasons indicated by this Court in the case of *Prabha Dutt* (supra). We may reiterate that interviews cannot be forced and willingness of the prisoners by this interviewed would always be insisted upon. There may be certain other cases where for good reason permission may also be withheld. There are situations which can be considered as and when they arise.
14. The petitioner is free to make an application to the prescribed authority for the requisite permission and as and when such application is made, keeping the guidelines indicated above, such request may be dealt with. There will be no order for costs.

**Supreme Court of India
1999 Cri. LJ 2273**

**State through Superintendent Central Jail, N. Delhi
vs
Charulata Joshi and Another**

G.B. Pattanaik and M.B. Shah, JJ.

1. ... Competing rights, namely, right of press to interview a prisoner in jail and right of jail authorities prohibiting such interview arise for consideration in the present appeal. One Babloo Srivastava, who is in judicial custody and is being tried for offence under Section 302 read with Section 120-B had been lodged in Tihar Jail. The news magazine 'India Today' moved an application before the Additional Sessions Judge, Delhi seeking permission to interview the under-trial prisoner in jail. The learned Sessions Judge by his order dated 6-11-95 granted the permission sought for. Being aggrieved by the aforesaid order the prosecuting agency moved the High Court in Revision. By the impugned order dated 1st May, 1996, the High Court did not interfere with the order of the learned Sessions Judge granting permission but modified the same by issuing the following directions:

However, it is made clear that the interview and/or photographs of Babloo Srivastava would be taken only if he expressed his willingness and not otherwise. If given, the respondent news magazine is expected to publish the interview with a sense of propriety and balance and without offending the law of Contempt of Courts or impairing the administration of justice.

The aforesaid order is being challenged in this appeal. The learned counsel appearing for the appellant strenuously argued that the learned Additional Sessions Judge had no jurisdiction to issue the permission in question and the order itself indicates that the learned Sessions Judge had passed the order mechanically without application of mind. He had also contended that though the High Court had modified the said order yet the right of the Jail Authorities to deny interview for good reasons has been conceded by this Court in Smt. Prabha Dutt v. Union of India, (1982) 1 SCC 1: (AIR 1982 SC 6) and therefore, the High Court was not justified in issuing the impugned order. The learned counsel for the respondents on the other hand contended that there is no Provisions in the Jail Manual prohibiting interviews of the under-trial prisoners. In the absence of such prohibition the Right of Press, as engrafted in Article 19(l)(a) cannot be curtailed though the learned counsel urged that while granting permission

the Court may put such conditions as it thinks fit in the interest of administration of justice. The learned counsel also urged that the High Court has considered all the germane factors and has modified the order of the learned Sessions Judge, and therefore, there is no infirmity with the order of the High Court so as to be interfered with.

2. At the outset we take up the issue regarding the authority of the learned Sessions Judge in granting permission. As it appears, the accused is an under-trial prisoner and the case is pending in the Court of the learned Additional Sessions Judge who had granted the order of permission. The trial of the accused being pending before the Additional Sessions Judge it cannot be said that he had no authority to issue permission to the Press to interview the under-trial inside the jail. We, therefore, do not find any substance in the argument of the learned counsel for the appellant appearing in this Court.
3. Coming to the second limb of the objections raised by the learned counsel appearing for the appellant, there cannot be dispute with the proposition that the order granting permission to the Press to interview an under-trial cannot be passed mechanically without application of mind. Inasmuch as the Court granting permission will have to weigh the competing interest between the right of a Press and the right of the Authorities prohibiting such interview in the interest of administration of justice. The Court, therefore, before disposing of an application seeking permission to interview an under-trial in jail must notice the jail authorities and find out whether there can be any justifiable and weighty reasons denying such interviews. The Court also should try to find out whether any restrictions or prohibitions are contained in the Jail Manual. The so called permission granted by the Court would be subject to the relevant Rules and Regulations contained in the Jail Manual dealing with the rights and liabilities of the under-trial prisoners. The Press is entitled to exercise its freedom of speech and expression by publishing a matter which does not invade the rights of other citizens and which does not violate the sovereignty and integrity of India, the security of the State, Public order, decency and morality. The Court also in the aforesaid case expressed the opinion that the Press must first obtain the willingness of the person sought to be interviewed and no Court can pass any order of the person to be interviewed express his unwillingness. It was also indicated in the aforesaid judgement that the so called right of the Press which it obtains on the basis of a permission from the Court would be subject to the prohibitions of the Jail Manual.

Order accordingly.

Conclusion

The media plays an important role as a vigilance device in order by keeping a check on and providing the prisoners with an opportunity to voice their opinions and concerns. It is a major source of unraveling various cases of abuse against prisoners that might go unnoticed/unreported by the standard procedures. Hence the prisoners' right to expression with the media's right to gather information is an important channel to identify the issues concerning prisoners.

PRISON FACILITIES

Introduction

The total prison population in India is approximately 385,000 prisoners, which is inclusive of women and juveniles. Out of these prisoners, approximately 67% of them, that is around, 260,000 are under-trial prisoners. The functioning and operation of the prisons in India is governed by the Prisons Act, 1894, which has been adopted by a majority of states in India. It is incumbent upon the States to ensure that adequate facilities are provided to the inmates of prisons under their governance. As per recent statistics, prisons in India are hazardously overcrowded. The 2010 annual review of Tihar Jail, New Delhi, states that the number of inmates in the jail are 10, 856, as against the authorized capacity of the jail which is only 6,500 inmates. In such dire circumstances the efficiency of the prison authorities in assuring proper facilities to all the prisoners becomes questionable. The All India Committee on Jail Reforms, under the chairmanship of Justice A.N. Mulla, submitted its report in 1983 with a total of 658 recommendations concerning various aspects of prisons in India. Since then various other committees and reports have been formulated, but on observing the jail facilities in India it is seen that the effective implementation of such recommendations is not convincing. Even the Draft National Policy on Prison Reforms and Correctional Administration, 2007 is devoid of any innovative remedies and the characteristics of the policy are repetitive and analogous to previous recommendations. The case laws mentioned in this chapter observe the steps taken by the judiciary while addressing the issues of prison facilities in Indian prisons.

The terms “Prison Facilities” or “Prison Facility” have not been defined by the Indian legislature. Although Chapter VI, Chapter VII, Chapter VIII and Chapter IX of the Prisons Act, 1894 deal with “Food, Clothing and Bedding of Civil and Unconvicted Criminal Prisoners”.

In *Madhukar Jambhale's* case (1987 Mah. LJ 68), the petitioner complained of bad food in the Dhule district jail. The food contained worms, etc. He also challenged Section 59 of the Prisons Act classifying prisoners into Class I and II based on higher status, education and standard of living. When the petition came up for hearing the divisions into different classes was already abolished. The petitioner also challenged various rules of the Maharashtra Prison (Facilities to Prisoners) Rules 1962, which restricted the right to correspond and provided for strict censorship. For example, prisoners were not allowed to correspond with prisoners in other prisons. Political materials were not to be communicated and nothing could be written complaining against the jail administration. The Bombay High Court held that there was no justification for the above rules.

Ranchod vs. State of M.P. (1986 (16) Reports M.P. 147), brought into sharp focus the pitiable state of jails in the State of M.P. The callous behavior of doctors, maltreatment by jail staff and tampering of jail records came up for judicial scrutiny. All this went on for years with the Visitors' Committee apparently oblivious of it all. This is an important case on the role of doctors in jails.

Inacio Manuel Miranda vs. State (1989 Mah. LJ 77), reasserted the rights of prisoners regarding prison facilities such as shaving blades, letters, ventilation in the room and so on. Most shocking however was the attitude of the High Court in the face of sustained disobedience of previous orders of the Court. Despite several judgements, the Prison Manual and Rules were not printed and available to the prisoners. Despite series of decisions, prison wages were not enhanced and remained at a pitifully low level. Despite repeated orders the Visitors Board was not properly constituted and functioning. After noting non-compliance with the orders of the Court, the Division Bench of the Bombay High Court was content with merely repeating the same directions all over again. Inspector General compliance was to be reported within six months (from September 1988). This was not done.

In the Matter of Prison Reforms Enhancement of Wages case (AIR 1983 Ker 261), the Kerala High Court was faced with a situation where undertrials were paid between 50 paise to Rs 1.60 per day for a full day's hard labor. The Court lamented the fact that the Prison Reforms Commission was not functioning.

Dealing with the objections of the State in respect of increase in wages, the judges said:

"We do not think that better treatment in jail would be an incentive to commit crimes.... and it is unreasonable to assume that merely because a person is moderately well fed and looked after under humane conditions that.... he feels happy in jail."

The constitutional questions to be answered were:

1. Can a prisoner under sentence claim wages for his work?
2. Must these wages be reasonable and not merely illusory?
3. Can a Court grant reliefs?

All three questions were answered in the affirmative. The Indian Penal Code speaks only of hard labor not free labor. Reliance was placed on Article 4 of the Universal Declaration of Human Rights which reads, "no one shall be held in slavery", Article 23 (1) which guaranteed the "right to work, free choice of employment, just and favourable conditions of work and protection against unemployment", and also Article 23(3) which guaranteed

"the right to remuneration ensuring for a dignified existence for self and family". Reliance was also placed on Article 10(1) of the International Covenant of Civil and Political Rights, declaring "all persons deprived of their liberty shall be treated with humanity and respect".

Accordingly, the Court held that prisoners ought to be paid wages at or above the minimum wage.

In *Gurdev Singh's* case (AIR 1992 Him. Pr. 76), the Himachal Pradesh High Court held that the payment of wages below "minimum wages" prescribed by law to prisoners amounted to "forced labour" under Article 23 of the Constitution. The Court held that there has to be no distinction between the work inside the prison and outside it. The Court also directed the State Government to undertake comprehensive prison reforms by appointing a high power committee to look into matters including opening of more Open Air Prisons, provision for education, vocational training and adequate work.

In *Prabhakar Pandurang Sanzgiri's* case (AIR 1966 SC 424), the convict had written a book "Inside the Atom" dealing with physics. He was prevented from publishing the same under the Defence of India Rules 1962, and the Bombay Conditions of Detention Order, 1951. The Supreme Court held that no prejudice to the defence of India or to public safety or to the maintenance of public order was possible and permitted the publication. The Court held that if the appropriate authority seeks to impose on a detenu a restriction not so prescribed, the said authority will be interfering with the personal liberty of the detenu in derogation of the law whereunder he is detained.

Kunnikkal Narayanan (AIR 1973 Ker. 97), was prevented from receiving "Mao's literature" by the prison authorities and challenged the same through a petition in the Kerala High Court. As no passage from these books could be shown, if read, to endanger security of the State or prejudice public order, the books were allowed.

The Kerala High Court held that there were no grounds to prevent Kunnikkal from obtaining these books. Article 19(1) (a) includes the freedom to acquire knowledge, to peruse books and read any type of literature subject only to certain restrictions. The security of State and maintenance of public order would not be affected, the Court held.

In *M.A. Khan's* case (AIR 1967 SC 254) the prison officials had refused Khan certain journals and periodicals even though the prisoner had offered to pay for them. These were refused on the ground that they were not included in the official list. The refusal was done under Clause 16 of the Bombay Conditions of Detention Order, 1951 which were framed under Section 4 of the Preventive Detention Act, 1950.

Perusing these Sections and Clauses the judge held that prisoners can be refused reading material only if the newspapers are found “unsuitable” by the authorities. In the present instance the prison authorities had supposedly found the journals “unsuitable” because they “preached violence” and criticized policies of the Government in respect of Kashmir.

The Court also perused Rule 30(4) of the Defence of India Rules according to which the State may determine the conditions with respect to “maintenance” and “discipline” of prisoners. Preventing prisoners from reading papers does not in any way relate to maintenance or discipline, the Court said. Further, the use of the word “unsuitable” in Clause 16 of the Bombay Conditions of Detention Order, gave the State arbitrary and unregulated discretion as there were no guidelines for the exercise of power, and was therefore violative of the principle laid down in Section 44 of the Defence of India Act.

Francis Coralie Mullin (AIR 1981 SC 746), a British national, arrested and detained in Central Jail, Tihar, petitioned the Court challenging the constitutional validity of sub-clauses (i) and (ii) of clause 3(b) of the Conditions of Detention Order. As per the sub clauses, in order to arrange an interview, her lawyer was required to obtain prior appointment from the District Magistrate, Delhi and the interview could take place only in the presence of a Customs Officer. This procedure for obtaining interview caused considerable hardship and inconvenience and there were occasions when, even after obtaining prior appointment from the District Magistrate, Delhi, her lawyer could not have an interview with her since no Customs Officer remained present at the appointed time. Further, she was allowed to meet her daughter aged about five years only once in a month.

The Supreme Court held sub-clauses (i) and (ii) of clause 3(b) to be violative of Articles 14 and 21. The detenu was permitted to have atleast two interviews in a week with relatives and friends at any reasonable hour on obtaining permission from the Superintendent of the Jail. The Court further held that a detenu was entitled to have interview with his legal adviser at any reasonable hour during the day after taking appointment from the Superintendent of the Jail. The interview need not necessarily take place in the presence of a nominated officer of Customs/Central Excise/Enforcement but if the presence of such officer can be conveniently secured at the time of the interview, then such officer can watch the interview but not be within hearing distance.

In the case of *R.D. Upadhyay vs. State of Andhra Pradesh and Others* (AIR 2006 SC 1946), the Supreme Court considered the issue of development of children who are in jail with their mothers, either as undertrial prisoners or convicts. Children, for none of their fault, but per force, have to stay in jail with their mothers. The Court observed that the jail

environment was certainly not congenial for development of the children. A study was ordered to be conducted by the National Institute of Criminology and Forensic Sciences where certain suggestions were made for proper care of children of women prisoners. It was further suggested that arrest of women suspects be made only by lady police. Such arrests should be sparingly made as it affects innocent children who are taken into custody with their mother.

Various reports were filed by the State Governments and Union Territories on the issues raised as a result of the study. In light of these reports, the Court issued detailed guidelines for providing various facilities to women prisoners and their children in the following cases: pregnancy; child birth in prison; female prisoners and their children; food, clothing, medical care and shelter; education and recreation for children of female prisoners; diet; etc. Accordingly, the court ordered Jail Manual and other relevant Rules, Regulations, Instructions to be suitably amended within three months so as to comply with the directions.

In *State of Maharashtra and Others vs. Asha Arun Gawali and Another* (AIR 2004 SC 2223), the Supreme Court expressed shock at the startling features of monstrosity found prevailing in the jail by the High Court while dealing with a Habeas Corpus application, to the effect that the detenu while in jail had master-minded killings of certain persons in connivance with the active participation of certain persons who had come to meet him in jail.

The Supreme Court observed that the concern for reformation of prisoners and improvement of prison conditions had been judicially recognised. But the same does not countenance "holding of darbars in prisons by prisoners", "five star hotel comforts for prisoners" or "free entry to and exit from jail" as surface in these cases, that too by statements of admission marked by abashed inefficiency unbecoming of those who are ordained to strictly carry out their duties and responsibilities i.e., state of jail authorities and the highly placed Governmental functionaries. The Court ordered an in-depth enquiry into the matter, and judicial officers were required to go for inspection of jails periodically.

In *Asgar Yusuf Mukadam and Others vs. State of Maharashtra and the Superintendent of Prison* (2004 Cri LJ 4312), the petitioners were lodged in Bombay Central Prison at Arthur Road, as under-trial prisoners in Bomb Blast Cases for a period exceeding seven years. The petition relating to the claim of home food was filed after such facility was denied to the under-trials pursuant to the amendment brought to Sections 31 and 32 of the Prisons Act, 1894. It was contended that the amended provision in Section 31 of the Prisons

(Maharashtra Amendment) Act, 2000 seeks to classify the non-convict prisoners in three categories viz. unconvicted criminal prisoners, satyagrahis and civil prisoners. Though the satyagrahis are also defined as unconvicted criminal prisoners having participated in non-violent public agitation, there is a clear discrimination sought to be made in their favour and against the petitioners inasmuch as that the satyagrahis and civil prisoners are permitted to have home food and other necessaries whereas no such facility is available to the unconvicted criminal prisoners.

The High Court held that the power to order home food vests in the Magistrate or the Trial Court under Section 167 of the Code of Criminal Procedure and the same is not controlled by virtue of Sections 31 and 32 of the Prisons Act, 1894. The Court therefore did not go into the vires of the amended Sections 31 and 32 of the Act.

The Court further held that the cardinal principles of criminal jurisprudence is that a person accused of an offence is deemed to be innocent until he is proved guilty. Section 167 of the Cr PC discloses implicit power in favour of the Magistrates and the Courts before whom the accused is produced for remand or continuation of detention of the accused in custody, to order the facility of home food on being requested for by such accused and on being satisfied about the need for grant of such facility.

Rama Murthy (AIR 1997 SC 1739), a prisoner in Central Jail, Bangalore, through a letter, brought to the notice of the Supreme Court the grievances of prisoners being denied rightful wages despite doing hardwork in different sections of the prison. The letter also mentioned the 'non-eatable food' and 'mental and physical torture' of the prisoners.

The Supreme Court made certain observations on the issues of overcrowding in the prisons, delay in trial, torture and ill-treatment, neglect of health and hygiene, insubstantial food and inadequate clothing, management of open-air prisons, etc. The Court issued directions to various authorities on the implementation of the 78th Reports of Law Commission of India on the subject of 'Congestion of undertrial prisoners in jail'; suggestions of Mulla Committee on streamlining the remission system and premature release and giving proper medical facilities and maintaining appropriate hygienic conditions, producing undertrial prisoners on remand dates to the prison staff; enacting of new Prison Act and the All India Jail Manual; keeping complaint box in jails; liberalisation of communication facilities; streamlining of jail visits; introduction of open air prisons; etc.

In *State of Gujarat and Another vs. Hon'ble High Court of Gujarat* (AIR 1998 SC 3164), the Supreme Court considered the question: whether prisoners who are required to do labour as part of their punishment should necessarily be paid wages for such work at

the rates prescribed under Minimum Wages law. The Court while considering the various decisions, *In the Matter of Prison Reform Enhancement of Wages of Prisoners* 1983 KLT 512, *Express Newspapers Ltd. v. Union of India* (1961 ILLJ 339 SC) held that it is imperative that the prisoner should be paid equitable wages for the work done by them. In order to determine the quantum of equitable wages payable to prisoners the concerned State shall constitute a wage fixation body for making recommendations. The Court recommended that the concerned State make a law for setting apart a portion of the wages earned by the prisoners to be paid as compensation to deserving victims of the offence the commission of which entailed the sentence of imprisonment to the prisoner, either directly or through a common fund to be created for this purpose.

Bombay High Court
1987 Mah. LJ 68

Madhukar Bhagwan Jambhale
vs
State of Maharashtra and Others

P.S. Shah, V.A. Mohta, JJ.

1. Petitioner Madhukar Bhagwan Jambhale, who was undergoing sentence and lodged in Dhule District Jail, made a complaint about torture and ill-treatment by the prison authorities by a letter to this Court. Overlooking all formalities the letter was treated as an application under Article 226 of the Constitution and Rule was issued. Miss. Indira Jaising was appointed Advocate for him and on her appointment a regular formal petition under Article 226 of the Constitution came to be filed on September 26, 1983. In this petition, apart from the complaint against torture and ill-treatment, various Rules and practices of the prison are challenged as violative of Articles 14, 19(1)(a) and 21 of the Constitution. Thus what was initially a complaint about the treatment meted out to an individual, the applicant before us, has assumed the character of class action on behalf of the convicts who are undergoing sentence in the prisons in this State.
2. In the month of July/August 1983 the petitioner complained to the prison authorities about deterioration of quality of food given to him. On August 13, 1983, he complained to the Senior Jailor that the Brinjal vegetables served in the morning meal contained worms, caterpillars. According to him, this complaint went unheeded and on the contrary he was threatened with dire consequence. His request for being promoted as a watchman was also turned down. Out of frustration he swallowed nails. He was then taken to hospital and the nails were taken out. According to him, the Jail Superintendent resented this form of protest and he was beaten and when the petitioner demanded ration for the day, the Superintendent called for a pot of night soil and demanded that the petitioner do eat it. It is alleged that he was then put up in a double lock-up in a separate cell. He again swallowed three nails and was required to be taken to the hospital for taking them out. In view of the serious nature of allegations made against the Dhule Prison Administration, the District and Sessions Judge, Dhule, was asked to make an enquiry into the allegations. We, however, do not propose to deal with the aforesaid allegations since we find that material on record indicates

that the petitioner is not consistent in his version about the incidents. Moreover, in his affidavit the Jail Superintendent has denied the allegations. According to him, the allegations are made by the petitioner out of frustration since his request for being promoted as a watchman was rejected. Assuming that the specific allegations made by the petitioner as to the quality of food and about his being asked to eat night soil may not be true, it does appear that he may be having some other genuine grievances against the Dhule Prison Administration. In the absence of adequate material, it is not possible for us to come to any definite conclusion in the matter. Miss. Jaising also fairly stated that in the circumstances she does not desire to make submissions regarding the alleged torture to the prisoner at the hands of the prison officers, particularly having regard to the fact that the prisoner was transferred to Yerawada Prison on November 7, 1983, during the pendency of this petition. She, however, submitted that this should not be taken as an admission of the petitioner that there was no torture or ill-treatment and the petitioner's right to take such proceedings against the prison officers as he may deem fit in a competent Court of law is not thereby affected.

3. The petition, however, has raised certain vital issues as regards the validity of certain Rules framed under section 59 of the Prisons Act, 1894. Firstly, the Rules regarding classification of convicts as Class I and Class II prisoners on the basis of higher status, better education and higher standard of living were challenged as discriminatory and violative of Article 14 of the Constitution. Secondly, Rules 20, 17(ix) and 23 of the Maharashtra Prisons (Facilities to Prisoners) Rules 1962, which put restrictions on the rights of the prisoners to correspond and also provide for censorship are challenged on the ground that they violate their rights guaranteed under Articles 14, 19(1)(a) and 21 of the Constitution. Thirdly, it is contended that the double look-up system provided for some of the cells in Dhule Prison, though said to be intended as separate confinement under the Prison Rules, is in effect nothing but solitary confinement and, therefore, wholly impermissible in law. Lastly, it is contended that the grievance procedure prescribed under the various rules is grossly inadequate and does not conform to the guidelines in the matter of grievance procedure laid down by the Supreme Court in *Sunil Batra Vs. Delhi Administration*, AIR 1980 SC 1579.
4. We may mention at the outset that the grievance about classification of convicts as Class I and Class II prisoners does not survive since the classification has been already abolished. It appears that Rule 3 of Part II of the Maharashtra Prisons (Admission, Classification and Separation of Prisoners) Rules 1966, provided for classification of convicted prisoners to Class I and Class II. However, this classification has been

discontinued by Government Resolution dated January 1, 1971. As a result of this abolition of the classification, all convicts are entitled to the same facilities. The challenge to the classification of Prisoners as Class I and Class II, therefore, does not survive.

....

8. It is well settled that convicts do not wholly shed their fundamental rights, though their liberty is in the very nature of things circumscribed by the very fact of their conviction. The consequent responsibilities of prison administrators have to be borne in mind. These responsibilities broadly stated are: (i) maintenance of internal order and discipline, (ii) securing the institutions against unauthorised access or escape and (iii) rehabilitation of prisoners. The maintenance of penal institutions is an essential part of the Government's task in preserving social order through enforcement of criminal law and the governmental interests are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorised entry and above all the rehabilitation of prisoners as indicated above. As a matter of fact the modern concept of criminology calls for greater attention to the reformation of a prisoner. *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675 and *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579, amongst others are landmark decisions emphasising the reformative aspect of the prison administration.
9. We will first take up for consideration the challenge to the validity of Rules 20 and 17(ix) of the Maharashtra Prisons (Facilities to Prisoners) Rules 1962 (hereinafter referred to as the 'said Rules'). Rule 20 of the said Rules provides as follows:

"20. A Prisoner who is entitled to write a letter and who desires to do so, may correspond on personal and private matters, but he shall not include any matter likely to become the subject of political propaganda or any strictures on the administration of the prison, or any reference to other persons confined in the prison who have their own opportunities for communication with their families".

Rule 17(ix) provides as under:

"17(ix) Prisoners shall not be allowed to correspond with inmates of other prisons. If, however, a prisoner has got his near relative in another prison, he may be permitted to send welfare letters only".
10. It was urged by Miss Jaising that the restrictions imposed on the prisoners under the said Rules are wholly unwarranted and are violative of the prisoner's right of freedom of speech guaranteed under Article 19(1)(a) of the Constitution and also violative of Article 14 of the Constitution as being discriminatory. The said Rules must be read

in the light of the provisions of Rule 23 of the said Rules. Under the said Rule 23 the Superintendent of Jail is entitled to withhold for reasons to be recorded in Form LXI any incoming or outgoing letter of a prisoner which seems to him to be improper or objectionable or he may erase any improper or objectionable passages in such letters. As far as Rule 17(ix) is concerned, it is curious that a prisoner is permitted to send welfare letters to his near relatives in other prison but, he is not permitted to send welfare letters to prisoners in other prisons, who are not related to him. We fail to see any rational basis for such discrimination between prisoners in the matter of sending welfare letters to prisoners lodged in other prisons depending on whether they are related to the prisoner or not. The Rule is on the face of it discriminatory and violative of Article 14 of the Constitution and must, therefore, be struck down. We hold that the prisoner is entitled to send welfare letters to prisoners in the other prisons whether such prisoners are his relatives or not.

11. Rule 20 incorporates three prohibitions. Firstly, the prisoner is prohibited from including in his letter any matter which is likely to be the subject of political propaganda. Secondly, he is also prohibited from including in his letter any matter containing strictures on the administration of prison and lastly, he is also prohibited from including in his letter any reference to other prisoners confined in the prison who have their own opportunity for communication with their families. While construing the said provisions, we have to bear in mind the provisions of Rules 23 which give wide powers to the prison authorities to withhold the letters containing objectionable matter and are entitled to erase such passages in the letter. It is obvious that Rule 20 contains blanket restrictions on the rights of the prisoner which he otherwise has. It is well settled that the prisoner does not lose his rights guaranteed under the Constitution, except to the extent necessitated by reason of his incarceration and the sentence imposed. The restrictions imposed on the prisoner to be valid must have relevance either to the maintenance of internal order and discipline in the precincts of the Jail or prevention of escape of the prisoner or prevention of transmission of coded message or messages which have the potentiality or tendency to give rise to disturbance of public order or inspiring commission of any illegal activity or offence or reasons of a like nature. Barring such restrictions we see no reason why the prisoner should be prevented from writing letters containing matters referred to in Rule 20. The most important object of prison administration, viz. that of reformation of the prisoners, also is paramount. The very fact that discriminatory, unreasonable and unnecessary restrictions are imposed on the prisoner is by itself likely to retard the

process of reformation of the prisoners. Validity of Rule 20 will also have to be judged from this angle as well.

12. It is clear that Rule 20 prevents a most innocent reference about the co-prisoner lodged in the same jail. Such restrictions obviously have no nexus with the constraints and responsibility of the prison Administration. Mr. More, the learned Public Prosecutor, contended that the Rule is intended to take care of various possibilities such as the possibility of the prisoner passing on information about the date and time of release of the co-prisoner to his adversaries which would facilitate them to plan for taking revenge on the co-prisoner as soon as he comes out of jail on his release, or the prisoner spreading false information about the co-prisoner with the intention of creating panic amongst his friends and relatives and so on. We do not think that a prisoner can be deprived of his Constitutional rights merely on such imaginary apprehensions and on the basis of some harm being caused to co-prisoner. The prison Administration is not powerless to prevent such possible abuse. In our view, Rule 23 is wide enough and provides sufficient safeguards even in such cases of abuse prohibition in relation to the reference to other prisoners confined in the same jail is clearly unjust, arbitrary and unreasonable and is liable to be struck down as violative of Articles 14, 19(1)(a) of the Constitution.
13. Then the prisoner is prohibited from writing any material in his letter which would amount to strictures on the administration of the prison. We fail to see why the prisoner should not give vent to his grievances against the prison administration to the outside world through his letter. It is to be noted that the prisoner is not prevented from making these grievances in the interviews which are permitted under the Rules. He is also permitted to make complaints to various authorities and is entitled to approach the Court by way of Writ Petition. It is quite possible that in a given situation he may not be in a position to complain about the administration directly to the prison authorities or even to the other authorities, such as District Judge who visits the prison, but he may desire his near relatives or friends to raise the issue before the appropriate Court in order to get his grievances redressed. We see no rational basis for this blanket prohibition. The only ground urged by Mr. More in support of this prohibition is that the strictures against the prison administration through letters would affect or is likely to affect internal discipline. We see no force in this argument, when the prisoner has freedom to make a grievance against the prison Administration through other means even to outside world.

14. Similarly, as regards the political propaganda referred to in Rule 20, it is not always the case that every political propaganda is detrimental to the welfare of the society merely because it finds a place in a letter sent through the jail. The wording of the Rule puts a blanket ban on a prisoner to express any views, however, innocent they may be or, however, beneficial to the society they may be. By reason of the conviction and being lodged in jail, the prisoner does not lose his political right or rights to express views on political matters, so long as such views propagated by the prisoner through letters do not have the potency of inciting violence or is likely to adversely affect maintenance of law and order or public order. Such cases of possible abuse can be and in fact have been taken care of by Rule 23. In our view, therefore, the prohibition on any matter likely to become the subject of political propaganda is clearly unwarranted, unjust and unreasonable and must be struck down as violative of Articles 14, 19(1)(a) of the Constitution. Keeping in view the decision of Supreme Court in *Maneka Gandhi's case* (supra) as also the decisions in *Sunil Batra's case* (supra), the Rule which puts blanket ban on the prisoner writing in his letters material mentioned in the said Rule is also violative of Article 21 of the Constitution.
15. It was urged by Miss. Jaising that even Rule 23 of the said Rules is bad as being unreasonable since it conferred unbridled and unguided powers in the prison Administration to censor a particular matter contained in the letter. She submitted that Rule 23 is left to the arbitrary discretion of the prison authorities to decide as to what is improper and objectionable matter written by the prisoner. We do not think that this contention is valid since we find that the Rule clearly provides that whenever the Superintendent decides to withhold any objectionable matter in the letter he is bound to record reasons for such erasures. In the event of any mala fide or improper exercise of powers by the Superintendent under this Rule, the prisoner shall not be without a remedy, particularly having regard to the fact that the Superintendent is enjoined to record reasons for his action. In the circumstances, such action of the Superintendent would be successfully challenged under Article 226 of the Constitution, apart from the fact that the prisoner can complain about such conduct on the part of the Superintendent or Jail administration to the District Judge or other Authorities who can take appropriate action to redress the grievance of the prisoner.
16. In the petition a ground is taken that the double lock-up in Dhule Jail does not conform to the minimum standards of cell, which can be used for separate confinement inasmuch as it does not enable the prisoners in the double lock-up to communicate with those outside and therefore it ought to be discontinued forthwith. In his affidavit

Shri Dawane, Superintendent of Dhule District Prison, has stated that the practice of use of cells with double lock pattern is not in existence in Dhule Jail at all. He, however, admitted that a block of about two cells surrounded by Court-yard wall with an entrance door existed to accommodate prisoners sentenced to death. However, the door has been removed and, therefore, double lock pattern of the cells, as alleged by the prisoner, does not exist in Dhule Jail. In the circumstances the grievance made in the petition does not seem to be correct and no directions in that behalf are called for. We may mention that Miss Jaising did not dispute that under the Rules a punishment of separate confinement of a prisoner for breach of prison Rules is permissible. We are informed that only such prisoners are kept in the said cells.

17. It was then contended by Miss Jaising that under the Maharashtra Prisons (Punishment) Rules 1963, there is no provision for giving a hearing or opportunity to defend before any punishment is inflicted by the prison authority. She submitted that the Rules of natural justice must be complied with by the prison authorities before imposing any punishment on the prisoner. In this connection Mr. More drew our attention to the fact that there is a non-statutory rule incorporated in the Maharashtra Prison Manual, 1979, which is followed by the prison authorities in the matter of punishment. This non-statutory Rule 1(i) provides as under :

"1(i) No prisoner shall be punished unless he has been informed of the offence alleged against him and given a proper opportunity of presenting his defence. The competent authority shall conduct an inquiry into the case. No prisoner shall be punished except in accordance with the terms of law or regulation."

18. It would, therefore, be clear that though there is no specific provision in the statutory rules of 1963 providing for an opportunity being given to the prisoner, the abovementioned procedure prescribed by the non-statutory rules is being followed and it is not disputed by Mr. More that the said non-statutory rules are binding on the prison authorities. We, however, think that it is desirable that the said non-statutory rules should be incorporated in the statutory rules in order to make the position clear. Mr. More assured that the Government would take appropriate steps to incorporate the above provision in the statutory rules. Our attention is also invited to the provisions of the Bombay Jail Accounts Manual 1956, under which a Punishment Register is required to be maintained. In this Punishment Register it is provided that in the case of every serious offence the names of the witnesses, the substance of the evidence of the witnesses, the defence of the prisoner and the Superintendent's findings with reasons shall be recorded in the remarks column by the Superintendent himself. If the Superintendent considers it essential, statements of all concerned should also

be taken and kept on record. These safeguards would meet the requirements of principles of natural justice and, therefore, we do not think that any direction in this regard is necessary.

19. It was then urged by Miss. Jaising that in the case of punishment some appeal procedure for challenging the order of punishment must be provided for. In this connection Mr. More drew out attention to the Order No. PJO/1672/18460/II (VI) issued by the Inspector General of Prisons, Maharashtra State, and published in the Maharashtra Government Gazette dated June 8, 1978, Clause 5 of the said order provides for such procedure which runs as under :

"5(a) The Inspector General of Prisons on representation or suo motu may call for the papers, may either confirm, annul, enhance reduce or modify the nature of punishment awarded to a prisoner by the Superintendent/Deputy Inspector General.

(b) The State Government may suo motu or otherwise set aside any order of punishment passed by a subordinate authority or confirm, enhance, reduce or modify the nature of punishment awarded to a prisoner".

We consider these provisions to be fair and adequate.

20. It was then urged by Miss. Jaising that there is no effective procedure for redressing grievances of the prisoner and whatever meagre procedure is in existence does not conform to the directions given by the Supreme Court in the second Sunil Batra's case (1978 Cri LJ 1741). In paragraph 11 of his affidavit Shri Siddique, Inspector General of Prisons, has described the present procedure for redressing the grievances of the prisoner. Mr. More fairly stated that the present procedure is inadequate in view of what is laid down in *Sunil Batra's* case. In that case various directions were given by the Supreme Court with a view to bring about reforms in the jail administration. These directions are to be found in paragraph 79 of the report by Krishna Iyer, J. Directions 3 to 5 are relevant so far as grievance procedure is concerned. These directions are:

"3. Lawyers nominated by the District Magistrate, Sessions Judge, High Court and Supreme Court will be given all facilities for interviews, visits and confidential communications with prisoners subject to discipline and security considerations. This has roots in the visitorial and supervisory judicial role. The lawyers so designated shall be bound to make periodical visits and record and report to the concerned Court results which have relevance to legal grievances.

4. Within the next three months, Grievances Deposit Boxes shall be maintained by or under the orders of the District Magistrate and the Sessions Judge which will be opened as frequently as is deemed fit and suitable action taken on complaints made. Access to such boxes shall be accorded to all prisoners.

5. *District Magistrates and Sessions Judges shall, personally or through surrogates, visit prisons in their jurisdiction and afford effective opportunities for ventilating legal grievances, shall make expeditious enquiries thereinto and take suitable remedial action. In appropriate cases reports shall be made to the High Court for the latter to initiate, if found necessary, habeas action".*
21. Mr. More submitted a draft about the manner in which the Government would be willing to implement these directions of the Supreme Court. Miss Jaising also stated that the suggestions, if incorporated in the draft, would meet with the requirements of the directions given by the Supreme Court. As suggested in the draft, we direct that the Respondents should implement the following procedure:
 1. **Grievance Deposit Box:** In addition to complaint boxes which are presently kept in different Cells in the prison, a sealed Grievance Deposit Box shall be kept at a conspicuous place inside the prison under lock and key. The key of the said Box shall remain exclusively with the District Judge. Access to the complaint Box shall be accorded to the prisoners. The said Box shall be opened by the Sessions Judge within whose jurisdiction the prison falls, at regular intervals. In case of Jails which are rendered impracticable for the Sessions Judge, to visit, Additional District Judge or a Senior-most Assistant Judge, nominated by the Sessions Judge should perform the aforesaid tasks. A detailed record of the complaints, grievances, shall be maintained by the concerned Sessions Judge who will also investigate into the complaints, and if found necessary and expedient shall take appropriate action. The record of the complaints shall also contain the particulars of the action taken.
 2. **Complaint Register:** The District and Sessions Judge shall maintain a complaint Register in prison office in such manner as may be directed by him in respect of the complaints found in the grievance Deposit Box. He shall also record the appropriate action taken in respect of the said complaints.
 3. **Visits by District & Sessions Judge/District Magistrate:** The District Magistrate and the Sessions Judge shall personally visit prisons in their jurisdiction and offer effective opportunities for ventilating the legal grievances of the prisoners and shall make expeditious enquiries, and take suitable remedial action. They shall, also ascertain the conditions prevailing in the prison, and ascertain whether the prisoners are provided with all the necessary facilities as set out in the Maharashtra (Facilities to Prisoners) Rules 1962. In the appropriate case, report shall be made to the High Court by a letter to initiate, if necessary, habeas action.
 4. **Visit by Lawyers:** The Sessions Judge shall nominate lawyers to make separate visits to the prison within his jurisdiction. The lawyers so appointed in their

visit shall be afforded by the prison administration facilities and opportunities to inspect the prison premises and the record relating to complaints from the prisoners and to interview and receive confidential communications from the inmates of the prison subject to disciplinary and security conditions. The Lawyers so nominated shall carry out periodical visits and report to the concerned Court results which have relevance to legal grievances.

5. The prisoner can send a letter or address a petition containing grievances regarding prison administration, to the following authorities:
 - a) Regional Deputy Inspector General of Prisons.
 - b) The Inspector General of Prisons, Pune.
 - c) The Secretary, Home Department, Bombay
 - d) The Home Minister/Chief Minister, Mantralaya, Bombay
 - e) The District Judge, High Court Judge, or Supreme Court Judge.
 - f) Lawyers nominated by the District Judge, as prison visitors.
 - g) Lokpal, Lokayukta.
 - h) Secretary, District Legal aid Committee/Secretary State Legal Aid Committee.

All these letters of petitions, shall be forwarded to appropriate authorities through proper channel, viz., through the Superintendent of respective prison. Such communication shall not be included in the scale prescribed in sub-Rule (iii) of Rule 17 of Maharashtra Prison (Facilities to Prisoners) Rules 1962.

22. We also direct that the abovementioned directions be communicated to the District and Sessions Judge and the District Magistrate of each District in the State for their information and necessary action.
23. In the result Rules 20 and 17(ix) of the said Rules are struck down as violative of Articles 19(1)(a) and 21 of the Constitution. As regards grievance procedure directions are given as above. Rule made absolute accordingly.
24. Criminal Application No. 1108 of 1983. No orders are necessary in view of the fact that the prisoner has been already transferred and we are informed that after completing the sentence he has already been released.

**Madhya Pradesh High Court
[1988 (16) Reports M.P. 147]**

**Ranchod
vs
State of M.P. and Others**

V.D. Gyani and B.B.L. Shrivastava, JJ.

1. V.D. Gyani, J. This letter of petition by the prisoners Ranchod and B .. hanta has been sent from Central Jail, Indore.
2. Cellulitis abscess caused by chloroquine and analgin injections to a patient hypersensitive to analgin and oxyphenbutazone, resulting in death in M. Y. Hospital, Indore on 18th Nov., 1986, is the theme of this letter's petition, sent by prisoners Ranchod and his father Bhanta, presently lodged at Central jail, Indore, where they are undergoing life imprisonment. The petition has many facets exposing the negligence of authorities, callous disregard to duty by all concerned, including the jail staff, the Executive Magistrate, the Visitors to jail appointed by the State Government, the District Judge, the police and the unethical conduct of the doctors.
3. Death takes no holiday. It knows no date and it is no respecter of persons. It occurs to the prince as well as to the prisoner. But when a prisoner dies, it does' create some ripples. Vengariya the prisoner who died rather made to die, if the allegations made in this letter petition are true, on his refusal to wash clothes not only of the doctors and their family, but also of the nurses and compounders and do other all and sundry work at the jail doctor's bungalow landed him in the Jail Hospital, where he was, as per allegations contained in the petition and not denied by the doctor or the compounder concerned, injected poison in the name of treatment, only because one cloth given for washing, was missing.
4. A Magisterial inquiry ordered into the death as it has to be under the rules, required to be held by a Sub-Divisional Magistrate, was delegated to a Tahsildar, who is still continuing with it, in face of a letter dated 27th Nov., 1986 issued by the Collector calling upon him to submit his report, if inquiry was completed. This letter indicates that the inquiry was to be completed within a week or a fortnight, but even after a lapse of almost ten months, except for examining two or three witnesses and exchanging correspondence from one end to another there is hardly any progress made in it. If the order sheets are

any indication, this Magisterial inquiry is no better or worse than a mutation proceeding, pending before a Tahsildar. The doctor and the compounder have proceeded on leave. They are not available for evidence and the Tahsildar has very comfortably posted the case for their evidence, after their return from leave. Viscera preserved in this case, is still lying at the police station, and the station officer is awaiting instruction from the Tahsildar as to what should be done in the matter. All this goes on unabated in face of the allegation that he was administered poison by the jail doctor. The least should have been done in the circumstances and is legitimately expected of the authorities was to send the viscera for chemical examination at the earliest opportunity, but even after lapse of more than nine months, it has not been despatched to the Forensic Science Laboratory.

5. Vengariya, along with his father Bhanta and brother Ranchod and nephew was convicted by the Sessions Judge, Mandleshwar, for offence punishable under Section 302/34 Indian Penal Code, and sentenced to undergo life imprisonment. He was admitted to Central Jail, Indore, on 9th Aug., 1986 .. His health as recorded at the time of admission was sound and good. He was assigned 'Safai' duty in the Jail Hospital, from 1st Sep., 1986 and continued as a 'Hospital' Worker' in the Jail Hospital till he died on 18th Nov., 1986. What a cruel irony of fate it was that his application for being released on bail came up for hearing just the next day, after the hearing of this petition and his counsel prayed and pressed for his release, little knowing that he had already been freed and released from the bonds of life itself and no Court could have ordered his release.
6. The petitioners are his father and brother. They have alleged that some poisonous injection was given to Vengariya who refused to wash clothes of the doctor, nurse and compounder. He was made to work at their residence after duty hours. He was much harassed for a missing cloth, subjected to mental torture and threatened by the compounder "to see him". These compounder and doctors have been specifically named by the petitioners, but none of them have come out with an affidavit to controvert the allegations made by Vengariya's father and brother.
7. The Jail Superintendent, while admitting that the deceased Vengariya was on Jail Hospital duty, has denied the allegations regarding washing of clothes and torture by officials. The return itself makes a shocking reading, those who extracted work from the deceased, have not come forward to deny the

allegations, but the Jail Superintendent wants us to believe that:

"The convicts are not permitted to work at the residence of Compounder/Male Nurse and Doctors for domestic work."

8. May be that the Jail Manual prohibits such work being taken from convict prisoners, but can it not be violated? Or is it not violated? Permitting a convict to work at jail official's residence is one thing and actually extracting work is altogether a different thing. Rule may be there, but they are also violated with impunity. When the allegations are against the doctors, compounders, nurses, by specifically naming them, they ought to have denied the allegations by filing separate affidavits. It is not the respondent's case that they are not available. They are very much available merely because some one has proceeded on leave, would also not afford a justification for not swearing an affidavit controverting the allegations.

9. Para 3 of the return reads as follows:

"Contents of para 3 are false, hence it is denied. None of the officials has tortured the deceased Vengariya. It is not the duties of doctor or compounder to inject the injection of poison to other patients. It is admitted that the convict Vengariya died on 18th Nov., 1986, in M. Y. Hospital, Indore, but it is denied that the body of the deceased was totally swelled because of injection but in fact the deceased Vengariya was admitted in Jail Hospital on 2nd Nov., 1986 as he was suffering from fever. The doctor prescribed the medicines and the treatment was continued in Jail Hospital upto 14th Nov., 1986. On 12th Nov., 1986 the deceased Vengariya complained of pain and abscess in left arm. The deceased was given treatment for the same. but was not given a proper response by the petitioner, hence the deceased Vengariya was shifted to M. Y. Hospital, Indore on 14th Nov., 1986. The general condition of the deceased Vengariya was fit except the abscess in the left arm. The condition of the deceased day by day deteriorated. The deceased was given proper treatment by well blood transmission. The deceased was operated at M. Y. Hospital, Indore, but ultimately he died on 18th Nov., 1986.

The contention of the petitioner that the deceased died due to the injection of poison given by compounder is totally false and baseless. The report of M. Y. Hospital, Indore is enclosed and marked Annexure - R1."

10. To say that it is not the duty of the doctor or compounder to Inject poison to other patients, is mere wishful thinking, warmed and cooled by the same summer and winter. Doctor can also act in dereliction of duty, They can also be found to be remiss or negligent in the discharge of their duty,

- 1.1. The contention that the deceased Vengariya was admitted to Jail Hospital on 2nd Nov" 1986 where he remained till 14th Nov" 1986 stands amply contradicted by the jail record itself, The attendance register of hospital workers for the month of Nov" 1986, shows Vengariya to be on duty, Letter 'P' indicating presence is put against his name, but this letter 'P' has been subsequently tampered with and converted into 'A', but the interpolation is so crude and prominent that it is quite visible to a naked eye,
12. To be admitted to a hospital for treatment and to be in the hospital on 'Safai duty' are two distinct and different things, It is clear from the record that even while undergoing treatment work was extracted from the deceased, The crude interpolation with letter 'P' converting it into 'A' appears to have been done as an 'after thought'.
13. The matter does not rest here. Even the number of hospital workers present has also been altered from 14 to 13, not for one or two days, but for full thirteen day, up to 14th Nov., 1986. If the prisoner was hospitalized, as is claimed in the return, how can it be that he has been shown on duty as well for the same period. The affidavit sworn by the Jail Superintendent, particularly para 3 thereof reads as follows:

"That the facts stated in paras 1 to 6 0,' the return are true, based on the information derived from the official records of the State Government."
14. To say the least, it gives a very distorted version and, therefore, lacks in inspiring confidence.
15. As per postmortem examination report, Vengariya died of shock due to septicemia and toxemia. Now, let us have a look at his medical treatment records He was in Jail Hospital from 2nd Nov., 1986 to 14th Nov., 1986. The total record consists of four sheets, with one ticket dated 2nd Nov., 1986 for outdoor patients, which shows that Vengariya was suffering from 'fever'. Provisional diagnosis on being admitted to M.Y. Hospital was injection abscess and cellulitis which stands confirmed by final diagnosis that it was injection abscess and spreading cellulitis. Patient's earliest record in the M.Y. Hospital ticket dated 14th Nov., 1986 for outdoor patient contains a caution that the patient was hypersensitive to analgin and oxyphenbutazone, yet the patient was given analgin and chloroquine Injections continuously for five days.
16. In case of patients with known hypersensitivity when such considerations are not heeded, the doctor IS doing nothing but extending a cordial gilt-edged invitation to death.

17. Ignorance of drug reactions is no defence. Before a doctor writes a prescription he must sort out in his mind known facts about patient's history and physical-emotional status. Any disease identified with their etiology and preferred treatments available, his patient's medications, past, present and future and environmental or hereditary factors, which might influence the prescribed medication, including congenital conditions, hypersensitivities, and idiosyncrasies. He must then avoid making any errors when writing the prescription. Rules for prescribing medication lay down that physicians must maintain accurate patient's record. He must be certain to list all medications taken past and present and carefully record any hypersensitivities, idiosyncrasies or other special situations that must be avoided in the future.
18. Medical record from Jail Hospital woefully lack in minimum requirements of prescription writing. Most physicians know how to write prescriptions *and* often neglect to write prescriptions in accordance with rules for prescribing medication. The jail doctor is no exception. In fact, the prescription has not been written by him. How devastating the effect can be, is demonstrated by Importance of decimal point in the proper place, by shifting one place to the right causes the patient to receive 10 times he dose intended. This error may prove fatal. A shift of one place to the left, causes the patient to receive 1/10 of the intended dose. This also can lead to serious consequences.
19. The patient Vengariya had injection abscess on the left arm. Injection of a drug into a muscle mayor may not quickly provide appropriate blood levels safely. It Will, if the drug is in solution, in a suitable vehicle and is promptly absorbed with ,minimal trauma into blood vessels at the proper site of injection. It will not if the vehicle is irritating, or the injection technique is incorrect or the drug precipitates from solution because of the pH of the tissue fluids, or the drug is in a repository form. Apparently, all injections into muscles cause some trauma. Even intramuscular (IM) lesions vary in intensity and character with the volume, speed, and depth of injection and with the type of medication. No physician can escape accountability to his patient if he persistently:
 - (i) applies inadequate diagnostic procedure,
 - (ii) prescribes and administers unsuitable medications or even appropriate ones improperly,

- (iii) uses a drug in categories of patients known to react adversely to that drug,
 - (iv) fails to act promptly to counteract serious adverse drug reactions,
 - (v) provides incorrect drug information or directions for use, or
 - (vi) provide inadequate follow-up of patient response to medication. The patient may respond unfavourably to medication when it is not properly selected, correctly prescribed, correctly dispensed, or appropriately administered. The medication selected for the patient should never be more hazardous than the disease to be treated.
20. Did any patient really sustain an adverse drug reaction? If so who is responsible?' Is a question which must be constantly asked by every conscientious physician to himself. Severe, sometimes irreparable, damage to the body is too often caused by both over-the - counter and prescription medications. Because of serious reactions to some or more drugs in these medications A drug reaction may be perceived through signs and symptoms or through abnormal clinical laboratory test result and it may manifest itself as a disease or syndrome.
21. Obviously, the term 'adverse' is only one of many qualifying adjectives for drug reactions. Dangerous effects may result from idiosyncrasy (a susceptibility peculiar to a rare phenotype), hypersensitivity (hyperreactivity often antigenic), overdosage (too large a dose given or taken internally for homicidal or suicidal purposes, or given or taken in error). What is expected of the physician in such cases? Did the physician take all reasonable precautions? Did he inquire and test the patient to determine whether he was sensitive to the drug? Did he withdraw all other medication that might interact adversely with the one he wishes to prescribe? Did he allow time for elimination of longacting interfering medications? Did he carefully avoid all physical, chemical, and therapeutic incompatibilities? The list such questions is very long indeed. Did the physician personally observe the adverse reactions? Can he state, without reservations, that he personally observed the adverse drug reaction take place after he administered the implicated drug so that a definite cause and effect relationship was clearly established? Physicians have injected penicillin into patients who immediately suffered anaphylactic shock and died. In a case with such an instantaneous response, there can be little doubt that the drug caused the reaction. On the other hand, physicians have occasionally reversed their conclusion that a given drug had caused a certain reaction, when more information became available. Did the, drug reaction 'pose an immediate or potentially serious hazard'?

22. To summarizes, the following are the proofs of negligence on the part of the physician:
- (i) Treatment of a condition with a drug not suitable for the conditions;
 - (ii) Failure to note a history of allergy to the drug administered;
 - (iii) Use of improper injection technique; (iv) Failure to stop treatment with a drug as soon as reaction occurs; and
 - (v) Failure to provide adequate therapy to counteract a reaction when it occurs.
23. The record does not show any such precaution being taken by the jail doctor. On the other hand he admitted before this Court, when he was present during the course of hearing of this petition, that prescription was written by the compounder who also administered the injection. It is an act of callous disregard to duty.
24. Now, recall to mind at this stage, the averment made in the return: 'It is not the duty of the doctor to inject poison'. Drug injection may itself prove to be poisonous. This is what the poor illiterate tribals really mean, when they complain of administering poison.
25. On 14th Nov., 1986 the prisoner was transferred to M.Y. Hospital, Indore in very serious condition, as can be gathered from the treatment card. At 11.40 p.m. on 14th Nov., 1986 the telephone operator was instructed by the doctor in charge to inform the concerned police station to arrange for recording a dying declaration. This itself goes to show the precarious condition in which the patient was. Accordingly a telephonic message was given by the telephone operator, Sharad Kulkarni, to both the police station, Mahatma Gandhi Road, Indore, as well as the Police Control Room. He also sworn an affidavit in support of the endorsements made by him on the treatment card, to the effect that 'telephonic message for recording a dying declaration given and also recorded the names of the police officers receiving the message on the other end'. Inspite of this message no arrangement appears to have been made for recording dying declaration till 4.00 p.m. A endorsement made at 4.00 a.m. on the 15th Nov., 1986 on the treatment card, reads: 'Patient is not fit for giving a dying declaration'. There is also yet another endorsement to the effect that a 'Radio message from the District Magistrate through constable Ashok Singh of Police Station Bhanwarkuwa was received at the M.Y. Hospital at 3.45 p.m. asking for the Sister on duty to call the doctor. A copy of the entry made in the General Diary of Police Station Bhanwarkuwa at Serial No. 1228 on the 15th Nov., 1986 at 1.50 a.m. has

been placed on record by the respondents. According to this entry one Naib Tahsildar, Shri. Pagare, was informed by constable Ashok Singh to proceed to M. Y. Hospital for recording dying declaration of the patient. What is surprising is that right from 11.40 p.m. to 4.00 a.m. inspite of intimation received, no Magistrate proceeded to the Hospital for recording a dying declaration, thereby letting out a valuable piece of evidence, which would have come from the mouth of the deceased. Silence so thrusted upon him has made it more compelling than any rhetoric, to ask the question as to why the doctor on duty could not record, as they sometimes do, what made him not to record a dying declaration?

26. The record does not indicate that the Naib Tahsildar, who was informed by the police constable Ashok Singh even bothered to proceed to the Hospital. On the other hand, what the endorsement on the treatment card dated 14th Nov., 1986 goes to show is that the constable visited the Hospital at 3.45 a.m. It appears that the Naib Tahsildar, who was approached by the constable around 1.50 a.m. instead of rushing to, Hospital, directed the constable to ascertain whether the patient was still in a condition to make a dying declaration. This lethargy on the part of those who are entrusted with the task of recording dying declarations, deserves to be deprecated. A dying man cannot be expected to wait for arrival of the Magistrate. It is the Magistrate, who should rise to the occasion and rush upto the dying man without any loss of time. Any reminiscence on his part results in shielding of truth as in the instant case, No one knows what statement the prisoner would have made, had he been immediately contacted on receiving information.
27. There is yet another disturbing feature of the treatment record of the M. Y. Hospital, Indore. At one stage it was felt necessary to operate the patient and the consent for such operation was given by the constable, who escorted him. It is extremely shocking as to how a constable, escorting a prisoner could consent to any operation, particularly when the patient himself was unconscious. How such a consent could satisfy the conscience of the doctor. It is nothing short of dehumanizing the patient, although just underneath the constable's signature on the consent endorsed by him, there is also the signature of the Superintendent of the Central Jail Indore, but It does not stand to reason that if the Superintendent of Central Jail was available for such a consent, what was the occasion for obtaining it from the constable escorting the prisoner? The irresistible Inference in such circumstances is that the Superintendent of Central Jail subsequently put his signature. It is clear from the fact that it does not

bear any date. 'The record shows that I and D was done under GA on 14th Nov., 1986. The patient who was already unconscious and known to be so to the doctors, was operated under general anesthesia; there can be an honest difference on opinion amongst the doctors on this point, the doctor may operate on his own but to obtain consent from the police constable is something, which does not appeal to reason. It is as though the prisoner was not a human being, but chattel or property belonging to the constable. It is not only consent but informed consent of the patient or his relation or guardian, which could possibly afford any protection to the doctor in the event the operation is called in question. Unfortunate as it is, Vengariya, the patient was also a prisoner and Virtually reduced to a subhuman level by the doctor, when the constable's consent was obtained for operation. How could he take upon himself the authority of consenting to an operation, that too in a condition when the patient himself was unconscious. All this had happened in face of the irrefutable fact that the patient's brother and father were very much available in the same prison, where from the prisoner Vengariya was brought to the hospital. But neither the doctor nor the Superintendent of Central Jail bothered at least the record does not show, to obtain consent from anyone of them. Yet, it may be claimed, that the operation was successful, but the patient is dead.

28. There is yet another human aspect of this petition which deserves attention. The father and brother were all along kept in dark as though they had nothing to do with the flesh and blood of their own blood, Vengariya. When blood transfusion became necessary patient's father and brother were not taken out of their cells to donate blood. It is also not borne out from the record that their bloodgroup was tested and found as not suitable, nor does the record show that even in that precarious condition they were allowed a visit to the patient. From 14th to 18th Nov. 1986, when Vengariya was in M.Y. Hospital, the jail record does not show that either the father was taken to the hospital to see his dying son, who was gasping for every breath of his life nor his brother taken to meet his dying brother. Even decency of death was denied. Possibly the authorities were competing in the glory of jail discipline, sacrificing human values.
29. This letter petition brings into sharp focus and throws light on many other ills besetting the system. Do your District and Sessions Judges, who are ex-officio visitors to the jail within their respective jurisdiction, the Director of Health Services, the Civil Surgeon or Medical Officers, the representatives

of people representing particular urban or rural consistency in the State Legislature and the non-official visitors, as appointed under Regulation No. 815 of the Jail Manual, do they satisfy themselves that the law, rules regulating the management of prisons and prisoners are duly carried out? Their duties are enumerated in Regulation No. 817 of the Jail Manual. They can call for and inspect any book or other record in the jail. Have they regularly visited the jail so as to apprise themselves of the genuine problems the prisoners are facing and their grievances. The nonofficial visitors to the jail, appointed by the State Government have they justified their appointment by getting themselves acquainted with the prisoner's problems and making efforts for amelioration of their lot, within the framework of the Jail Manual itself, if all this had been going on smoothly, as is expected and sought to be, possibly there was no need for Ranchod and Bhanta to make this letter petition. The question looms large, who bothers, much less mourns for the prisoners what the prisoner - petitioners prayed is a direction for holding an inquiry, which is, as stated above, already going on. We can only direct it to be expedited. Thorough probe in the whole episode and even criminal prosecutions of those found to be responsible in the circumstances, suspicious as they are, is a must.

30. If the Magisterial inquiry, which is going on is not to be reduced to a farce by mere exchange of correspondence from one end to other and has to serve any meaningful purpose, it ought to have been completed long back. But unfortunate as it is in face of allegations of poisoning, the viscera has not yet been sent for chemical examination. The suspicious circumstances in which Vengariya died, calls for a thorough probe. We, therefore, direct the respondent No.1 to hold a thorough probe into the matter and proceed in accordance with law against those found to be remiss or negligent in their duty. Criminal prosecutions be launched against those found to be guilty. The probe, as directed above, is independent of the Magisterial inquiry, which is going on. The probe, as directed above, must be completed within the period of forty-five days from the date of this order and those found guilty must be proceeded against with law.
31. A copy of this order be sent to the State Government.

Bombay High Court
1989 Mah LJ 77

Inacio Manuel Miranda and Others
vs
State

C.S. Dharmadhikari, G.D. Kamat, JJ.

1. These Writ Petitions came to be registered on the basis of the letters received from the prisoners. In the letters, several complaints were made about the conditions in the prison. After being *prima facie* satisfied, this Court directed the District and Sessions Judge, North Goa, Panaji, to inquire into the complaints made by the prisoners, by visiting the Jail and to submit his report. Accordingly, after visiting the Jail and recording the statements of inmates and Jail Officers, the learned District and Sessions Judge submitted his report.
2. Supreme Court in the case of *Sheela Barse v. State of Maharashtra*, 1988(1) Bom. C.R. 58 has reiterated the view expressed in the earlier decisions that, term 'Life' in Article 21, has an extended meaning. Therefore, citizens who are detained in prisons either as undertrials or as convicts are also entitled to the benefits guaranteed by the Constitution, subject to reasonable restrictions. This Court in *Madhukar Bhagwan Jambhale v. State of Maharashtra and Others*, 1987 Mah. L.J. 68 has summarised the legal position, in para 8 of the said judgment, which reads as under :

"It is thus well settled that convicts do not wholly shed their fundamental rights, through their liberty is in the very nature of things circumscribed by the very fact of their conviction. The consequent responsibilities of prison administrators have to be borne in mind. These responsibilities broadly stated are:

- (i) *maintenance of internal orders and discipline,*
- (ii) *securing the institutions against unauthorised access or escape and*
- (iii) *rehabilitation of prisoner.*

The maintenance of penal institutions is an essential part of the Government's task in preserving societal order though enforcement of criminal law and the governmental interests are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorised entry and above all rehabilitation of prisoners as indicated above. As a matter of fact the modern concept of criminology calls for greater attention to the reformation of a prisoner. Sunil Batra v. Delhi

Administration, AIR 1978 SC 1675 and Sunil Batra v. Delhi Administration, AIR 1980 SC 1579 amongst others are landmark decisions emphasizing the reformative aspect of the prison administration."

Therefore, the grievances made in these writ petitions will have to be tested on the touchstone of these well established principles.

3. After the matter was heard for some time, ultimately, the complaints crystallized into the following grievances:

That one shaving blade is used to shave several prisoners. The District Judge in his report stated that after shaving, the prisoners' faces are disinfected with alum stones. It seems to be an admitted position that the same shaving blade is used on account of security reasons. The learned District Judge, however, found that there was no evidence to show that sufficient care is taken to prevent any infection due to the use of common blade. After hearing the learned Advocate General, we are satisfied that the Jail Authorities should be directed to take necessary precaution to use some sort of disinfectant either alcohol or dettol or other effective disinfectant, to avoid any infection and also to prevent transmission of disease from one prisoner to another. This direction will equally apply to the grievance made about using of common needle for extraction of blood.

4. A grievance was also made that Rule 17 and Rule 19 of the Goa, Daman and Diu Prisoners (Facilities to Prisoners) Rules, 1968, are not being followed and even otherwise, the same are discriminatory. From the report of the District Judge, it appears that the Jailor has deposed before him that the Jail Authorities supply papers to the prisoners free of cost from the Office of the Prison for the purpose of preferring appeals, applications, etc. and in case they are required for private use, it is sold at 0.08 paise a sheet, which is the cost price. Rule 19 states that writing material should be supplied by the Government without any cost. However, Rule 17 contemplates that Class I Prisoners can write four letters, two at the Government cost and two at the prisoner's cost and a Class II prisoner can write two letters per calendar month, one at Government cost and one at his own cost. It appears that this classification is made under the Goa, Daman and Diu Prisoners (Admission, Classification and Separation of Prisoners) Rules, 1968. However, we are informed by the learned Advocate General that, in practice, all prisoners are treated as Class II prisoners. This Court in *Madhukar Bhagwan Jambhale v. State of Maharashtra and Others* (Supra) had an occasion to deal with a somewhat similar question. In paragraphs 4 and 5 of the said judgement, a note was taken by this Court that a similar provision in Maharashtra about the classification of prisoners, came to be discontinued by Government Resolution dated 1st of January, 1971. In the said decision, this Court was concerned with the

facility given to the prisoners for writing welfare letters. However, in our view, the classification in the present Rules for the purpose of writing letters could safely be treated as discriminatory, and therefore, unreasonable. All convicts should be treated equally in the matter of writing letters and should be allowed to write at least four letters per month, two with the paper supplied by the Government at Government cost, and two, at the cost of the prisoner, on the paper supplied by the Government at 0.08 paise per sheet which is stated to be the cost price.

5. The next grievance made in the petition is regarding the non-availability of the Jail Rules. Rule 28 of the Facilities Rules provides that there should be library in the prison. From the Report of the District Judge, it appears that the Government has directed the Jailer vide letter dated 9th of February, 1988, bearing No. 9-12/84 HD (G), written by the Under Secretary (Home) that the Rules should not be made available to the prisoners. To say the least, we are not only surprised by this direction, but in our view, the said direction is wholly arbitrary and unreasonable. It would be against the principles of natural justice to permit the prisoners to be punished or penalised by laws of which they had no knowledge and of which they could not even with exercise of due and reasonable diligence, acquire any knowledge. These Rules are framed under section 59 of the Prisoners Act and are published in the Gazette. However, how many persons read the Gazette, and even if they read, how many of them retain a copy of it? It is not enough that the law is enacted, Rules are framed and Orders are issued, but they should be also available to the person concerned, if required. It appears to be an admitted position that Jail Manual is not published so far, and only two copies of compilation are available with the Goa Government, one with the Superintendent of Jail, Aguada and the other, with the Inspector General of Prisons. It will be most unfair to punish a prisoner for breach of a rule or a condition of which he has no knowledge and no facilities are also available for acquiring such knowledge. Therefore, the minimum which is expected of the Government is to make copies of compilation and to make them available in the libraries of the jails. Therefore, we direct the State Government to prepare copies of the compilation and make them available in the libraries of the Jail and sub-jails.
6. In Writ Petition No. 16 of 1988, a grievance was made by the nine inmates of the Judicial Lock-up at Panaji. The District and Sessions Judge was directed by this Court to inquire into the matter and make a report. Similar grievance was made in Writ Petition No. 38 of 1987 also. In his report, the District Judge observed that "there is absolute lack of proper ventilation and the Judicial Lock-up is worse than a zoo

where at least good ventilation is provided to the animals". It is observed in the report by the District Judge that the prisoners confined there have to face inconvenience and the Government should make necessary arrangement so that the prisoners get fresh air and light. The Government should also make arrangements to provide W.C. Therefore, the Government is directed to take suitable steps in this behalf to improve the condition in Locks-ups at Panaji.

7. Then, a grievance is made in the petition that the wage system as incorporated in Rules 44, 45 and 46 of the Goa, Daman and Diu (Facilities to Prisoners) Rules 1968 and the wages paid are wholly unreasonable. It is also contended by Shri Rebello, the learned Counsel appointed as amicus curiae, that the wages paid are violative of citizens fundamental rights guaranteed under Articles 21 and 23 of the Constitution of India. In support of this contention he has placed strong reliance upon the decision of the Kerala High Court in the matter of: *Prison Reforms Enhancement of Wages of Prisoners*, A.I.R. 1953 Ker. 261 and a decision of the Andhra Pradesh High Court in *Poola Bhaskara Vijaykumar v. State of Andhra Pradesh & Another*, AIR 1988 AP 295 and the cases referred to therein. In our view, it is not necessary to decide the question as to whether the Rule relating to the payment of wages is violative of Article 21 or Article 23, since in any case, it could safely be held that the wages paid have no basis. In spite of our repeated queries, it was not possible for the respondents to indicate as to on what basis these wages are fixed. According to Shri Rebello, the basis could be only the minimum wages payable to the workers in the similar employment because as held by the Supreme Court, payment of anything less than the minimum wage will amount to 'begar' within the contemplation of Article 23 of the Constitution. We do not propose to examine this contention in detail. However, since no basis is being disclosed for the fixation of the wages, a scrutiny of the whole question is absolutely necessary. Hence, we direct the State Government to appoint a committee of experts to go into this question and re-fix the wages, in accordance with law.

8. A grievance is also made before us about the composition of the Board of Visitors. In this context, we cannot do better than to draw the attention of the Government towards the observations of the Supreme Court in *Sanjay Suri v. Delhi Administration*, 1988 (Supp.) SCC 169 wherein it is observed by the Supreme Court:

"The Visitor's Board should consist of cross-sections of society: people with good background social activities, people connected with the news media, lady social workers, jurists, retired public officers from the judiciary as also the executive. The Sessions Judge should be given an acknowledged position as a visitor and his visits should not be routine ones. Full care should be taken by him to have a real picture of the defects in the administration qua the resident prisoners and under trials".

In view of these observations of the Supreme Court, the State Government is obliged to reconstitute the Visitor's Board as per the guidelines laid down in that behalf and we direct accordingly.

9. During the course of arguments, a grievance was also made that there is no effective procedure for redressing grievance of the prisoners and whatsoever meagre procedure is in existence does not conform to the directions given by the Supreme Court in *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579.
10. In *Sunil Batra's* case certain directions were given by the Supreme Court with a view to bring about reforms in the jail administration. These directions are to be found in paragraph 79 of the Report and we will like to draw the attention of the Goa Government towards the said directions as well as towards the Division Bench decision of this Court in *Madhukar Bhagwan Jambhale v. State of Maharashtra and Others* (Supra) and ultimate directions issued by the Division Bench in that behalf, which read as under:

"1. Grievance Deposit Box

In addition to complaint boxes which are presently kept in different cells in the prison, a sealed Grievance Deposit Box shall be kept at a conspicuous place inside the prison under lock and key. The key of the said Box shall remain exclusively with the District Judge. Access to the Complaint Box shall be accorded to the prisoners. The said Box shall be opened by the Sessions Judge within whose jurisdiction the prison falls, at regular intervals. In case of Jails which are rendered impracticable for the Sessions Judge to visit, Additional District Judge or a Senior most Assistant Judge, nominated by the Sessions Judge should perform the aforesaid task. A detailed record of the complaints, grievances, shall be maintained by the concerned Sessions judge who will also investigate into the complaints, and if found necessary and expedient shall take appropriate action. The record of the complaints shall also contain the particulars of the action taken.

2. Complaint Register

The District and Sessions Judge shall maintain a Complaint Register in prison office in such a manner as may be directed by him in respect of the complaint found in the Grievance Deposit Box. He shall also record the appropriate action taken in respect of the said complaints.

3. Visits by District and Sessions Judge/District Magistrate

The District Magistrate and the Sessions judge shall personally visit prison in their jurisdiction and offer effective opportunities for ventilating the legal grievances of the prisoners and shall make expeditious enquiries, and take suitable remedial action. They shall also ascertain the conditions prevailing in the prison, and ascertain whether the prisoners are provided with all the necessary facilities as set out in the Maharashtra (Facilities to Prisoners) Rules, 1962. In the appropriate

case, report shall be made to the High Court by a letter to initiate if necessary, habeas action.

4. *Visit by Lawyers*

The Sessions Judge shall nominate lawyers to make separate visits to the prison within his jurisdiction. The lawyers so appointed in their visits shall be afforded by the prison administration facilities and opportunities to inspect the prison premises and the record relating to complaints from the prisoners and to interview and receive confidential communications from the inmates of the prison subject to disciplinary and security conditions. The lawyers so nominated shall carry out periodical visits and report to the concerned Court results which have relevance to legal grievances.”

We direct the Government of Goa to implement the directions incorporated in the judgment of this Court in *Madhukar's* case.

11. In these petitions, several other grievances were made which are individual in nature.

In our view, if the grievance procedure suggested by us is followed by the State Government, the prisoners will have a forum to make those grievances which can be effectively gone into as and when made.

12. In Writ Petition No. 23 of 1988, a grievance is made by the prisoner James Vincent Fernandes that the Goa Government has not framed any scheme for rehabilitation of the prisoners, though such a scheme is available in other States. In the affidavit filed in reply, it is stated by the respondents that the Government of India has circulated guidelines in the form of draft schemes for rehabilitation of prisoners after their release. Based on this, the Directorate of Social Welfare, Government of Goa, has prepared a draft scheme for grant of assistance to the released/incarcerated prisoners and their families and the same is under consideration of the Government and the Government's approval is awaited. In our view, if the draft scheme is already submitted to the Government by the Directorate of Social Welfare, which is already under consideration, the Goa Government can safely finalise the said scheme within a period of six months.

13. Hence, the rule is made absolute in all the three Writ Petitions, in terms of the aforesaid directions. The Government of Goa is directed to comply with these directions as expeditiously as possible, in any case, within a period of six months. The Inspector General of Prisons to report compliance to this Court by the end of six months.

**High Court of Kerala
AIR 1983 Ker 261**

In the Matter of:

**Prison Reforms Enhancement of Wages of Prisoners
O.P. Nos. 6566 and 7472 of 1982 Section D/- 13.4.1983**

P. Subramaniam Poti, T. Chandrasekhara Menon, JJ.

1. This Court has been receiving petitions from prisoners in the various jails of the State either directly or through the grievance deposit boxes maintained in the jails. Such of those matters as call for attention of the Government are brought to the notice of the Government by the High Court, expecting that action would be taken thereon and if no action is taken then the court is called upon to look into the matter on the judicial side and pass necessary orders.
2. The High Court forwarded a request of 19 prisoners from the Central Prison at Cannanore to the Government for necessary action along with the letter of the Registrar dated 18-6-1982. One of the prayers made in the representation by the prisoners was that the wages of the prisoners may be enhanced. The Government's attention was drawn to this prayer. In fact the question of enhancement of wages of prisoners was pending with the Government on a recommendation made by the High Court earlier. That has been so pending for a fairly long time, for more than three years now. In the meantime representations in that matter are being received from the prisoners. Therefore the High Court decided to take cognizance of the complaint of the 19 prisoners concerning the propriety of non-payment of adequate wages. By then the High Court also received a similar petition from another prisoner, one P. V. Sandappan who also raised the question of inadequacy of wages. Thus the matter has been taken up in these two petitions so that we could consider the question of justification for direction as to wages to be paid to the prisoners in the jails in the State.
3. Though the prisoners were not as such represented in this court we had the assistance of eminent counsel who acted as amicus curiae in this case. We place on record our thanks to Sri P. Balagangadhara Menon, Advocate, who from the very commencement of this matter has been of great assistance to us. So is the case with Sri S. Sivaraman, Advocate. We had also the benefit of hearing the arguments of Advocates Sri K. A.

Abdul Salam and Sri M.P. Krishnan Nair representing the Law Society of India. We also heard Mr. Vincent Panikulangara, the Secretary of the Public Interest Law Service Society (PILSS). The learned Advocate General fairly placed before us the Government's point of view and furnished us material that we wanted in the case. We are thankful to all of them.

4. The question for decision is by no means easy. It is complicated, more so because of attitudes. The approach to a criminal, the purpose of punishment, the object to be achieved by keeping the prisoner behind bars, the need for a harsh or soft treatment towards the criminal are all matters on which there has been and there continues to be keen controversy. Civilised opinion recognises the role played by society in the preparation of crimes. Society prepares the crime, the criminal commits it said Henry Thomas Buckle. The criminal is, according to one school of thought, to be dealt with as a victim, but equally powerful is the other school which considers him in a different light and which considers that unrelenting misery should be decreed for the criminal, deterrence being, according to that school, the very purpose and object to be achieved by the punishment. Though reference to the righteousness of these attitudes may perhaps be not irrelevant here the question that we are called upon to decide must necessarily be approached from an entirely different angle. The morality of inadequate wages paid to a prisoner is a matter essentially for the Legislature to consider and the executive to feel about. Whatever may be the sentiments of the court on this question it is not for this court to lay down any policy. All the same the court will activise itself in the cause if by denying adequate wages for the labour extracted from a prisoner, extracted at an illusory cost, the constitutional rights of a prisoner is being infringed and the prisoner is exploited. So the issue before us is whether in law the claim of the prisoners in the various jails of the State for proper remuneration for the work they are compelled to do not on their own volition, but because of the compulsions of the prison rules is enforceable by this Court's mandate.

...

7. Section 53 of the Indian Penal Code categorises imprisonment provided under the Indian Penal Code. Rigorous imprisonment is imprisonment with hard labour. Imprisonment may be rigorous or simple or may be for life. Section 55 provides that in every case where imprisonment for life is the sentence imposed, the appropriate Government may, without the consent of the offender, commute the Punishment for imprisonment of either description for a term not exceeding 14 years. Therefore life imprisonment is capable of being commuted into simple or rigorous imprisonment.

The Jails of the State house convicts who have to undergo rigorous imprisonment as well as those who have to undergo simple imprisonment, the former class being bound to do hard labour.

8. The Travancore-Cochin Prisons Act 1950 extends to the area of the whole of the erstwhile State of Travancore-Cochin. Central Act 9 of 1894 applies to the Malabar District of the erstwhile State of Madras. The Kerala Prison Rules 1958 extends to the whole of Kerala. Section 37 of the Travancore-Cochin Prisons Act envisages employment of criminals sentenced even to simple imprisonment and if they neglect work penalty can be imposed on them by altering the scale of their diet. Exhaustive provisions are made in Chapter XXII of the Kerala Prisons Rules concerning convict labour. Rule 377 envisages three main classes of labour, hard, medium and light and the scale of tasks is arranged according to these classes. Reference may also be made to Rule 384 which deals with utilisation of wages. That rule envisages utilisation of one-third of the wages earned by a convict for his personal needs in jail. One-third could be sent to the family for its needs and the remaining one-third is to be reserved for being paid to the prisoner on his release. One-third to be utilised by the prisoner in jails is given to the prisoner in the form of coupons for making purchase from the jail canteen. He could even purchase remission from the wages so paid to him.
9. It is evident that despite Section 37 of the Travancore-Cochin Prisons Act 1950 no prisoner who is sentenced to simple imprisonment could be compelled to contribute labour. The stand taken in the statement by the Joint Secretary to the Government, Home Department is that in the case of those sentenced to simple imprisonment, work is given only on the basis of their written request and subject to the physical fitness certified by the Medical Officer. Evidently therefore the stand taken is that they are voluntarily rendering their services which they have no obligation to render. It is further stated that the prisoner sentenced to rigorous imprisonment, are generally put to labour. It is said that they are so put to labour in the jails subject to the terms of rigorous imprisonment defined by the penal laws, for serving the purpose of inculcating a sense of reliance. It is also said that this is intended to give them proper orientation and training in different kinds of trades and industries.
10. Is a prisoner who has to undergo his term of sentence in Jail entitled, as of right, to claim that he should be paid wages for his outturn of work? Is he entitled to insist that the wages paid should not be illusory but reasonable? Can he complain to this Court that his personal liberty is infringed and his rights eroded by compulsion to do hard labour practically free? Is a Court, called upon to grant relief in such a case? If so, what

should be the approach of the Court in the circumstances? These are the questions we are called upon to consider in this case.

11. We heard different points of view including the one that the court should also consider the ethics of soft treatment to prisoners. There is a fairly prominent school of thought which believes that deterrence should be the main object of punishment and if those outside the prisons get an impression that jail life is soft and remunerative potential offenders may not fear about the consequences of their acts and in fact, may be induced to commit crimes as life inside the jail may seem to be better than that outside it. It is true that there could be two opinions on better treatment to the prisoners. All along the proponents of the deterrent theory have been as vociferous as those of the rehabilitative and reformatory theories. Those of the former class feel that the sentence of imprisonment should operate necessarily as a disincentive and the potential criminals of tomorrow must be deterred from their activities by harshness and perhaps by the inhumanity in the punishment of the offenders. The retributive school of thought seeks an eye for an eye and considers that alone will assuage the sentiments of the victim as well satisfy the society.
12. If the object of punishment is to make an example of the offender by decreeing him to such suffering as will put fear into the minds of those who watch it, any softness in the treatment of the prisoner in the matter of sentence as well as in the matter of humane approach in the jails would defeat the objective of punishment. Necessarily that should mean that the prisoner should be ill-fed and ill-housed, treated with as much barbarity as is possible in the circumstances so that, he feels that the prison is a hell to which he has been decreed for a term of years by the Judgment, of the court. The proponents of this theory do not take note of the cause of the commission of the crime, the impact of the inhuman treatment on society and the effect such treatment will have on the sentiments of the near and close relations of the prisoner who suffer emotionally and otherwise by such a situation. A barbarous approach unsuited to the civilised notions of human dignity may not generally receive public approval today.
13. We do not think that better treatment, in jails would be incentive to commission of crimes. Though perhaps fear of punishment may deter a few criminals from otherwise continuing their life of crime, most offences are committed on account of social and economic pressures. Serious offences like murder and grievous hurt are quite often committed by emotional imbalance caused by situations in which the decision taken by the offender may not be rational, decision which perhaps in a cooler or relaxed

atmosphere he may not have taken. The comparative comfort or discomfort in the jails, may not have relevance in those cases.

14. It appears to us that it would be unreasonable to assume that merely because a person is moderately well-fed and looked after under humane conditions in the jail he is unconcerned with the sentence or feels happy in the jail. To a person under restraint the most valuable right, the absence of which he feels deeply, is his personal freedom, the freedom to move about freely in society, the freedom to associate with his kith and kin and the freedom to work as he likes to earn and maintain his dependants. The absence of access to the affection of the members of his family makes him emotionally upset and he waits for the day when he will be able to go back to his home for a reunion with his close relations and friends. Everyday of his sentence is of count to him materially. Quite often we have come across prisoners sentenced to imprisonment for a fairly long term feeling aggrieved about a mistake of a few days in computing set off of their period of remand custody, against the term of imprisonment they have to undergo. It may appear that it matters little to a prisoner who is to be released 7 years later that there has been a failure to deduct 5 days by way of set off. But it is not so. We have seen that really it matters to him much. He is keenly alive to the mistake and seeks to get the mistake corrected at the earliest. He is always and at all times certain of how many years, days and months he had spent in jail. All these indicate how valuable to him the prospect of freedom after the period of sentence is. Many accelerate their realease by purchasing remission parting with the few paise that they earn by way of wages and by donating blood in the hope that this process takes them nearer to the day when they can be back is the affectionate atmosphere at home. The most deterrent factor in imprisonment is really the fact of curtailment of personal freedom. It may not be necessary to make it harsh and inhuman in order to render the sentence of imprisonment a deterrent.
15. The main or dominant purpose of the punishment, if not the sole purpose is reforming the criminal and redirecting him into society as an honest citizen. Reformative and rehabilitative approaches must have predominant influence in framing any prison policy. To some degree this is reflected in the Prison Rules. The provision in Rule 384 of the Kerala Prison Rules 1958 enables any prisoner to send to his family one-third of the wages which he earns and to use for his personal needs one-third in jail. That is a provision which shows concern for the family of the prisoner despite the fact that he is one who is to suffer a punishment. Similarly the provision for conserving one-third of the wages earned by him to be paid to him on his release is indicative of the need

of rehabilitation. The prisoner out in the street after his term should not find himself without means to look after himself. How far the paltry sum that he could accumulate from the present nominal wages of 50 paise or a rupee per day is a different matter. But we are only pointing out that a rehabilitative approach with the intention to bring the prisoner back to the mainstream of society is not foreign to the policy of our Prison Rules.

16. Of course if there is some compelling reason why a prisoner should not be paid reasonable wages that would require consideration. If not, the advantage that a prisoner may derive and the good that may accrue to the society must persuade us to view any measure for payment of reasonable wages to the prisoner as an appropriate socially oriented measure. Payment of reasonable wages to a PRISONER would enable him to have sufficient funds to meet the minimum personal requirements in jail. It may help the prisoner in providing his dependents, may be an old mother, an invalid farther or orphaned children with the minimum to keep them, not in comfort, but out of hunger. That may go a long way to remedy an evil which is necessarily attendant upon imprisonment. Quite often it is not merely the criminal who is punished. Of course he undergoes the sentence. But the people who depend upon him, such as OLD parents may be unable to make a living for themselves. The wife and children of the prisoner may have no means to answer their primary needs. In these circumstances the dependants are severely punished, in fact more than the criminal himself. That would be quite unfair. No civilised law can conceive of imposing a punishment the impact of which is on the innocent dependants. To some extent this unfairness and injustice envisaged in our present penological approach could be mitigated by making a provision for minimum sustenance for dependants which would be the case if one-third or even one-half of the reasonable wages is passed on to them. Though that by itself may not be sufficient to maintain them that will go a long way to keep them from utter starvation and misery.

17. The advantage of giving fair wages to a prisoner may be:

1. The punishment would appear to be just, and fair and not as an exhibition of vindictiveness.
2. There would be a possibility of the prisoner being rehabilitated on release.
3. The severity of the resultant punishment on the dependants of the prisoner may be softened by payment of a substantial part of the fair wages due to the prisoner to them.

4. Any provision for payment of wages to a prisoner is a recognition of his humanness, his right as an individual. That may preserve his self-respect.
5. Such a measure would take away reasons for nursing vengeance against the society.
6. A humane approach would make it easier for the prison authorities to enforce discipline.
7. The prisoner may be induced to dedicate himself to the work.

More than all these the State can absolve itself of the charge that it is exploiting the prisoners by taking free labour, a charge which in the case of a civilised Government, is certainly not commendable.

18. There can be no two opinions that our civilised thoughts are reflected in documents such as the Universal Declaration of Human Rights adopted and proclaimed by the General Assembly resolution of 10th December, 1948. The Preamble to this declaration mentions that the foundation of freedom, justice and peace in the world is the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family. The General Assembly proclaims the Universal Declaration of Human Rights as a common standard of achievement for all people and all nations. Article 4 declares that no one shall be held in slavery or servitude. Article 23 Clause (1) of the Declaration envisages that everyone has the right to work to the free choice of employment, to just and favourable conditions of work and to protection against unemployment. Clause (3) of this Article, which is particularly relevant for our purpose provides that everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented if necessary, by other means of social protection. The International Covenant on civil and Political Rights provides in Article 10 (1) that all persons deprived, of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person Article 10 (3) which reflects modern enlightened and civilised opinion on our penological approach is of importance and may be quoted here:

"10 (3). The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status."

We have adverted to these provisions with a definite purpose. Whatever might have been the opinions held once upon a time on the right to exploit human labour,

even the labour of prisoners undergoing sentences of imprisonment, the modern approach to punishment to labour and to wages reflected in documents adverted to is unequivocal. Reformation and social rehabilitation ought to be the avowed objectives of the penological system.

19. Though we have in some detail dealt with the question of attitude to punishment we must make it clear beyond doubt that the case before us rests entirely on our understanding of our constitution in relation to the rights of the prisoner for fair wages as return for his labour. Our exercise so far was only to show that the approach we propose to adopt would not only be fair and equitable, but one consistent with civilised notions of human rights. We are not going to decide this case on the basis of ethics of giving more humane treatment to a prisoner in jail. That is for the executive and Legislature to concern themselves with on the basis of a policy approach they may choose to adopt. We confine our attention in these cases to the question of the legality and constitutionality of denying reasonable wages to a prisoner when, against his will, he has been compelled to work.
20. Now we will go into the main question in these cases, namely, whether the prisoners should be paid wages and if so should the wages be reasonable?
21. The approach to the question of payment of wages in the different countries of the world differs widely. From 1877 to 1913 some local English prisons used to pay wages or gratuity, however small, to the inmates. This practice was totally abolished in 1913 but re-introduced later in response to a fairly large body of public opinion. The wages paid in the United States of America is said to be meagre. Wages are paid in the shape of compensation in Belgium and Japan, premium' in Sweden, gratuity in China, bonus in Thailand and reserve in Portugal (Vide Bhattacharya on Prisons, at page 75). But the wages supplied in all these countries are meagre or inadequate and is not in recognition of the right of the prisoner to claim such wages. Hence to sustain a claim of the prisoner for reasonable wages, wages which a man outside the prison would obtain by negotiation supplemented by the labour and welfare laws of the country there is no precedent brought to our notice, perhaps the question is raised by the prisoners in this form for the first time. The approach in this case is therefore to be made in the light of our Constitution and the rights assured to the individual under our laws.
22. Does a prisoner lose all the rights on being sentenced to a prison or do his rights remain suspended during the period of imprisonment to be revived on his release? The answer to this, in the context of the Indian Constitution, is simple. A prisoner does not forfeit his citizenship nor does he lose his civil rights, except such rights as freedom

of movement, which are necessarily lost because of the very fact of imprisonment. This position is now beyond doubt by reason of the authoritative pronouncements of the Supreme Court. Chandrachud J., as the learned Chief Justice then was, has summed up the scope of curtailment of freedom of the prisoners in *D. B. M. Patnaik v. State of A. P.*, AIR 1974 SC 2092 thus (Para 6):

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

A similar view was expressed by the United States Supreme Court in a motion made by an inmate of the Nebraska State prison, on behalf of himself and other inmates. His complaint was that prison disciplinary proceedings did not comply with the due process clause of the Federal Constitution. Justice, White speaking for the Court said in that case. *Charles Wolff v. McDonnel*, (1974) 41 Led 2d 935 at p. 950:

*"Petitioners assert that the procedure for disciplining prison inmates for serious misconduct is a matter of policy raising no constitutional issue. If the position implies that prisoners in State institutions are wholly without the protections of the Constitution and the Due Process Clause, it is plainly untenable. Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a "retraction justified by the considerations underlying our penal system", *Price v. Johnston*, (1948) 334 US 266. 285: 92 Led 1356 : 68 S Ct 1049. But though his rights may be diminished by the needs and exigencies of the institutional environment a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."*

Wolff's case is referred to in Sunil Batra's case, (AIR 1978 SC 1675). Krishna Iyer J. observed in that case at p. 1691 (paragraph 57) thus:

*"So the law is that for a Prisoner all fundamental rights are an enforceable reality, though restricted by the fact of imprisonment. The omens are hopeful for imprisoned humans because they can enchantingly invoke *Maneka* (1978) 1 SCC 248: (AIR 1978 SC 597) and in its wake. Articles 14, 19 and even 21 to repel the deadening impact of unconscionable incarcerated inflictions based on some lurid legislative text or untested tradition. As the twin cases unfold the facts, we have to test the contentions of law on this broader basis."*

Desai. J. speaking for himself and on behalf of Chief Justice and two other Judges said in that case:

*"It is no more open to debate that convicts are not wholly denuded of their fundamental rights. No iron curtain can be drawn between the prisoner and the Constitution. Prisoners are entitled to all constitutional rights unless their liberty has been constitutionally curtailed (see *Procunier v. Martinee*, (1974) 40 L ed 2d 224 at p. 248). However, a prisoner's liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him is then all the more substantial. Conviction for a crime does not reduce the person into a non-person whose rights are subject to the whim of the prison administration and, therefore, the imposition of any major punishment within the prison system is conditional upon the observance of procedural safeguards (See *Charles Wolff v. McDonnel*, (1974) 41 L ed 2d 935 at p. 973). By the very fact of the incarceration prisoners are not in a position to enjoy the full panoply of fundamental rights because these very rights are subject to restrictions imposed by the nature of the regime to which they have been lawfully committed."*

23. We may therefore take it as well settled law in India that the fundamental rights of prisoners are restricted only to the extent called for in the nature of the sentence. They are not wholly denuded of fundamental rights. The object of the sentences against them cannot be to render them non-persons. They must continue to retain their dignity and self-respect as individuals.
24. Having found that the prisoners undergoing sentence of imprisonment in the jails of the State are entitled to the enjoyment of their fundamental rights and the guarantee of such fundamental rights is available to them except in so far as such rights may have to be curtailed or, restricted by reason of the fact of imprisonment we will proceed to examine how far their right to receive remuneration for their labour will be available to them as a Constitutional right. Article 23 (1) of the Constitution of India prohibits forced labour. Our attempt here is to examine how far labour taken from the prisoners and not properly remunerated could be said to infringe Article 23 (1) of the Constitution. To appreciate the scope of the right under Article 23 (1) it may be necessary to refer to the other provisions of the Constitution. Article 39 lays down the rules of policy to be followed by the State and Clause (a) of this Article particularly refers to the principle that the citizens should have right to adequate means to livelihood. The State has an obligation under Article 41 of the Constitution to make effective provision for securing the right to work, of course, within the limits of State's economic capacity. Just and humane conditions of work must be secured by the State. Article 42 provides for such an obligation. Article 43 envisages the duty of the State to

endeavour to secure by suitable legislation or economic organisation or in any other way to all workers a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. The securing of a living wage by way of remuneration is the essence or spirit of the message embodied in Article 43 which should inform and inspire the State in all its activities and should form the foundation for its actions.

25. Article 23 (1) of the Constitution reads:

"23. Prohibition of traffic in human beings and forced labour.-- (1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law".

Though a restricted meaning was being given by some of the High Courts in India to the terms 'forced labour' in this article treating that as something analogous to begar such an approach would not be warranted now. The scope and content of Article 23 has been well examined in the recent decision of the Supreme Court in *People's Union for Democratic Rights v. Union of India* (AIR 1982 SC 1473) and this, view has been reiterated by the Supreme Court in *Writ Petition No. 6816 of 1981* : (Reported in AIR 1983 SC 328). Article 23 (2) has application only to cases where the State thinks it necessary to impose compulsory service for public purpose such as conscription. That may have no relevance to the question now before us.

26. Now let us proceed to examine Article 23 (1) of the Constitution. It prohibits begar. It prohibits other similar forms of forced labour. The element of compulsion in forced labour need not necessarily be by reason of enforcement of contractual obligations. Social or economic compulsions may also be the basis of forced labour. Merely because remuneration is paid and that remuneration is adequate labour will not cease to be forced or compulsory. The labour should be offered voluntarily. Whether the provisions of a penal statute such as Section 53 of the Indian Penal Code which decrees labour as a content of the punishment would operate as a valid exception is an interesting question. In the *People's Union* case the court look the view that even if there be a contractual obligation on a workman to serve for a specified term if the workman is not willing to serve for the whole term, but is compelled to do so it would be forced labour. Evidently that is because even contracts need not always reflect the voluntary character of the consent. What would be the position of a statutory obligation arising by reason of a pre-constitution enactment to perform hard labour, not necessarily offered voluntarily is a matter that may call for examination as and when such a question is raised before us. We are not called upon to consider that,

question here since before us no such case was suggested and therefore we had no occasion to examine it. We assume for the purpose of this case that because of the statutory provision in Section 53 of the Indian Penal Code performance of labour by the prisoner could be enforced whether he consents to it or not but all the same another aspect of the case calls for close examination. The Indian Penal Code only decrees hard labour and not free labour. If there is a fundamental right available to a person to get remuneration for the work done by him and non-payment of such remuneration would also amount to 'forced labour' within the meaning of that term in Article 23 (1) of the Constitution of India should not the prisoners be entitled to claim that by extracting not only hard labour but also free labour from them the provision in Article 23 (1) of the Constitution has been infringed? Could they not complain that Section 5 of the Indian Penal Code enables imposing hard labour on them, but does not envisage free labour and that in the light of Article 23 (1) of the Constitution if such free labour is extracted from them that would amount to forced labour and consequently the court should come to their rescue?

27. We must frankly admit that it is the exposition of law in regard to the scope of Article 23 (1) of the Constitution in the *People's Union* case (AIR 1982 SC 1473) that has persuaded us to take the view here that the prisoners are entitled to payment of fair or living wages. The complaint in that case was that the contractors were paying the workmen engaged in the construction work for Asiad 1982 much less than the minimum wage, that there was an obligation on the contractors to pay such minimum wage and though apparently the workmen had offered their services voluntarily for inadequate remuneration that was because of economic compulsions and that such labour too will fall within the scope of the term 'forced labour' in Article 23 (1) of the Constitution. We will now refer to the discussion on the question in the *People's Union* case. In paragraph 15 of the judgment Justice Bhagwati, speaking for the Bench, observed:

"15. Now the next question that arises for consideration is whether there is any breach of Article 23 when a person provides labour or service to the State Or to any other person and is paid less than the minimum wage for it. It is obvious that ordinarily no one would willingly supply labour or service to another for less than the minimum wage, when he knows that under the law he is entitled to get minimum wage for the labour or service provided by him. It may therefore be legitimately presumed that when a person provides labour or service to another against receipt of remuneration which is less than the minimum wage, he is acting under the force of some compulsion which drives him to work though he is paid less than what he is entitled under law to receive. What Article 23 prohibits is 'forced labour' that is labour or service which a person is forced to provide and 'force' which would make such labour or service

'forced labour' may arise in several ways. It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as 'force' and if labour or service is compelled as a result of such 'force', it would be 'forced labour'. Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have, no, choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him. And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly 'forced labour'. There is no reason why the word 'forced' should be read in a narrow and restricted manner so as to be confined only to physical or legal 'force' particularly when the national charter, its fundamental document has promised to build a new socialist republic where there will be socio-economic justice for all and everyone shall have the right to work, to education and to adequate means of livelihood. The Constitution makers have given us one of the most remarkable documents in history for ushering in a new socio-economic order and the Constitution which they have forged for us has a social purpose and an economic mission and therefore every word or phrase in the Constitution must be interpreted in a manner which would advance the socio-economic objective of the Constitution. It is not often that in a capitalist society economic circumstances exert, much greater pressure on an individual in driving him to a particular course of action than physical compulsion or force of legislative provision.

The word 'force' must therefore be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leaves no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wages. Of course, if a person provides labour or service to another against receipt of the minimum wage it would not be possible to say that the labour or service provided by him is 'forced labour' because he gets what he is entitled under law to receive. No inference can reasonably be drawn in such a case that he is forced to provide labour or service for the simple reason that he would be providing labour or service against receipt of what is lawfully payable to him just like any other person who is not under the force of any compulsion. We are therefore of the view that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words "forced labour" under Article 23. Such a person would be

entitled to come to the Court for enforcement of his fundamental right under Article 23 by asking the Court to direct payment of the minimum wage to him so that the labour or service provided by him ceases to be 'forced labour' and the breach of Article 23 is remedied. It is therefore clear that when the petitioners alleged that minimum wage was not paid to the workmen employed by the contractors, the complaint was really in effect and substance a complaint against violation of the fundamental right of the workmen under Article 23."

28. The Supreme Court reiterated what it said in the *People's Union Case* (AIR 1982 SC 1473) in the case of *Sanjit Roy v. State of Rajasthan* (Writ Petition No. 6816 of 1981) : (Reported in AIR 1983 SC 328). There also a similar question arose. In a drought hit area the State Government undertook relief work evidently with the object of providing those affected with some form of work, but the wages Paid were unremunerative much less than the minimum wages. The view taken in the *People's Union* case was reiterated in that case. The Court said (at p. 333): --

"I must, therefore, hold consistently with this decision that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the meaning of the words 'forced labour' and attracts the condemnation of Article 23. Every person who provides labour or service to another is entitled at the least to the minimum wage and if anything less than the minimum wage is paid to him, he can complain of violation of his fundamental right under Article 23 and ask the court to direct payment of the minimum wage to him so that the breach of Article 23 may be abated."

29. We have therefore to decide the case before us on the basis of the approach made by the Supreme Court in the cases adverted to. In the case of those sentenced to simple imprisonment the stand taken by the Government is that the work taken from them is on the basis of their consent. If so necessarily they have to be paid fair or living wages. We have been in this judgment using the terms 'fair wages', 'living wages' and 'reasonable wages' not intending thereby a different, content for each of these terms or giving them any technical meaning. By the employment of these terms we only mean wages that would be reasonable. What would be paid to an employee, who is free to negotiate and has the support of the welfare and labour legislations, should determine the standard of reasonable wages. There is no justification for the State to claim that it is free to take prison labour without payment, that whatever it pays is ex gratia and is not as of right and therefore there can be no claim for Proper wages. A prisoner who undergoes the sentence in jail must necessarily have his movement restricted. That is involved in the very concept of imprisonment. His communication with the rest of the world would also be necessarily restricted. His right to practice his

profession, however fundamental it may be will not be available to him while in the jail. But there are other valuable rights any curtailment of which will have no relevance to the nature of the punishment. The right not to be exploited in contravention of Article 23 (1) is a right guaranteed to a citizen and there is no reason why a prisoner should lose his right to receive wages for his labour. In other words there is no reason why a prisoner should be compelled to do forced labour, forced in the sense that such labour is unremunerative or not paid for. We have taken pains to explain by way of preface to the discussion on the material issue in the case that it would be quite consistent, with a civilised approach that wages are paid to a prisoner for the work taken from him. We have enumerated the advantages of such payment. If on a proper understanding of Article 23 (1) of the Constitution there is no justification to read that Article as excluding the case of a prisoner who is asked to do work on payment of illusory wages we see no compelling reason to do so. The consequence is that to deny a prisoner reasonable wages in return for his work will be to violate the mandate in Article 23 (1) of the Constitution. Consequently the State could be directed not to deny such reasonable wages to the prisoners from whom the State takes work in its prisons.

30. That necessarily takes us to the final question, namely what should be the reasonable wages to be paid to the prisoners. Of course there could be no two opinion that the wages now paid cannot, be taken seriously at all. It cannot be said to be even inadequate wages, for. 50 paise minimum and Rs. 1.60 maximum per day cannot at all be said to possess the character of remuneration for the work taken from the prisoners. The minimum wage laws of this country prescribe what minimum wage has to be paid in each industry. These minimum wages, it must be understood, are fixed at a much lower level than living wages. Irrespective of the capacity of the industry to pay. It has obligation to pay minimum wages and if it cannot pay even such minimum wage it does not deserve to exist. Reasonable wages would therefore always exceed minimum wages. Having said so we think we should leave it to the Government what reasonable wages should be paid to the inmates of the prisons. A unanimous wage structure would of course be desirable lest there be charge of discrimination, in assigning work. It is for the Government to consider all aspects of the question so that a just and reasonable wage structure is designed for the inmates of the prisons. We can appreciate that time must necessarily be taken by the Government in deciding upon such a wage structure. Until then it cannot be that, the present situation is to continue. There must be an ad hoc measure, a measure which takes into account the current wages in, several industries, the minimum wages fixed, the increase in cost

of living in the recent days and such other matters of relevance. After considering all these matters and going through the minimum wages notifications in regard to various industries we think that as an ad hoc measure we may safely fix Rs. 8 per day as reasonable wages subject of course to alteration later, when as a result of further study, research and assessment the Government is able to decide upon appropriate wages to be paid to the prisoners.

31. Before leaving the case we think it is necessary to advert to two matters. We have taken note of the financial impact our decision may have on the State exchequer, not that this should dissuade us in any way from coming to a correct decision. We have been told by the statement submitted by the Advocate General that the number of employed prisoners in the prisons, in the State is 856 and even if all of them is Raid reasonable wages at this rate of ad hoc wages now fixed, it cannot be said that there would be such a strain on the exchequer as would affect seriously the functioning of the Government. The annual payment to the prisoners as wages taking the number of working days as 300 would be only in the region of Rs. 20,00,000. The other aspect which we wish to notice here is the absence of rehabilitative programmes in the State. Prisoners who have been put to work in the jails will benefit by such work only if on being released they are able to rehabilitate themselves in such work. That no doubt requires a large and comprehensive scheme, but the good results that will accrue to the State by turning the prisoners into responsible self-respecting citizens would necessarily justify the time spent on and attention given to devising and implementing a proper rehabilitation programme. We had called the attention of the Government to this aspect of the matter in the report sent by the High Court in 1980 and we are afraid it has not been seriously taken note of yet.

We therefore direct that forthwith the Government make arrangements to pay to the inmates of the prisons, who are put to work, wages at Rs. 8 per day, part of which they may utilise for themselves, part of which they could arrange to remit to their dependents and part accumulated to be paid to them at the time of release. Rule 384 of the Kerala Prison Rules may need immediate attention in the light of this judgment and we hope the Government will look into it forthwith.

High Court of Himachal Pradesh
AIR 1992 HP 70

Gurdev Singh and Others etc.

vs

State of Himachal Pradesh and Others

Bhawani Singh, D. Gupta, JJ.

1. These criminal writ petitions, being common in nature, scope and effect are being decided by a common judgment and the learned counsel for the parties also agree that they should be so decided.
2. The petitioners, in both these petitions, are undergoing imprisonment in the jails of the State. They submitted the petitions to this Court which were placed on Judicial side for examination and decision by Chief Justice P.D. Desai, as he then was. In Criminal Writ Petition 6 of 1985 (*Gurdev Singh v. State of H. P.*) the petitioners complain that they are employed for work but are being paid Rs. 1.50 per day for the labour. They also say that no wages are paid for the first three months of labour. In Criminal Writ Petition No. 49 of 1985 (*Bhag Singh Chauhan v. State of H.P.*), in addition to the allegation of the improper management of wage amounts by the Superintendent of Jail and the Store Keeper, they also say that they are forced to work with contractors either at less wages or no wages at all. The allegation as to the mis-utilization of wage amounts were inquired into by the District and Sessions Judge, Shimla on the directions by this Court. However, the report discloses that the allegation of Bhag Singh, convict regarding the mis-utilization of the wage amounts against the jail officials has no substance. We have, therefore, no material before us to arrive at a conclusion favourable to the petitioner and against the jail officials. However, there is something to be said on the engagement, rate of wages, their receipt and management by the jail authorities, which aspect, we will turn to, at an appropriate place in the succeeding part of this judgment.
3. In his reply, the Inspector General of Prisons stated that the payment of wages to prisoners for rendering services in the jail factory/garden/kitchen etc. is regulated by the provisions of the Wage Earning Scheme applicable in respect of Model Central Jail, Nahan and District Jail, Dharamshala. Prisoners are paid wages @ Rs. 3/- (skilled), Rs.2.25 semi-skilled) and Rs. 1.50 (unskilled) for full task.

The wages are paid to the workers of various categories in the following manner:--

- (1) A worker who performs the prescribed task of standard quality is entitled to the payment of wages prescribed for the trade or work in which he is employed.
- (2) A worker who performs task of standard quality in excess of the prescribed isk is entitled to payment of additional wages in proportion to the additional work at the rate prescribed i.e. Rs. 3/- 2/2/25 and Rs. 1/50 respectively for skilled, semi-skilled and unskilled labour.
- (3) No prisoner who does not accomplish the prescribed task of the standard quality is entitled to any payment of wages provided that 50 per cent of the wages prescribed in Rs. 3/-, Rs. 1/25 and Rs. 1/50 respectively for skilled semi-skilled and unskilled work, are payable in the following cases : --
 - (a) to convicted criminal prisoners in skilled trades for duration of the period of training in excess of three months provided the prisoners accomplished a task of the standard quality exceeding 50 per cent.
 - (b) Undertrials and simple imprisonment prisoners after three months of admission to the wage earning Scheme/system provided they accomplish the task of the standard quality exceeding 50 per cent.
 - (c) The unskilled workers recommended hard, medium and light work by the Medical Officer concerned get wages @ Rs. 1/50, Rs. 1/25 and Rs. 1/- respectively per day.
4. For the purpose of payment of wages prison labour is classified into three categories as defined below:--
 - (i) 'Skilled workers' those employed on work which involve either physical or mental or both kinds of skill in its execution and which cannot be accomplished by ordinary labour with proficiency without sufficient skill.
 - (ii) 'Semi-skilled Worker' means workers engaged on a task which cannot be performed by untrained hands but which can be executed with some training and practice but does not require any strict standard of precision.
 - (iii) 'Unskilled Worker' means workers engaged on a task which does not require any skill or training.
5. Classification of each prisoner eligible for employment on various industries and trades allocated to each jail are made in accordance with the above categories by the Superintendent Jail concerned for the purpose of payment of wages in accordance

with the nature of work on which the prisoner is employed with the approval of the Inspector General of Prisons.

6. Out of the wages earned by the prisoners they are allowed to spend Rs. 25/- per month to purchase items such as Ghee, bodies, cigarettes etc. The balance is deposited in their personal account. If they so desire amount is also remitted to their families. But no such payment is made to the prisoners.
7. The following categories of prisoners are eligible for employment under the Scheme:
 - (i) All prisoners sentenced to rigorous imprisonment.
 - (ii) Criminal prisoners sentenced to simple imprisonment as long as they so desire provided that no prisoner not sentenced to rigorous imprisonment shall be punished for neglect of work.
 - (iii) All convicted criminal prisoners with their consent.
 - (iv) Civil prisoners subject to provisions of paras 797 and 798 of Punjab Jail Manual.

Provided that women prisoners during pre-natal and post-natal period and convalescent prisoners shall be exempted from work on the recommendations of the Medical Officer.
8. While allotting work to the prisoners the following factors are taken in to consideration:
 - i) Physical and mental health;
 - ii) Age;
 - iii) Length of sentence;
 - iv) Requirements of security and discipline;
 - v) Previous occupation, training and experience;
 - vi) Result of vocational aptitude tests, where given;
 - vii) Area (Urban and rural) where the inmate is likely to resettle after released and possibilities of employment;
 - viii) Level of work-skills and abilities;
 - ix) Rehabilitation needs;
 - x) Possibilities of imparting multiple skills;
 - xi) Vocational training needs;
 - xii) Inmate's occupational performance so far as they are compatible with institutional conditions and available facilities for work and training.

Note: Prisoners are assigned work carefully on the basis of their interests, abilities, training needs and trust-worthiness. But questionable and superficial interests are not considered.

9. The allotment of work in the above manner is subject to the following conditions:
 - (i) Requirements of the institution for essential services and maintenance jobs are considered on priority basis;
 - (ii) Only volunteers are employed in conservancy work.

Under the Scheme there is no provision for payment of compensation to prisoner who may sustain injury while on work.
10. The State has also placed its case through various affidavits, filed at various stages of this case. In the affidavit of 5-8-1985 of Special Secretary (Home) to the Government by Himachal Pradesh, it has been stated that the State Government is profoundly concerned over the welfare of prisoners and the need for jail reforms which it would like to within its resource limits. It has been admitted that the present conditions of jails are not as ideal as the Govt. would like it to be and in order to ameliorate the conditions in the jails, the necessary steps in that behalf are under consideration.
11. It has further been stated that payment of minimum wages to all prisoners including those undergoing rigorous imprisonment would amount to abolition of rigorous imprisonment which has remained so far as accepted principle of jurisprudence and as long as the statute recognizes the concept of rigorous imprisonment, providing of minimum wages to all prisoners would, in essence, obliterate the difference between rigorous imprisonment and simple imprisonment.
12. According to the Government, manual work by prisoners sentenced to labour is recognized part of Jail Administration and discipline as envisaged by Prisons Act, 1894 and the Punjab Jail Manual, as applicable to Himachal Pradesh. To prescribe minimum wages for such labour of the prisoners inside the prison - the benefit of which goes mostly to the prisoners themselves - would adversely affect Jail Administration, discipline and morale. Moreover, the stipulation of minimum or reasonable wages combined with the concept of rigorous imprisonment denotes some kind of assured employment to the prisoners in preference to the law-abiding unemployed citizens outside the prison wall, and since the Government has not been able to provide employment to all such unemployed citizens, it does not consider it proper to do so in the case of prisoners. It has further been stated that the Government also feels that the stipulation of minimum wages for manual work done by the prisoners in

the jail will restrict the discretion of the Government to introduce different kinds of jail reforms in future, because any such step would bind it to inflexible quanta of wages which the Government may not always be able to provide for. The jail reforms, in the forms of education and technical training, would prove immensely useful for post-release rehabilitation and the claim for minimum or reasonable wages is thus not acceptable.

13. Then, it has been stated that in pursuance of this Court's directions of 16-9-1985, the Government has deleted from Clause 12 of the Wage Earning Scheme Sub-clauses (iii) and (iv) vide order dated 28-9-1985 to remove the disability clause against prisoners sentenced imprisonment for three months or less and the prisoners for the first three months of their imprisonment. By affidavit of September 30, 1985, it has been stated by the Inspector General of Prisons that no prisoner, whose services were utilized in the jail factory/garden/kitchen and/or at any other place during the last five years, has/had received any injury by accident arising out of and in the course of his employment for such work.

....

19. Principally, four questions arise for determination in this case. The first question is whether a prisoner is entitled to claim wages in return for his work and, if so, what should be the wages payable to him. The second question relates to the reasonableness of the provision debarring prisoners from claiming wages for a period of three months from the day of their incarceration. The third is about the compulsory deduction of some part of the wages towards maintenance and the fourth relates to the initiation of reforms in various jails in the State.

.....

21. The Constitution of India is the supreme law of the nation and all other laws have to be enacted within the parameters laid down by it. The same test has to be passed by all laws which were in force on the commencement of the Constitution (Article 13). The Preamble sets the human tone and temper of the Constitution and envisages, among other things, justice, equality and the dignity of the individuals. Article 21 is the repository of human values, prescribes fair procedure and forbids arbitrariness, barbarities, punitive or processual. Article 23 prohibits forced labour when it says:

"23. Prohibition of traffic in human beings and forced labour.

(1) *Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.*

- (2) *Nothing in this Article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them."*
22. The apex Court had occasion to interpret the meaning of this provision in large variety of cases, however, for the purpose of this case, it would be necessary to refer to two important decisions, First case is AIR 1982 SC 1473 (*People's Union for Democratic Rights v. Union of India*). In paras 14, 15 and 16, the Court said:
- "14. When the Constitution makers enacted Article 23 they had before them Article 4 of the Universal Declaration of Human Rights but they deliberately departed from its language and employed words which would make the reach and content of Article 23 much wider than that of Article 4 of the Universal Declaration of Human Rights. They banned "traffic in human beings which is an expression of much larger amplitude than 'slave trade' and they also interdicted "begar and other similar forms of forced labour." The question is what is the scope and ambit of the expression 'begar and other similar forms of forced labour'? Is this expression wide enough to include every, conceivable form of forced labour and what is the true scope, and meaning of the word "forced labour?" The word 'begar' in this Article is not a word of common use in English language. It is a word of Indian origin which like many other words has found its way in the English vocabulary. It is very difficult to formulate a precise definition of the word 'begar', but there can be no doubt that it is a form of forced labour under which a person is compelled to work without receiving any remuneration. Molesworth describes 'begar' as "labour or service exacted by a government 'or person in power without giving remuneration for it.' Wilson's glossary of Judicial and Revenue Terms gives the following meaning of the word 'begar':*
- "a forced labourer, one pressed to carry burthens for individuals or the public. Under the old system, when pressed for public service, no pay was given. The Begari, through still liable to be pressed for public objects, now receives pay. Forced labour for private service is prohibited."*
- "Begar" may therefore be loosely described as labour or service which a person is forced to give without receiving any remuneration for it. That was the meaning of the word 'begar' accepted by a Division Bench of the Bombay High Court in *S. Vasudevan v. S.D. Mital*, AIR 1962 Bom 53. 'Begar' is thus clearly a film of forced labour. Now it is not merely 'begar' which is unconstitutionally prohibited by Article 23 but also all other similar forms of forced labour. This Article strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values. The practice of forced labour is condemned in almost every international instrument dealing with human rights. It is interesting to find that as far back as 1930 long before the Universal Declaration of Human rights came into being. International Labour Organisation adopted convention No. 29 laying down that every member of the International Labour Organisation which ratifies this convention shall "suppress the use of forced or compulsory labour in all its forms" and this prohibition was elaborated in Convention No. 105 adopted by the*

*International Labour Organisation in 1957, The words “forced or compulsory labour” in Convention No. 29 had of course a limited meaning but that was so on account of the restricted definition of these words given in Article 2 of the Convention. Article 4 of the European Convention of Human Rights and Article 8 of the International Covenant on Civil and Political Rights also prohibit forced or compulsory labour. Article 23 is in the same strain and it enacts a prohibition against forced labour in whatever form it may be found. The learned counsel appearing on behalf of the respondent laid some emphasis on the word ‘similar’ and contended that it is not every form of forced labour which is prohibited by Article 23 but only such form of forced labour as is similar to ‘begar’ and since ‘begar’ means labour or service which a person is forced to give without receiving any remuneration for it, the interdict of Article 23 is limited only to those forms of forced labour where labour or service is exacted from a person without paying any remuneration at all and if some remuneration is paid, though it be inadequate, it would not fall within the words ‘other similar forms of forced labour’. This contention seeks to unduly restrict the amplitude of the prohibition against forced labour enacted in Article 23 and is in our opinion not well founded. It does not accord with the principle enunciated by this Court in *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621 : AIR 1978 SC 597 (supra) that when interpreting the provisions of the Constitution conferring fundamental rights, the attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and content. It is difficult to imagine that the Constitution makers should have intended to strike only at certain forms of forced labour leaving it open to the socially or economically powerful sections of the community to exploit the poor and weaker sections by resorting to other forms of forced labour. Could there be any logic or reason in enacting that if a person is forced to give labour or service to another without receiving any remuneration at all, it should be regarded as a pernicious practice sufficient to attract the condemnation of Article 23, but if some remuneration is paid for it, then it should be outside the inhibition of that Article? If this were the true interpretation, Article 23 would be reduced to a mere rope of sand, for it would then be the easiest thing in an exploitative society for a person belonging to a socially or economically dominant class to exact labour or service from a person belonging to the deprived and vulnerable section of the community by paying a negligible amount of remuneration and thus escape the rigour of Article 23. We do not think it would be right to place on the language of Article 23 an interpretation which would emasculate its beneficent provisions and defeat the very purpose of enacting them. We are clear of the view that Article 23 is intended to abolish every form of forced labour. The words “other similar forms of forced labour” are used in Article 23 not with a view to importing the particular characteristic of ‘begar’ that labour or service should be exacted without payment of any remuneration but with a view to bringing within the scope and ambit of that Article all other forms of forced labour and since ‘begar’ is one form of forced labour, the Constitution makers used the words “other similar forms of forced labour”. If the requirement that labour or work should be exacted without any remuneration were imported in other forms of forced labour, they would straightway come within the meaning of the word ‘begar’ and in that event there*

would be no need to have the additional words "other similar forms of forced labour". These words would be rendered futile and meaningless and it is a well recognised rule of interpretation that the Court should avoid a construction which has the effect of rendering any words used by the legislature superfluous or redundant. The object of adding these words was clearly to expand the reach and content of Article 23 by including in addition to 'begar', other forms of forced labour within the prohibition of that Article. Every form of forced labour, 'begar' or otherwise, is within the inhibition of Article 23 and it makes no difference whether the person who is forced to give his labour or service to another is remunerated or not. Even if remuneration is paid, labour supplied by a person would be hit by this Article if it is forced labour, that is, labour supplied not willingly but as a result of force or compulsion. Take for example a case where a person has entered into a contract of service with another for a period of three years and he wishes to discontinue serving such other person before the expiration of the period of three years. If a law were to provide that in such a case the contract shall be specifically enforced and he shall be compelled to serve for the full period of three years, it would clearly amount to forced labour and such a law would be void and offending Article 23. That is why specific performance of a contract of service cannot be enforced against an employee and the employee cannot be forced by compulsion of law to continue to serve the employer. Of course, if there is a breach of the contract of service, the employee would be liable to pay damages to the employer but he cannot be forced to continue to serve the employer without breaching the injunction of Article 23. ...

15. Now the next question that arises for consideration is whether there is any breach of Article 23 when a person provides labour or service to the State or to any other person and is paid less than the minimum wage for it. It is obvious that ordinarily no one would willingly supply labour or service to another for less than the minimum wage, when he knows that under the law he is entitled to get minimum wage for the labour or service provided by him. It may therefore be legitimately presumed that when a person provides labour or service to another against receipt of remuneration which is less than the minimum wage, he is acting under the force of some compulsion which drives him to work though he is paid less than what he is entitled under law to receive. What Article 23 prohibits is 'forced labour' that is labour or service which a person is forced to provide and 'force' which would make such labour or service 'forced labour' may arise in several ways. It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as 'force' and if labour or service is compelled as a result of such 'force', it would be 'forced labour'. Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate

the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him. And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly 'forced labour'. There is no reason why the word 'forced' should be read in a narrow and restricted manner so as to be confined only to physical or legal 'force' particularly when the national character, its fundamental document has promised to build a new socialist republic where there will be socio-economic justice for all and everyone shall have the right to work, to education and to adequate means of likelihood. The Constitution makers have given us one of the most remarkable documents in history for ushering in a new socio-economic order and the Constitution which they have forged for us has a social purpose and an economic mission and therefore every word or phrase in the Constitution must be interpreted in a manner which would advance the socio-economic objective of the Constitution. It is not unoften that in a capitalist society economic circumstances exert much greater pressure on an individual in driving him to a particular course of action than physical compulsion or force of legislative provision. The word 'force' must therefore be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leaves no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage. Of course, if a person provides labour or service to another against receipt of the minimum wage it would not be possible to say that the labour or service provided by him is 'forced labour' because he gets what he is entitled under law to receive. No inference can reasonably be drawn in such a case that he is forced to provide labour or service for the simple reason that he would be providing labour or service against receipt of what is lawfully payable to him just like any other person who is not under the force of any compulsion. We are therefore of the view that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words "forced labour" under Article 23. Such a person would be entitled to come to the Court for enforcement of his fundamental right under Article 23 by asking the Court to direct payment of the minimum wage to him so that the labour or service provided by him ceases to be 'forced labour' and the breach of Article 23 is remedied. It is therefore clear that when the petitioners alleged that minimum wage was not paid to the workmen employed by the contractors, the complaint was really in effect and substance a complaint against violation of the fundamental right of the workmen under Article 23.

16. Before leaving this subject, we may point out with all the emphasis at our command that whenever any fundamental right which is enforceable against private individuals such as, for example, a fundamental right enacted in Article 17 or 23 or 24 is being violated, it is the constitutional obligation of the State to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the

fundamental right by the private individual who is transgressing the same. Of course, the person whose fundamental right is violated can always approach the Court for the purpose of enforcement of his fundamental right, but that cannot absolve the State from its constitutional obligation to see that there is no violation of the fundamental right of such person, particularly when he belongs to the weaker section of humanity and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him. The Union of India, the Delhi Administration and the Delhi Development Authority must therefore be held to be under an obligation to ensure observance of these various labour laws by the contractors and if the provisions of any of these labour laws are violated by the contractors, the petitioners vindicating the cause of the workmen are entitled to enforce this obligation against the Union of India, the Delhi Administration and the Delhi Development Authority by filing the present writ petition ..."

23. The second case is AIR 1983 SC 328 (*Sanjat Roy v. State of Rajasthan*) where the Supreme Court reiterated what he had said in the *People's Union* case (AIR 1983 SC 1473) (supra). In this case also, similar kind of question arose for consideration and determination. In a drought hit area, the State Government undertook the relief work evidently with the object of providing those affected with some form of work, but the wages paid were unremunerative, much less than the minimum wages. The view taken in the *People's Union* case (supra) was reiterated again when the Court said (at p. 333) (of AIR 1983 SC 328).

"I must, therefore, hold consistently with this decision that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the meaning of the words 'forced labour' and attracts the condemnation of Article 23. Every person who provides labour or service to another is entitled at the least to the minimum wage and if anything less than the minimum wage is paid to him, he can complain of violation of his fundamental right under Article 23 and ask the Court to direct payment of the minimum wage to him so that the breach of Article 23 may be abated."

-
31. From the aforesaid statement of law by the Supreme Court, it is plainly clear that remuneration, which is not less than the minimum wages, has to be paid to anyone who has been asked to provide labour or service by the State. The payment has to be equivalent to the services rendered, otherwise it would be 'forced labour' within the meaning of Article 23 of the Constitution. Here, there is no difference between a prisoner serving sentence inside the prison walls and a free man in the society. Although on account of incarceration, a prisoner may lose enjoyment of some of the right, but there is no total extinction by reason of the jail sentence, Section 53

of the Indian Penal Code may provide for assignment of work in cases of rigorous imprisonment, however, it does not say that the labour provided by such a prisoner has to be free. Again, it does not envisage subjecting the prisoners) to obnoxious, harsh and uncalled for duties which are ex facie condemnable. Here, reference can be made to *Nawal Kishore Thakur v. Brahmu Ram*, ILR (1984) Him Pra 381: (1985 Cri LJ 244 at p. 245):

- "7. Provisions such as those made in paragraph 702 read with the Explanation to Paragraph 703 of the Manual are, *prima facie*, violative of Article 21 of the Constitution because they could be regarded as an infraction of liberty or life in its wider sense without prescribing in respect thereof by law a procedure which is right, just, fair and reasonable. In fact, those provisions involve forced labour for a prisoner because no payment is contemplated to be made for such work, although, for other work within the jail, which could be classified as jail industry, payment at the usual rate is required to be made. Employment of a prisoner for such private work of menial nature against his will and without remuneration also offends human dignity which again is infraction of life and liberty as understood in its wider sense. Besides, such, provisions also, *prima facie*, violate Article 14 of the Constitution because they are arbitrary, irrational, unjust and unfair in their operation."
- "8. Under the circumstances, the operation of Paragraph 702 and the Explanation to Paragraph 703 of the Manual is suspended with immediate effect. The State Government is directed to issue instructions forthwith, to all jail authorities in the State not to take from any prisoner the work of the nature contemplated by paragraph 702 and the Explanation to Paragraph 703 of the Manual. The State Government will also immediately take up for consideration the question of the repeal of provisions of Paragraph 702 read with Explanation to Paragraph 703 of the Manual and such of similar provisions of anachronistic nature in light of the observations made hereinabove and a report as regards the action taken in the matter will be placed on the record of this proceeding on or before July 30, 1984."

32. As recorded in the preceding part of this judgment, the State Government has complied with this Court's directions by issuing notification of July 28, 1984.
33. We, therefore, proceed to reject the submission that the State can put the prisoners, sentenced to rigorous imprisonment, to hard labour without payment of any wages in view of the nature of the sentence they serve. Equally untenable is the plea that giving of better facilities and payment of wages to them would mean creating an impression that committing of crime and going to the prison is a better mode of living and earning wages. This kind of understanding of the matter is completely misconceived. It is difficult to comprehend the matter in this way. No one would like to commit crime, suffer indignity and undergo obligatory hard labour by losing all benefits which a free

man can otherwise avail in the society. While examining this kind of argument, the learned Judges of the Kerala High Court in AIR 1983 Ker 261 (*In the matter of Prison Reforms Enhancement of Wages of Prisoners*) said in para 14 of the judgment that:

"It appears to us that it would be unreasonable to assume that merely because a person is moderately well-fed and looked after under humane conditions in the jail he is unconcerned with the sentence or feels happy in the jail. To a person under restraint the most valuable right the absence of which he feels deeply, is his personal freedom, the freedom to move about freely in society the freedom to associate with his kith and kin and the freedom to work as he likes to earn and maintain his dependants. The absence of access to the affection of the members of his family makes him emotionally upset and he waits for the day when he will be able to go back to his home for a reunion with his close relations and friends. Everyday of his sentence is of count to him materially. Quite often we have come across prisoners sentenced to imprisonment for a fairly long terms feeling aggrieved about a mistake of a few days in computing set off of their term of imprisonment they have to undergo. It may appear that it matters little to a prisoner who is to be released 7 years later that there has been a failure to deduct 5 days by way of set off. But it is not so. We have seen that really it matters to him much. He is keenly alive to the mistake and seeks to get the mistake corrected at the earliest. He is always and at all times certain of how many years, days and months he had spent in jail. All these indicate how valuable to him the prospect of freedom after the period of sentence is. Many accelerate their release by purchasing remission parting with the few paise that they earn be way of wages and by donating blood in the hope that this process takes them nearer to the day when they can be back in the affectionate atmosphere at home. The most deterrent factor in imprisonment is realty the fact of curtailment of personal freedom. It may not be necessary to make it harsh and inhuman in order to render the sentence of imprisonment a deterrent."

34. We are told that there are various kinds of prisoners in the jail. However, compulsory work is necessary in the case of those who are sentenced to rigorous imprisonment while in other cases the prisoners are subjected to work after receiving their consent. Now, the question arises whether all kinds of prisoners should be put to work and paid accordingly. In our opinion, subjecting prisoners, sentenced to rigorous imprisonment, to hard work and providing work to others is not at all bad. However, the same has to be done keeping in view their will, physical strength and the uppermost obligation to make payment for the work got done from them. There has to be no distinction between the work inside the prison and outside it. Similarly there has to be no distinction between 'open prisons' and 'closed prisons'.
35. We have no information about other prisons in the State except the Open Air Jail at Bilaspur and we are happy to note that the incharge of the said jail makes all efforts to secure work for the engagement of the prisoners with various organisations near

and around the jail premises thereby not only keeping the prisoners busy but also enabling them to have social contacts outside the jail and earn wages for themselves and their dependents. These efforts should not only increase in the Open Air Jail at Bilaspur but also in other jails in the State so that the prisoners are engaged in various kinds of works, obviously, subject to security, jail discipline, their physical capacities and other weighty reasons to be duly recorded relating to certain case(s). This all will create sense of discipline and responsibility amongst them. It would educate the prisoners in various vocations and help them to rehabilitate themselves suitably as soon as they are out of the jails.

36. Now, the question arises about the quantum of wages payable to them. On the Court's insistence, the Government appears to have considered the matter and revised the wages, as already stated above, but this increase is woefully inadequate. They cannot be justified on any basis and we are not convinced by the submission that these are conventional. In case they have linkage with the past, its continuance cannot be sustained after the commencement of the Constitutional of India. Moreover, it appears that it proceeds on the assumption that in every treatment towards the prisoner, there has to be some indication of retribution for the crime committed by the prisoner. As a matter of fact, the propounders of this kind of thought have lost sight of the fact that as against the retributive theory of punishment, reformatory theory has been brought to the fore by the social scientists, scholars and law professors and they lay great emphasis on the rehabilitation of the prisoners and call for extensive, effective and rewarding reforms in this field. The information supplied to us by the learned counsel for the State discloses that the State Government is not paying even the minimum wages, fixed by the State Government under the Minimum Wages Act, 1948 and notified on 26-1-1990, to the prisoners. Payment of minimum wages, as already noticed above, is a mandatory requirement under the Minimum Wages Act, 1948. It has to be paid compulsorily since the non-payment thereof renders one liable to prosecution. Shri K.D. Sood referred to paras 16 and 17 of the Kerala judgment and submitted that the State Government has to pay reasonable wages/living wages which are decidedly higher than the minimum wages. We quote these paras of the judgment as under:

"... Payment of reasonable wages to a prisoner would enable him to have sufficiently funds to meet the minimum personal requirements in jail. It may help the prisoner in providing his dependents, may be an old mother, an invalid father or orphaned children with the minimum to keep them, not in comfort, but out of hunger. That may go a long way to remedy an evil which is necessarily-attendant upon imprisonment. Quite often it is not merely the criminal who is punished. Of course, he undergoes the

sentence. But the people who depend upon him, such as old parents may be unable to make a living for themselves. The wife and children of the prisoner may have no means to answer their primary needs. In these circumstances the dependents are severally punished in fact more than the criminal himself. That would be quite unfair. No civilised law can conceive of imposing a punishment, the impact of which is on the innocent dependants. To some extent this unfairness and injustice envisaged in our present penological approach could be mitigated by making a provision for minimum sustenance for dependants which would be the case if one third or even one-half of the reasonable wages is passed on to them. Though that by itself may not be sufficient to maintain them from utter starvation and misery.

- i. *The punishment would appear to be just and fair and not as an exhibition of vindictiveness.*
 - ii. *There would be a possibility of the prisoner being rehabilitated on release.*
 - iii. *The severity of the resultant punishment on the dependants of the prisoner may be softened by payment of a substantial part of the fair wages due to the prisoner to them.*
 - iv. *Any provision for payment of wages to a prisoner is a recognition of his humanness, his right as an individual. That may preserve his self respect.*
 - v. *Such a measure would take away reasons for nursing vengeance against the society.*
 - vi. *A humane approach would make it easier for the prison authorities to enforce discipline.*
 - vii. *The prisoner may be induced to dedicate himself to the work.*
 - viii. *More than all these, the State can absolve itself of the charge that it is exploiting the prisoners by taking free labour, a charge which in the case of a civilised Government, is certainly not commendable.”*
37. Similar question came for consideration before the Full Bench of the Gujarat High Court in Reference on the report of *Jail Reforms Committee v. State of Gujarat* (Criminal Reference No. 2/84 decided on 31-1-1985) where the relevant observations can be reproduced as under:
- “We are happy to note that the State Government accepted the view expressed by this Court that minimum wages that is being paid in similar industries must be paid to the prisoners. It is a very progressive approach by this State Government.....”*
38. While dealing with the question of the extent of wages payable to the prisoners, the Kerala High Court, AIR 1983 Kerala 261 said in paras 29 and 30 of the judgment that:
- “29. We have therefore to decide the case before us on the basis of the approach made by the Supreme Court in the cases adverted to. In the case of those sentenced to simple imprisonment the stand taken by the Government is that the work taken from them is on the basis of their consent. If so necessarily they have to be paid*

fair or living wages. We have been in this judgment using the terms' 'fair wages', 'living wages' and 'reasonable wages' not intending thereby a different content for each of these terms or giving them any technical meaning. By the employment of these terms we only mean wages that would be reasonable. What would be paid to an employee, who is free to negotiate and has the support of the welfare and labour legislations, should determine the standard of reasonable wages. There is no justification for the State to claim that it is free to take prison labour without payment that whatever it pays is ex gratia and is not as of right and therefore there can be no claim for proper wages. A prisoner who undergoes the sentence in jail must necessarily have his movement restricted. That is involved in the very concept of imprisonment. His communication with the rest of the world would also be necessarily restricted. His right to practice his profession, however fundamental it may be, will not be available to him while in the jail. But there are other valuable rights, any curtailment of which will have no relevance to the nature of the punishment. The right not to be exploited in contravention of Article 23(1) is a right guaranteed to a citizen and there is no reason why a prisoner should lose his right to receive wages for his labour. In other words there is no reason why a prisoner should be compelled to do forced labour, forced in the sense that such labour is unremunerative or not paid for. We have taken pains to explain by way of preface to the discussion on the material issue in the case that it would be quite consistent with a civilised approach that wages are paid to a prisoner for the work taken from him. We have enumerated the advantages of such payment. If on a proper understanding of Article 23(1) of the Constitution there is no justification to read that Article as excluding the case of a prisoner who is asked to do work on payment if illusory wages we see no compelling reason to do so. The consequence is that to deny a prisoner reasonable wages in return for his work will be to violate the mandate in Article 23(1) of the Constitution. Consequently the State could be directed not to deny such reasonable wages to the prisoners from whom the State takes work in its prisons.

30. *That necessarily takes us to the final question, namely what should be the reasonable wages to be paid to the prisoners. Of course there could be no two opinion that the wages now paid cannot be taken seriously at all. It cannot be said to be even inadequate wages for 50 paise minimum and Rs. 1.60 maximum per day cannot at all be said to possess the character of remuneration for the work taken from the prisoners. The minimum wage laws of this country prescribe what minimum wage has to be paid in each industry. These minimum wages, it must be understood, are fixed at a much lower level than living wages. Irrespective of the capacity of the industry to pay, it has obligation to pay minimum wages and if it cannot pay even such minimum wage it does not deserve to exist. Reasonable wages would therefore always exceed minimum wages. Having said so we think we should leave it to the Government what reasonable wages should be paid to the inmates of the prisons. A unanimous wage structure would of course be desirable lest there be charge of discrimination in assigning work. It is for the Government to consider all aspects of the question so that a just and reasonable*

wage structure is designed for the inmates of the prisons. We can appreciate that time must necessarily be taken by the Government in deciding upon such a wage structure. Until then it cannot be that the present situation is to continue. There must be an ad hoc measure, a measure which takes into account the current wages in several industries, the minimum wages fixed, the increase in cost of living in the recent days and such other matters of relevance. After considering all these matters and going through the minimum wages notifications in regard to various industries we think that as an ad hoc measure we may safely fix Rs. 8/-per day as reasonable wages subject of course to alteration later, when as a result of further study, research and assessment the Government is able to decide upon appropriate wages to be paid to the prisoners."

39. After carefully considering the various aspects of the matter, we are of the considered opinion that all the prisoners of various categories in all the jails in the State are entitled to be paid reasonable wages for the work they are called upon to do in the jails and outside the jails. These wages are left to be decided by the State Government within a reasonable period, say, one year from the date of decision of these cases. However, the prisoners will be paid the minimum wages as notified by the State Government from time to time under the Minimum Wages Act, 1948 from the date of filing of these petitions in this Court. These wages will be worked out within a period of three months from today and deposited in the account of each prisoner.
40. The second question does not call for any decision since the State Government has dispensed with this practice, as already stated, by the learned counsel for the State and recorded in the preceding part of this judgment.
41. On the third question, it was contended that the deduction of Re. 1/- out of each day's earning from a prisoner put to work is towards his maintenance on which the State is otherwise spending much more than this deduction. No statutory provision has been shown to us in support of this deduction. We feel that this kind of deduction is indefensible. There is no acceptable rationale behind this kind of deduction especially from those prisoners who have been put to work. No maintenance charges are taken from other prisoners who may not like to do any work. When a prisoner is sent to prison, his maintenance is the primary concern of the State. Similar view on this aspect of the matter has been taken by the Gujarat High Court in the case (*supra*) when the Full Bench was directly concerned with this kind of deduction. It is necessary, therefore, to reproduce the view of the Full Bench in para 9 of the judgment when it said that:

"9. A prisoner is not a free agent. Extracting work from him is not a matter of contract wherein parties freely enter into agreement as to the work to be done and the

payment to be made. The prisoner undergoes incarceration in the jail not because of his volition. The right to be paid for work done is a right which any person who works has. It is not that the prisoner has any choice about his food or his clothing. Given the choice no prisoner may like to wear the cloth supplied to him in the jail. That could also be said of the food supplied to him. It is not as if in a case where a prisoner is not obliged to work he need not be fed or clothed by the State. There are prisoners who undergo a sentence of simple imprisonment. They have no obligation to do any labour. The Government which keeps such a prisoner in jail cannot contend that since he does not work no food will be given to him and no clothing will be supplied. Under-trials are in custody in Jails and sub-jail. They are not to do any work nevertheless they have to be fed and clothed. There are detenus under the laws of preventive detention who are also provided with food and clothing in jails without any return by way of work. There are prisoners sentenced to rigorous imprisonment who are sick and are unable to do work and they have necessarily to be fed. They cannot be told that since they do not work they will not be fed. Even those who are able to work and who could be compelled to do labour may not be given labour due to absence of work as the reply affidavit of the State Government shows. It mentions that at times the sales of produce manufactured in jails are poor and then many go without work. It cannot be said that they will not be fed when there is no work. These work illustrate beyond doubt that feeding of a prisoner is a responsibility of those who keep the prisoner in custody irrespective of any return from him. It is so not only human beings, but even to animals. When they are not allowed to be free they have to be fed. It will be uncivilised, if not cruel, to extract from such prisoners the return for the food and clothing supplied to them, not food and clothing of their choice, not food and clothing of excellence, but only a bare subsistence which any authority that keeps another in custody and retain must necessarily meet as a compulsory obligation. If the prisoners' wages is appropriated for the food naturally the prisoner must have a choice of saying no and making his own choice of the food. That cannot be the case."

42. In view of what has been said above, we direct that the provision permitting the realisation of maintenance charges from the prisoners be dispensed with forthwith and no future recovery be made in this behalf.
43. The last question relates to the initiation of jail reforms in the State of Himachal Pradesh. We advert to this aspect now.
44. In India, prison system has existed from the earliest times, although their management had not been good. Prisoners used to be lodged in those prisons but no attention was ever paid towards their proper upkeep since the whole object had been to punish them for the crime they had once committed. During the period preceding the British Rule, the prisoners were illtreated, tortured and subjected to barbarous treatment. However, with the advent of the British Rule, some serious efforts to improve the condition of prisons and prisoners were initiated. Many Committees were appointed

from time to time to look into the system of prison management and suggest measures to eradicate evils which were existing there. It was as a result of these recommendations by the Committees that better amenities to the various kind of jail inmates were extended and the number of prisoners which could be accommodated in each of the existing jails was also prescribed. Then came the Committee for Jail Reforms headed by Justice A. N. Mulla which gave suggestions on various aspects of jail administration including those relating to modernisation of jails and segregation of young prisoners from the hardened criminals. The culture of transforming the criminals into good citizens and rehabilitating them suitably on completion of jail sentence became so prominent that various facilities were provided in the prisons for their training. They were engaged against works inside and outside the jails so that they could earn something and spend the same on themselves and their families. By keeping them busy, there was radical improvement in prison discipline and decline in jail crimes. The situation improved to such an extent that in many jails the prisoners were associated in the internal management of the jails. Prison labour was held as the best alternative to engage the prisoners to keep them physically and mentally alert. It created in them self-confidence and by keeping in touch with various kinds of activities inside and outside the jails, they could return back after serving the sentences with clear confidence to settle themselves suitably and effectively.

45. In this state, we are told, there are various kinds of jails, namely, Open Air Jail, Bilaspur, Model Central Jail, Nahan, District Jails and the Sub-jails. The functioning of Open Air Jail is different from others. Different Schemes are in operation for the functioning of the jails. We understand that the management at the Open Air Jail, Bilaspur, is more democratic, advanced, liberal and reformative as compared to other closed jails; it is also apparent from the material placed before us by the State. At the suggestion of the Court, certain steps have been taken for the management of prisoners' wages so that there is no cause for complaint by any of them that his/their wages were not efficiently dealt with. It is undeniable that there are many reasons for the criminals to commit crimes. A prisoner who has committed an offence is not to be condemned outright. Crime is a kind of disease which has to be cured like other diseases by various methods so that the criminal is usefully cultivated for the society and in order to do so, successful results have been achieved. We may usefully refer to the establishment of Open Air Jail for the rehabilitation of hardened and habitual criminals at Munjoli in Guna District of Madhya Pradesh of notorious dacoits of Chambal ravine like Mohar Singh and Madho Singh. The jail is spread over sufficient land looked after by the prisoners for which they are paid wages to enable them to support their families.

They have been granted Bank loans for starting dairying, poultry farming, tailoring and agricultural farming. They have their own bank accounts, canteens run on cooperative basis, their own Panchayats to settle their mutual disputes. They are allowed 15 days' parole in six months to meet their relatives and families. Similarly, there is Open Air Jail 'Navjiwan Shiver' at Lakhimpur for the rehabilitation of surrendered dacoits from Bundelkhand region spread over 124.75 acres of land with adequate housing and irrigation facilities. There is Open Air Jail at Durgapur in Rajasthan where the sole object is to render correctional and rehabilitational services to the prisoners. This is also a kind of agricultural colony spread over 160 acres of land. The unique feature is that the prisoners stay in the farm along with their families in the residential quarters provided for this purpose. They do work daily and receive wages for that. If we study the management pattern of Open Prisons in Andhra Pradesh, Assam, Gujarat, Maharashtra, Mysore, Rajasthan and Uttar Pradesh, we understand that State's Open Air Jail at Bilaspur, established in 1968, calls for fundamental improvements. When the position in this Open Air Jail is not very satisfactory, we can very easily conclude that in other closed jails in the State drastic changes and radical improvements are immediately called for. The necessity is of will to do and in case the same is there, reforms are not difficult. In his affidavit dated August 5, 1985, the Special Secretary (Home) states:

"The State Government is profoundly concerned over the welfare of the prisoners and the need for jail reforms and would like to introduce necessary jail reforms from time to time within the resource limits of the Government. The present conditions of the jails are not as ideal as the Government would like it to be. However, the Government is considering steps to ameliorate the conditions in the jail within its means."

36. But except for the good wishes for the prisoners, jail reforms have not been undertaken after the filing of this affidavit. We feel the State Government should undertake comprehensive jail reforms within a year by appointing a high power committee comprising of men from jail administration, social activists and criminologists to advise the State Government in this field. In addition to various other important aspects, the Committee will also look into matters like:
- (1) opening of more Open Air institutions with sufficient agriculture land attached to it so that prisoners hailing from rural areas with agricultural background may continue to work in the same atmosphere and rehabilitate suitably in their villages;
 - (2) provision for adequate work inside and outside jails;

- (3) provision for different jails/correctional institutes for young prisoners, juvenile offenders, hardened criminals and other prisoners who suffer from mental aberrations;
- (4) opening of more Open Air Jails in the State and one exclusively for women;
- (5) provision for education and vocational training;
- (6) liberal remissions and regular paroles;
- (7) greater opportunities to meet friends and near relatives and facilities to allow them to discuss their problems away from the policemen's gaze;
- (8) proper attention for health and entertainment facilities for prisoners;
- (9) comprehensive scheme for procurement of work for them and payment of reasonable living wages therefor;
- (10) provision for better dieting facilities etc.;
- (11) comprehensive management of their wage funds; and
- (12) provision for after-release guidance and help.

Supreme Court of India
AIR 1966 SC 424

State of Maharashtra

vs

Prabhakar Pandurang Sangzgiri and Another

K. Subbarao, K.N. Wanchoo, J.C. Shah, S.M. Sikri, V. Ramaswami, JJ.

1. Prabhakar Pandurang Sangzgiri, who has been detained by the Government of Maharashtra under S. 30(1) (b) of the Defence of India Rules, 1962, in the Bombay District Prison in order to prevent him from acting in a manner prejudicial to the defence of India, public safety and maintenance of public order, has written, with the permission of the said Government, a book in Marathi under the title 'Anucha Antarangaat' (Inside the Atom). The learned Judges of the High Court, who had gone through the table of contents of the book, expressed their opinion on the book thus:
"..... we are satisfied that the manuscript book deals with the theory of elementary particles in an objective way. The manuscript does not purport to be a research work but it purports to be a book written with a view to educate the people and disseminate knowledge regarding quantum theory."
2. The book is, therefore, purely of scientific interest and it cannot possibly cause any prejudice to the defence of India, public safety or maintenance of public order. In September 1964, the detenu applied to the Government of Maharashtra seeking permission to send the manuscript out of the jail for publication; but the Government by its letter, dated March 27, 1965, rejected the request. He again applied to the Superintendent, Arthur Road Prison, for permission to send the manuscript out and that too was rejected. Thereafter, he filed a petition under Art. 226 of the Constitution in the High Court of Maharashtra at Bombay for directing the State of Maharashtra to permit him to send out the manuscript of the book written by him for its eventual publication. The Government of Maharashtra in the counter-affidavit did not allege that the publication of the said book would be prejudicial to the objects of the Defence of India Act, but averred that the Government was not required by law to permit the detenu to publish books while in detention. The High Court of Bombay held that the civil rights and liberties of a citizen were in no way curbed by the order of detention and that it was always open to the detenu to carry on his activities within the conditions governing his detention. It further held that there were no rules prohibiting a detenu from sending a book outside the jail with a view to get it published. In that view the

High Court directed the Government to allow the manuscript book to be sent by the detenu to his wife for its eventual publication. The State of Maharashtra has preferred the present appeal against the said order of the High Court.

3. The contentions of the learned Additional Solicitor General may be briefly stated thus: When a person is detained he loses his freedom; he is no longer a free man and, therefore, he can exercise only such privileges as are conferred on him by the order of detention. The Bombay Conditions of Detention Order, 1951, which regulates the terms of the first respondent's detention, does not confer on him any privilege or right to write a book and send it out of the prison for publication. In support of his contention he relies upon the observations of Das, J., as he then was, in *A. K. Gopalan v. State of Madras* ([1950] S.C.R. 88, 291) wherein the learned Judge has expressed the view, in the context of fundamental rights, that if a citizen loses the freedom of his person by reason of a lawful detention, he cannot claim the rights under Art. 19 of the Constitution as the rights enshrined in the said article are only the attributes of a free man.
4. Mr. Garg, learned counsel for the detenu, raised before us the following two points: (1) a restriction of the nature imposed by the Government on the detenu can only be made by an order issued by the appropriate Government under clause (f) and (h) of sub-rule (1) of Rule 30 of the Defence of India Rules, 1962, hereinafter called the Rules, and that too in strict compliance with S. 44 of the Defence of India Act, 1962, hereinafter called the Act, and that as the impugned restriction was neither made by such an order nor did it comply with S. 44 of the Act, it was an illegal restriction on his personal liberty; and (2) neither the detention order nor the conditions of detention which governed the first respondent's detention enabled the Government to prevent the said respondent from sending his manuscript book out of the prison for publication and, therefore, the order of the Government rejecting the said respondent's request in that regard was illegal.

...

6. The question, therefore, in this case is whether the first respondent's liberty has been restricted in terms of the Defence of India Rules whereunder he was detained. If it was in contravention of the said Rules, he would have the right to approach the High Court under Art. 226 of the Constitution. In exercise of the power conferred on the Central Government by S. 3 of the Act, the Central Government made the Defence of India Rules. Under S. 30 of the Rules the Central Government or the State Government, if it is satisfied with respect to any person that in order to prevent him from acting in

any manner prejudicial to the matters mentioned therein, it is necessary so to do, may make an order directing that he be detained. Under Sub Rule 4 thereof he shall be liable to be detained in such place and under such conditions as to maintenance, discipline and the punishment of the offence and the breaches of discipline as the Central Government or the State Government, as the case may be, may from time to time determine. In exercise of the power conferred under sub-R. (4) of R. 30 of the Rules, the Government of Maharashtra determined that the conditions as to maintenance, discipline and the punishment of offenses and breaches of discipline governing persons ordered to be detained in any place in the State of Maharashtra, shall be the same as those contained in the Bombay Conditions of Detention Order, 1951.

7. The Bombay Conditions of Detention Order, 1951, does not contain any condition as regards the writing of books by a detenu or sending them out of jail for publication. Briefly stated, the scheme of the said provisions is that a person can be detained if the appropriate Government is satisfied that in order to prevent him from doing the prejudicial acts mentioned in R. 30 of the Rules it is necessary to detain him in prison subject to the conditions imposed in the manner prescribed in sub-rule (4) of Rule 30 of the Rules. To put it in a negative form, no restrictions other than those prescribed under sub-rule (4) of R. 30 can be imposed on a detenu. If the appropriate authority seeks to impose on a detenu a restriction not so prescribed, the said authority will be interfering with the personal liberty of the detenu in derogation of the law whereunder he is detained. If that happens, the High Court, in terms of Art 226 of the Constitution, can issue an appropriate writ or direction to the authority concerned to act in accordance with law.
8. We have gone through the provisions of the Bombay Conditions of Detention Order, 1951. There is no provision in that Order dealing with the writing or publication of books by a detenu. There is, therefore, no restriction on the detenu in respect of that activity. Sub-rule (iii) of R. 17 of the said Order reads,

"All letters to and from security prisoners shall be censored by the Commissioner or the Superintendent, a% the case may be. If in the opinion of the Commissioner or the Superintendent, the dispatch or delivery of any letter is likely to be detrimental to the public interest or safety or the discipline of the place of detention, he shall either withhold such letter, or despatch or deliver it after deleting any objectionable portion therefrom. In respect of the censoring of letters of security prisoners, the Commissioner or the Superintendent shall comply with any general or special instructions issued by Government."

9. The Maharashtra Government has not relied upon this rule. Indeed, in the counter-affidavit its case was not that it prohibited the sending of the book for publication under the said sub-rule, but that it was not required by law to permit the detenu to publish books while in detention; nor was it its case before the High Court that the publication of this book was detrimental to public interest or safety or the discipline of the place of detention. *Prima facie* the said sub-rule applies only to letters to and from security prisoners and does not regulate the sending out of prison books for publication. Indeed, the learned Additional Solicitor General does not rely upon this provision.

...

11. In this case, as we have said earlier, we are only concerned with the question whether the restriction imposed on the personal liberty of the first respondent is in terms of the relevant provisions of the Defence of India Rules. Here, the first respondent's liberty is restricted under the Defence of India Rule's subject to conditions determined in the manner prescribed in Sub-Rule (4) of R. 30 thereof. We find it difficult to accept the argument that the Bombay Conditions of Detention Order, 1951, which lays down the conditions regulating the restrictions on the liberty of a detenu, conferred only certain privileges on the detenu. If this argument were to be accepted, it would mean that the detenu could be starved to death, if there was no condition providing for giving food to the detenu. In the matter of liberty of a subject such a construction shall not be given to the said rules and regulations, unless for compelling reasons. We, therefore, hold that the said conditions regulating the restrictions on the personal liberty of a detenu are not privileges conferred on him, but are the conditions subject to which his liberty can be restricted. As there is no condition in the Bombay Conditions of Detention Order, 1951, prohibiting a detenu from writing a book or sending it for publication, the State of Maharashtra infringed the personal liberty of the first respondent in derogation of the law whereunder he is detained. The appellant, therefore, acted contrary to law in refusing to send the manuscript book of the detenu out of the jail to his wife for eventual publication.

Kerala High Court
AIR 1973 Ker 97

Kunnikkal Narayanan
vs
State of Kerala and Another

P. Govindan Nair, T.S. Krishnamoorthy Iyer, K. Sadasivan, JJ.

1. The petitioner, Kunnikkal Narayanan, has been detained under the Maintenance of Internal Security Act, 1971, for short, the Act. He has prayed in this petition as amended by order on C.M.P. No. 7630 of 1972 and by order on C.M.P. No. 14154 of 1972 for the following reliefs :
 - (1) for a declaration that Section 5 (a) of the Act is illegal and unconstitutional,
 - (2) for a declaration that part (b) in paragraph 19 (1) of the Kerala Security Prisoners' Order is illegal.
 - (3) that the Government Order dated 23-12-1971 marked as Ext. R1 and produced along with the counter-affidavit made on behalf of the State on 19-12-1972 in answer to C.M.P. No. 7630 of 1972 be quashed and
 - (4) that a direction be issued that the three books;
 - (a) Four Essays on Philosophy by Mao Tse-Tung,
 - (b) Mao Papers by Jerome Ch'en and
 - (c) Mao Tse-Tung by Stuart Sehram,be delivered to the petitioner.

2. The three books referred to above were sent to the petitioner but he was not permitted to receive them on the ground that the books fell within the term 'Mao literature' in Ext. Rule 1, an order passed by the Government under part (b) of Sub-Clause (1) of Clause 19 of the Kerala Security Prisoners' Order, 1971, hereinafter referred to as the Order. The relevant portion of Ext. Rule 1 is in these terms :

"It is hereby ordered under Clause 19 of the said Order that it will not be permissible for Security Prisoners to receive or purchase Mao literature."

And Clause 19 of the Order provides:

"19. Books, Newspapers and periodicals.-

- (1) *Security Prisoners may receive such books, newspapers and periodicals as are not (a) prescribed by the Government; or (b) considered by the Government as not permissible.*
- (2) *In addition to books, newspapers and periodicals which may be received through post or otherwise Security Prisoners who receive funds from outside may be allowed to purchase from such funds, books, newspapers and periodicals coming within Sub-clause (1) above."*
3. The Order was passed by the State Government under Section 5 of the Act, the relevant part of which may also be read at this stage:
"5. Power to regulate place and conditions of detention- Every person in respect of whom a detention order has been made shall be liable-
(a) to be detained in such place and under such conditions, including conditions as to maintenance, discipline and punishment for breaches of discipline, as the appropriate Government may, by general or special orders, specify; and
(b) ..".
4. The petitioner challenged the action of the State in refusing to deliver the books Nos. (1) and (2) mentioned in paragraph 2 above, in O. P. No. 1167 of 1972 on the grounds, that those books were not "Mao literature" and that there was discrimination in not supplying the books to the petitioner. This Court held that the books fell within the expression "Mao literature" and further held that there had been no discrimination and dismissed the petition. There was no challenge in that petition of the validity of the Act or the Order or for that matter Ext. R1.
....
10. ... Detention, no doubt, makes it impossible for the person detained by the very nature of the act of detention, to exercise the freedoms guaranteed by Sub-clauses (b), (c), (d), (e) and (g) of Article 19(1) of the Constitution. This is not a direct curtailment of these freedoms but is a necessary and incidental consequence of the act of detention. However there is no such necessary consequence as far as the freedom under Article 19(1) (a) is concerned. A person under detention can continue to give expression to his views, indulge in writing books, in reading books and in learning subjects and generally in acquiring knowledge. Such freedom of course can also be restricted in the interest of the security of the State and public order envisaged by the Act. Such restriction will also be valid under Article 19(2) of the Constitution as well. So even if the fundamental right under Article 19(1) (a) continued to exist after detention its restriction cannot be said to be against Article 19 of the Constitution.

11. If the books are of such a nature as we have already adverted to, conducive to instigate people to acts of violence to overthrow established Governments and to disturb public order and peace, they can be denied to a detenu. The very purpose of detention will be destroyed by allowing security prisoners to train themselves to a course of action which would overthrow established Governments or result in creating instruments that will disturb peace and public order of the State. So power can be given to Government to prevent access to such books. That is the power conferred by part (b) of Sub-clause (1) of Clause 19 of the Order. That power can be exercised only to prevent access to books to a security prisoner for the purposes of achieving the ends envisaged by the Act, namely, security of the State and maintenance of public order. We therefore negative the contention that Clause 19 of the Order is violative of Article 19 of the Constitution of India.
12. We are now left with the question as to whether Ext. R1 order passed by the Government in purported exercise of the power under part (b) of Sub-clause (1) of Clause 19 of the Order is valid. We have already read the relevant part of Ext. R1. The order only says that security prisoners are not permitted to receive or purchase "Mao literature". This Court held that two of the three books denied to the petitioner came within the expression "Mao literature."
13. No passages from these books had been brought to our notice in the course of the arguments to show that a reading of these books would result in endangering security of the State and prejudicially affect public order. We consider that any order passed by the Government preventing access to books must necessarily be for the purpose of achieving the objects envisaged by the Act. There must also be an indication in the order passed by the Government that this was the purpose sought to be achieved. Prevention of access to "Mao literature", we consider is too wide and ambiguous a term for defining the purposes or objects sought to be achieved by such orders. The order Ext. R-1 has resulted in the denial of the three books mentioned above to the petitioner. This however did not prevent three other books; (1) The State and Revolution -- V. I. Lenin, (2) Lenin on War and Peace and (3) National Liberation War in Viet Nam -- By General Vo Nguyen Giap, being made available to the petitioner, to his daughter and his wife respectively. The statement of the petitioner that these books were so made available was not disputed before us by counsel for the State. These three books were produced before us by the petitioner and a number of passages were read from these books. We shall not refer to all of them but it will be appropriate to read a few. In the book The State and Revolution, it is said "Democracy is an

organisation for use of violence by one class against another", and that "The State machine must be smashed". Similarly in Lenin on War and Peace, there is the passage "An oppressed class which hesitates to use arms deserves to be treated as slaves" and further that "Even women and children should take up arms, following the example of Paris Commune, to overthrow capitalist society". In the National Liberation War in Viet Nam, there are passages such as "Armed struggle and political action should go together", "To win power, combine military action of the people with mass uprisings".

14. If such literature is conducive to creating a frame of mind which will express itself by resort to violence for the purpose of achieving political ends, or overthrowing established Governments or by disrupting public order, one would have felt that the three books that we have referred to now are better kept out of the reach of security prisoners. Yet they have been made available and the order Ext. R-1 did not prevent the receipt of those books by the security prisoners Ext. R-1 does not therefore serve the purpose sought to be achieved. The books that do not contain or contain much less inflammatory materials than those contained in these three books are denied to security prisoners whereas inflammatory materials as pointed out above have been made available to the petitioners and others. This we think, is the result of using such wide and ambiguous words "Mao literature" in Exhibit R-1, and such an order does not achieve as has been shown above the purpose that is sought to be achieved by an order of Government under Clause 19 of the Order and under Section 5 of the Act. We are therefore constrained to set aside Ext. R-1 and allow this petition to that extent. We do so.
15. It need hardly be said that it will be open to the Government to pass appropriate fresh orders in this matter in the light of what we have stated in this judgment. In fact, it is essential that the matter is dealt with expeditiously and appropriate orders passed. It is for the Government to consider whether there should be an appropriate authority conferred with power to decide which literature should be allowed and which prohibited by applying the guidelines formulated and principles laid down by the Government. In the meantime, we direct the State Government to consider the question as to whether the petitioner can be permitted to receive the three books that we have mentioned in paragraph 1 above and pass necessary orders. This too must be done expeditiously.

Bombay High Court
AIR 1967 SC 254

M.A. Khan

vs

State and Another

Tarkunde, Wagle, JJ.

1. The petitioner in this case has been continuously in detention since 7th June 1963, in pursuance of orders passed by the Government of Maharashtra from time to time under Rule 30 (1) (b) of the Defence of India Rules. During this period, he was trying to have certain journals and periodicals at his own cost, but could not get the permission to receive them. The Jail authorities did not allow him to purchase or receive the journals and periodicals on the ground that they were not included in the official list of newspapers allowable to security prisoners of Class I. On 5th July 1965, the petitioner wrote to the Secretary of the Home Department, Government of Maharashtra, that he may be permitted to purchase at his own cost or to receive the following journals and periodicals.
 - (1) 'The Dawat' (Urdu), Daily of Delhi
 - (2) 'The Radiance' (English), Weekly of Delhi
 - (3) 'The Margdeep' (Marathi), Biweekly of Poona
 - (4) 'The Tajally' (Urdu), Monthly of Deoband
 - (5) 'The Kanti' (Hindi), Monthly of Rampur
 - (6) 'Zindagi' (Urdu), Monthly of Rampur, and
 - (7) 'Fanoos Digest', Monthly of Pakistan.

Having failed to receive any reply from the Government to this letter, he filed the present petition under Article 226 of the Constitution for a writ or direction requiring the respondents, the State of Maharashtra and the Superintendent of the Bombay District Prison, to allow him to receive and use the literature he had asked for. After the petition was filed, the petitioner gave up his claim in respect of the monthly 'Fanoos Digest', which was being published in Pakistan, on account of the commencement of the recent Indo-Pakistan conflict.

2. The conditions under which the petitioner was detained were those provided by the Bombay Conditions of Detention Order, 1951. This order had been issued by the Government of Bombay under Section 4 of the Preventive Detention Act, 1950. Sub-rule (4) of Rule 30 of the Defence of India Rules, 1962, provided that the Central Government or the State Government, as the case may be, may from time to time determine the conditions as to maintenance, discipline and the punishment of offences and breaches of discipline in respect of persons detained under Sub-rule (1) (b) of Rule 30. In exercise of the powers conferred by Sub-rule (4) of Rule 30, the State of Maharashtra issued an order on 9th November 1962, that the conditions as to maintenance, discipline and the punishment of offences and breaches of discipline governing persons ordered to be detained in any place in the State of Maharashtra under the Defence of India Rules, shall be the same as those contained in the Bombay Conditions of Detention Order, 1951.
3. The grievance of the petitioner centres on Clause 16 of the Bombay Conditions of Detention Order, 1951, which relates to books and newspapers which can be received by security prisoners. Clause 16 runs as follows:
 16. (i) *Class I security prisoners may be allowed at Government expense one weekly newspaper for every 20, and one daily newspaper for every 15 security prisoners, out of the list of newspapers considered suitable for convicts of Class I and Class II. Class II security prisoners may be allowed one such weekly newspaper for every 40, and one such daily newspaper for every 20 security prisoners. Both Class I and Class II security prisoners may be allowed, at their cost, any other weekly or daily newspapers included in the said list; provided that if any security prisoner wants any newspaper not included in the said list, he shall obtain the orders of Government through the Commissioner or the Superintendent, as the case may be.*
 - (ii) *Books (including periodicals not treated as newspapers) may be received by the security prisoners through the post subject to the condition that the postal article containing the books shall first be opened by the Commissioner or the Superintendent, as the case may be, or any person appointed by him in this behalf, and the delivery of such book to the security prisoner shall be refused by the Commissioner or the Superintendent, as the case may be, if in his opinion it is not suitable.*

It will be noticed that Sub-clause (i) of this Clause allows security prisoners to have at their cost any of the weekly or daily newspapers which are included in the list of newspapers 'considered suitable for convicts of Class I and Class II'. And such other newspapers as may be allowed to them by orders of the State Government. Under Sub-clause (ii) the detenus are allowed to receive books (including periodicals which are not treated as newspapers) provided, however, that the delivery of any such book to the detenu can be refused by the Commissioner of Police or the Jail

Superintendent, as the case may be, if in his opinion the book is 'not suitable'. The petitioner challenged the legality of the above Clause 16 in the course of his petition on the grounds, firstly that the imposition of such a condition was beyond the powers conferred on the State Government by Sub-rule (4) of Rule 30 of the Defence of India Rules, and secondly, that the imposition of the condition was contrary to the provisions contained in Section 44 of the Defence of India Act, 1962.

4. These contentions were denied on behalf of the respondents in an affidavit in reply filed by the Under Secretary to the Government of Maharashtra in the Home Department and General Administration Department. It was further stated in the affidavit that the Government had considered the request made by the petitioner for being allowed to receive the said journals and periodicals at his own cost and had rejected that request. It was observed that 'Dawat' was a daily newspaper, that 'Radiance' and 'Margdeep' were, periodicals which could be classed as newspapers, and that the Government had decided under Sub-clause (i) of Clause 16 of the Bombay Conditions of Detention Order, 1951, that the petitioner should not be permitted to get the said Journals on the ground that they were 'unsuitable'. In regard to the other publications, viz. 'Tajally', 'Kanti' and 'Zindagi' it was stated in the affidavit that they fell within the category of 'periodicals not treated as newspapers', and that the petitioner was not allowed to have them as the Government found them also to be unsuitable on the ground that they preached violence. In a supplementary affidavit the Under Secretary stated further that several issues of the daily newspaper 'Dawat' were examined by the office of the Inspector General of Police and that, as a result of the detailed scrutiny made by the said office, the Government came to the conclusion that the said paper was unsuitable for being permitted to the petitioner 'as the editorials and notes contain a violent attack on the accepted policies of Government of India particularly in regard to Kashmir'. The affidavit went on to say, 'The said newspaper is positively anti-national and pro-Pakistani. Besides criticising Indian leaders, it advocates a veiled insinuation of extra-territorial loyalty for the Muslims'. The above allegations in regard to daily newspaper 'Dawat' were denied in an affidavit filed by the petitioner in rejoinder.
5. As stated above, the first contention of the petitioner is that the powers which can be exercised by the State Government under Sub-rule (4) of Rule 30 of the Defence of India Rules do not include a power to impose on detenus a condition like the one contained in Clause 16 of the Bombay Conditions of Detention Order. 1951. Sub-rule (4) of Rule 30 lays down-

So long as there is in force in respect of any person such an order as aforesaid directing that he be detained, he shall be liable to be detained in such place, and under such

conditions as to maintenance, discipline and the punishment of offences and breaches of discipline as the Central Government or the State Government, as the case may be, may from time to time determine.

Broadly stated, this sub-rule enables the Central Government or the State Government to determine the conditions as to maintenance and discipline of persons detained under Rule 30(1) (b) of the Defence of India Rules. Now what is objected to in Clause 16 is that, it enables the Jail authorities and the State Government to prevent a detenu from having, even at his own cost, newspapers and books which can be freely read by the general public but which are regarded by the said authorities to be unsuitable to the detenus. It is obvious that such a condition does not relate to the 'maintenance' of the detenus. It was urged by the learned Assistant Government pleader, who appeared for the respondents, that the condition relates to the discipline of detenus and that the State Government was, therefore, competent to impose such a condition in the exercise of its powers under Sub-rule (4) of Rule 30. In making this submission the learned Assistant Government Pleader attributed to the word 'discipline' a far wider meaning than is justified by the context in which that word occurs. The word 'discipline' as it occurs in Sub-rule (4) can comprise only those rules of behaviour which promote the orderly functioning of the institution where the detenus are accommodated and such further rules which are necessary for effectuating the specific purposes for which the detenus are detained. It follows that the word 'discipline' in Sub-rule (4) cannot be utilised to enable the Government or the Jail authorities to regulate the reading habits of the detenus. It does not empower the State Government to constitute themselves as the mentors of the detenus. The purpose of preventive detention is not to improve the minds of the detenus but to prevent them from acting in any manner prejudicial to the objects mentioned in Sub-rule (1) of Rule 30. It must accordingly be held that the provisions of Clause 16, in so far as they prevent the detenus from having at their cost newspapers, periodicals and books which can be freely read by the general public, have no rational connection with the maintenance of discipline of detenus and are beyond the powers conferred on the State Government by Sub-rule (4) of Rule 30.

6. A reference may be made in this connection to the decision of the Supreme Court in *State of Maharashtra v. Prabhakar Pandurang*. The grievance of the detenu in that case was that the Government of Maharashtra had refused to give him permission to send out of the Jail, where he was detained, the manuscript of book on a scientific topic which he had written and which he wanted to have published. It was contended on behalf of the Government of Maharashtra that a detenu can exercise only such

privileges as are conferred on him by the order of detention and that the provisions of Bombay Conditions of Detention Order, 1951, did not confer on the detenu any privilege to write a book and send it out for publication. In rejecting this contention the Supreme Court observed:

"We find it difficult to accept the argument that the Bombay Conditions of Detention Order, 1951, which lays down the conditions regulating the restrictions on the liberty of a detenu, conferred only certain privileges on the detenu. If this argument were to be accepted, it would mean that the detenu could be starved to death, if there was no condition providing for giving food to the detenu. In the matter of liberty of a subject such a construction shall not be given to the said rules and regulations, unless for compelling reasons. We, therefore, hold that the said conditions regulating the restrictions on the personal liberty of a detenu are not privileges conferred on him, but are the conditions subject to which his liberty can be restricted."

These observations lend support to our view that the liberties of detenus cannot be curtailed by imposing conditions which are beyond the powers which are granted by the terms of Sub-rule (4) of Rule 30 of the Defence of India Rules.

7. The learned Assistant Government Pleader argued that, it is necessary in the interest of security that detenus should be prevented from receiving an unlimited supply of periodicals and books and that the condition in Clause 16 is thus necessary for ensuring discipline in the Jail or the camp where detenus are accommodated. This argument might have carried weight, if Clause 16 were designed to restrict the number of periodicals and books received by detenus in such manner as to enable the Jail authorities to subject them to a proper scrutiny. The purpose of Clause 16, however, is not to restrict the number of periodicals and books that could be received by a detenu at his own cost; the purpose is that the detenu shall not be able to have, even at his own cost, such periodicals and books as are unsuitable in the opinion of the State Government or the Jail authorities.
8. It was further urged by the learned Assistant Government Pleader, that the terms of Clause 16 are intended to prevent the detenus from having periodicals and books which are vulgar or obscene, or which preach violence, or which are proscribed by law, and that such a restriction is necessary for maintaining discipline in the Camp or the Jail where the detenus are accommodated. Now, in the first place, the restrictions which have been imposed by Clause 16 are not confined to periodicals and books which are vulgar or obscene, or which preach violence, or which are proscribed by law. Under Sub-clause (i) of Clause 16, a detenu can get at his own cost such newspapers as are included in the list of news papers 'considered suitable for convicts of Class I

and Class II' and such other news papers as may be allowed by the State Government. We do not know on what basis the list of newspapers 'considered suitable for convicts of Class I and Class II' is prepared. The learned Assistant Government Pleader told us that, he also did not know it. There is similar vagueness with regard to the basis on which the State Government may allow a detenu to have at his cost newspapers other than those included in the aforesaid list. The effect of Sub-clause (i) of Clause 16, is that the right of a detenu to have newspapers of his choice is subjected to an entirely arbitrary and unregulated discretion of the State Government. Under Sub-clause (ii) of Clause 16, detenu can receive books of his choice only if they are 'suitable' in the opinion of the Commissioner of Police or the Jail Superintendent as the case may be. No guidance is provided in Sub-clause (ii) in regard to the basis on which the suitability of books is to be decided by the Commissioner or the Jail Superintendent. In this connection it was pointed out by the learned Assistant Government Pleader that a restricted meaning to the word 'suitable' in Sub-clause (ii) of Clause 16 was given in the judgment of a Division Bench of this Court in *George Fernandas v. State of Maharashtra* 66 Bom LR 185. In that case a Jail Superintendent had arbitrarily fixed the number of books which would be made available to the detenu, and the contention of the detenu was that the provisions of Clause 16 did not permit the Superintendent to restrict the number of books which could be received by him. That contention of the detenu was upheld by the Court. The validity of Clause 16 was not challenged by the detenu in that case; on the contrary the detenu relied on Clause 16 in support of his contention. While upholding the detenu's contention, the Court made the following observation about the discretion which has been granted by Sub-clause (ii) of Clause 16 to a Jail Superintendent to decide upon the suitability of a book or publication wanted by the detenu:

"But as far as we can see, that discretion will have to operate within a well defined field. The book may be unsuitable considering the material or the contents of the book which may be objectionable, because it preaches violence, it may be vulgar or obscene, it may be pornographic, or it may have been proscribed, but beyond the compass of this discretion, we do not find any power in the Superintendent to withhold a book from the detenu on any other ground."

As no dispute arose in that case with regard to the suitability of any book or publication, this observation of the Court was clearly obiter. It appears that the above restriction on the scope of the term 'suitable' was derived by the Court from rules 1357 and 1360 of the Bombay Jail Manual which have been quoted in the said judgment. It appears to us, with great respect, that neither the terms of Sub-clause (ii) of Clause 16, nor the context in which those terms are used, provide any indication of the

manner in which the Commissioner or the Superintendent, as the case may be, is to decide on the suitability or otherwise of any book or publication wanted by a detenu. Supposing, however, that such a restriction to the discretion of the Commissioner or the Superintendent can be read in Clause 16 (ii), the discretion so restricted would be unlawful, for there is nothing in sub rule (4) of Rule 30 of the Defence of India Rules, which entitles the State Government to prevent a detenu from receiving any book or periodical which can be lawfully obtained and read by a person, who is not under detention. The State Government may of course, prevent a detenu from receiving periodicals and books which cannot be lawfully obtained by people, who are not under detention. Books and periodicals which are proscribed, or which are obscene, may be disallowed on those grounds, but not books and periodicals which can be freely had by the general public.

9. It will be noticed that, it is not our conclusion that the whole of Clause 16 is invalid. In our view, the two sub-clauses of Clause 16 are invalid in so far as they prevent a detenu from obtaining at his own cost a periodical or a book which can be freely and lawfully obtained by the general public.
10. The second contention advanced on behalf of the petitioner was that the restriction which has been imposed upon him in the matter of receiving newspapers and periodicals at his own cost is contrary to the provisions contained in Section 44 of the Defence of India Act. Section 44 lays down:

44. Ordinary avocations of life to be interfered with as little as possible.-Any authority or person acting in pursuance of this Act, shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of India and civil defence.

The scope and effect of Section 44 was considered by this Court in *State v. Dhanji Virji Bhanusali*, Criminal Application No. 1576 of 1965, Dt. 7-12-1965 (Bom). In the course of the judgment in that case it was observed:

It appears to us, on the one hand, that the standard of compliance with Section 44 is a subjective standard, and that the section does not purport to lay down any objective or impersonal standard. In other words, the section requires that every authority or person, acting in pursuance of the Act, shall adopt such action as in its or his judgment accords with the principle of least interference. It appears to us, on the other hand, that the terms of that section are mandatory, that authorities and persons acting in pursuance of the Act, are bound to abide by the principle laid down in that section, and that acts done in violation of that principle are invalid. This does not, however mean that the question whether in a particular case the provisions of that section

nave been complied with is non-justiciable. If an authority or person makes any order which, in his considered opinion, is in conformity with the principle enunciated in that section, it cannot be challenged in a Court of law on the ground that another order of less severity would have sufficed to meet the situation. If, however, an authority or person makes an order without regard to the principle enunciated in that section, he acts in breach of a legislative mandate and his order can be held by the Court to be invalid. In our view, Section 44 is thus mandatory, and the question of compliance or otherwise with that section is also justiciable in the limited sense mentioned above.

It was further observed in the judgment:

The result is that an authority or person exercising powers under the Act, is bound to have regard to the principle enunciated in Section 44, that the Court will not examine the propriety of an action adopted by an authority or person after paying due regard to that principle, but that the Court can strike down any such action where it is shown that the authority or person concerned paid no heed to that principle or could not have rationally adopted the action if the principle had been taken into consideration.

11. On the basis of this decision, it was urged by Mr. Singhvi on behalf of the petitioner that Clause 16 of the Bombay Conditions of Detention Order, 1951, contravenes Section 44 of the Defence of India Act, in so far as it prohibits a detenu from receiving at his own cost a periodical or book which can be obtained by the general public. Mr. Singhvi argued that if the State Government had taken into consideration, the principle of least interference laid down in Section 44 while determining the conditions of maintenance and discipline of detenus, the Government could not have rationally come to the conclusion that it was necessary for ensuring public safety and interest or the defence of India and civil defence that persons in preventive detention should be debarred from reading periodicals and books which can be freely read by the public at large.
12. Now, it appears to us that, it would have been necessary for us to decide whether the impugned provisions of Clause 16, are consistent with the principle laid down in Section 44 if we had come to the conclusion that the State Government was given the power under Sub-rule (4) of Rule 30 of the Defence of India Rules, to regulate the literature which may be received and read by the detenus. If such a power had been granted to the State Government by Sub-rule (4) of Rule 30, it would have been necessary to decide whether that power was exercised in conformity with the requirements of Section 44 when the provisions of Clause 16, were applicable by the State Government to persons detained under the Defence of India Rules. On the finding given by us earlier, no such power was granted to the State Government by Sub-rule (4) of Rule 30.

13. Supposing, however, that it was within the power of the State Government under Sub-rule (4) of Rule 30 to impose conditions on the books and periodicals that may be received by detenus at their own cost, we are of the view that the restrictions in that behalf contained in Clause 16 are violative of the principle laid down in Section 44. It was not denied before us that reading newspapers, periodicals and books is one of the ordinary avocations of life. A reference to any standard dictionary would show that the word 'avocation' originally meant a diversion from one's principal vocation, but that it has now come to include the principal occupation as well as the subsidiary pursuits of life of an individual. It must, therefore, be held that the restriction placed by Clause 16 on the periodicals and books which can be received and read by detenus amounts to an interference with one of the ordinary avocations of detenus. We are further of the view that if the State Government had taken into consideration the principle of least interference laid down in Section 44, when they determined the conditions of maintenance and discipline of detenus, they could not have rationally come to the conclusion that it was necessary for ensuring the public safety and interest or the defence of India and civil defence that persons kept in preventive detention should be debarred from receiving and reading periodicals and books which could be freely received and read by the general public.
14. We hold accordingly that the respondents, the State of Maharashtra and the Superintendent of the Bombay District prison were not entitled to disallow the petitioner from receiving the newspapers and periodicals mentioned in his letter of 5th July 1965, addressed to the Secretary of the Home Department of the Government of Maharashtra except the Urdu monthly 'Fanoos Digest' which is no longer being asked for by the petitioner. The respondents are directed to remove the said restriction and allow the petitioner to receive at his cost the newspapers and periodicals mentioned above. The respondents will pay the petitioner's costs.

**Supreme Court of India
AIR 1981 SC 746**

**Francis Coralie Mullin
vs**

The Administrator, Union Territory of Delhi and Others

P.N. Bhagwati, Syed Murtaza Fazalali, JJ.

1. This petition under Article 32 of the Constitution raises a question in regard of the right of a detenu under the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act (hereinafter referred to as COFEPOSA Act) to have interview with a lawyer and the members of his family. The facts giving rise to the petition are few and undisputed and may be briefly stated as follows:

The petitioner, who is a British national, was arrested and detained in the Central Jail, Tihar under an Order dated 23rd November 1979 issued under section 3 of the COFEPOSA Act. She preferred a petition in this Court for a writ of habeas corpus challenging her detention, but by a judgment delivered by this Court on 27th February 1980, her petition was rejected with the result that she continued to remain under detention in the Tihar Central Jail. Whilst under detention, the petitioner experienced considerable difficulty in having interview with her lawyer and the members of her family. Her daughter aged about five years and her sister, who was looking after the daughter, were permitted to have interview with her only once in a month and she was not allowed to meet her daughter more often, though a child of very tender age. It seems that some criminal proceeding was pending against the petitioner for attempting to smuggle hashish out of the country and for the purpose of her defence in such criminal proceeding, it was necessary for her to consult her lawyer, but even her lawyer found it difficult to obtain an interview with her because in order to arrange an interview, he was required to obtain prior appointment from the District Magistrate, Delhi and the interview could take place only in the presence of a Customs Officer nominated by the Collector of Customs. This procedure for obtaining interview caused considerable hardship and inconvenience and there were occasions when, even after obtaining prior appointment from the District Magistrate, Delhi, her lawyer could not have an interview with her since no Customs Officer nominated by the Collector of Customs remained present at the appointed time. The petitioner was thus effectively denied the facility of interview with her lawyer and even her young daughter 5 years

old could not meet her except once in a month. This restriction on interviews was imposed by the Prison Authorities by virtue of clause 3(b) sub-clauses (i) and (ii) of the Conditions of Detention laid down by the Delhi Administration under an Order dated 23rd August 1975 issued in exercise of the powers conferred under section 5 of the COFEPOSA Act. These two sub-clauses of clause 3(b) provided inter alia as under:

"3. The conditions of detention in respect of classification and interviews shall be as under:-

(a)

(b) Interviews: Subject to the direction issued by the Administrator from time to time, permission for the grant of interviews with a detenu shall be granted by the District Magistrate, Delhi as under:-

(i) Interview with legal adviser:

Interview with legal adviser in connection with defence of a detenu in a criminal case or in regard to writ petitions and the like, may be allowed by prior appointment, in the presence of an officer of Customs/Central Excise/ Enforcement to be nominated by the local Collector of Customs/Central Excise or Deputy Director of Enforcement who sponsors the case for detention.

(ii) Interview with family members:

A monthly interview may be permitted for members of the family consisting of wife, children or parents of the detenu....."

2. The petitioner, therefore, preferred a petition in this Court under Article 32 challenging the constitutional validity of sub-clauses (i) and (ii) of clause 3(b) of the Conditions of Detention Order and praying that the Administrator of the Union Territory of Delhi and the Superintendent of Tihar Central Jail be directed to permit her to have interview with her lawyer and the members of her family without complying with the restrictions laid down in those sub-clauses. The principal ground on which the constitutional validity of sub-clauses (i) and (ii) of clause 3(b) of the Conditions of Detention Order was challenged was that these provisions were violative of Articles 14 and 21 of the Constitution inasmuch as they were arbitrary and unreasonable. It was contended on behalf of the petitioner that allowing interview with the members of the family only once in a month was discriminatory and unreasonable, particularly when under-trial prisoners were granted the facility of interview with relatives and friends twice in a week under Rule 559A and convicted prisoners were permitted to have interview with their relatives and friends once in a week under Rule 550 of the Rules set out in the Manual for the Superintendence and Management of Jails in the Punjab. The petitioner also urged that a detenu was entitled under Article 22 of the Constitution to consult and be defended by a legal practitioner of his choice

and she was, therefore entitled to the facility of interview with a lawyer whom he wanted to consult or appear for him in a legal proceeding and the requirement of prior appointment for interview and of the presence of a Customs or Excise Officer at the interview was arbitrary and unreasonable and therefore violative of Articles 14 and 21.

3. The respondents resisted the contentions of the petitioner and submitted that sub-clauses (i) and (ii) of clause 3(b) were not violative of Articles 14 and 21, since the restrictions imposed by them were reasonable, fair and just, but stated that they would have no objection if instead of a monthly interview, the petitioner was granted the facility of interview with her daughter and sister twice in a week as in the case of under-trial prisoners and so far as interview with the lawyer is concerned, they would not insist on the presence of a customs or excise officer at the interview. Though these two concessions were made on behalf of the respondents at the hearing of the petition before us, the question still remains whether sub-clause (i) and (ii) of clause 3(b) are valid and it is necessary that we should examine this question in the context of our constitutional values, since there are a large number of detenus under the COFEPOSA Act and the conditions of their detention in regard to interviews must be finally settled by this Court.
4. Now it is necessary to bear in mind the distinction between 'preventive detention' and 'punitive detention', when we are considering the question of validity of conditions of detention. There is a vital distinction between these two kinds of detention. 'Punitive detention' is intended to inflict punishment on a person, who is found by the judicial process to have committed an offence, while 'preventive detention' is not by way of punishment at all, but it is intended to pre-empt a person from indulging in conduct injurious to the society. The power of preventive detention has been recognised as a necessary evil and is tolerated in a free society in the larger interest of security of the State and maintenance of public order. It is a drastic power to detain a person without trial and there are many countries where it is not allowed to be exercised except in times of war or aggression. Our Constitution does recognise the existence of this power, but it is hedged-in by various safeguards set out in Articles 21 and 22. Art. 22 in clauses (4) to (7), deals specifically with safeguards against preventive detention and any law of preventive detention or action by way of preventive detention taken under such law must be in conformity with the restrictions laid down by those clauses on pain of invalidation. But apart from Art. 22, there is also Art. 21 which lays down restrictions on the power of preventive detention. Until the decision of this Court in

Maneka Gandhi v. Union of India (1978) 1 SCC 248 : AIR 1978 SC 597, a very narrow and constricted meaning was given to the guarantee embodied in Art. 21 and that article was understood to embody only that aspect of the rule of law, which requires that no one shall be deprived of his life or personal liberty without the authority of law. It was construed only as a guarantee against executive action unsupported by law. So long as there was some law, which prescribed a procedure authorising deprivation of life or personal liberty, it was supposed to meet the requirement of Art. 21. But in *Maneka Gandhi's* case (*supra*), this Court for the first time opened-up a new dimension of Art. 21 and laid down that Art. 21 is not only a guarantee against executive action unsupported by law, but is also a restriction on law making. It is not enough to secure compliance with the prescription of Article 21 that there should be a law prescribing some semblance of a procedure for depriving a person of his life or personal liberty, but the procedure prescribed by the law must be reasonable, fair and just and if it is not so, the law would be void as violating the guarantee of Art. 21. This Court expanded the scope and ambit of the right to life and personal liberty enshrined in Art. 21 and sowed the seed for future development of the law enlarging this most fundamental of Fundamental Rights. This decision in *Maneka Gandhi's* case became the starting point-the-spring-board-for a most spectacular evolution the law culminating in the decisions in *M. O. Hoscoot v. State of Maharashtra* (1979) 1 SCR 192 : 1978 Cri LJ 1678, *Hussainara Khatoon's* case (1980) 1 SCC 81 : (1979) Cri LJ 1036, the *first Sunil Batra's* case (1980) 2 SCR 557 : (1980) Cri LJ 1099 and the *second Sunil Batra's* case (1980) 3 SCC 488. The position now is that Art. 21 as interpreted in *Maneka Gandhi's* case (*supra*) requires that no one shall be deprived of his life or personal liberty except by procedure established by law and this procedure must be reasonable, fair and just and not arbitrary, whimsical or fanciful and it is for the Court to decide in the exercise of its constitutional power of judicial review whether the deprivation of life or personal liberty in a given case is by procedure, which is reasonable, fair and just or it is otherwise. The law of preventive detention has therefore now to pass the test not only of Art. 22, but also of Art. 21 and if the constitutional validity of any such law is challenged, the Court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just. But despite these safeguards laid down by the Constitution and creatively evolved by the Courts, the power of preventive detention is a frightful and awesome power with drastic consequences affecting personal liberty, which is the most cherished and prized possession of man in a civilised society. It is a power to be exercised with the greatest care and caution and the courts have to be ever vigilant to see that this power

is not abused or misused. It must always be remembered that preventive detention is qualitatively different from punitive detention and their purposes are different. In case of punitive detention, the person concerned is detained by way of punishment after he is found guilty of wrong doing as a result of trial where he has the fullest opportunity to defend himself, while in case of preventive detention, he is detained merely on suspicion with a view to preventing him from doing harm in future and the opportunity that he has for contesting the action of the Executive is very limited. Having regard to this distinctive character of preventive detention, which aims not at punishing an individual for a wrong done by him, but at curtailing his liberty with a view to pre-empting his injurious activities in future, it has been laid down by this Court in *Sampat Prakash v. State of Jammu and Kashmir* (1969) 3 SCR 574 : (1969) Cri LJ 1555,

"that the restrictions placed on a person preventively detained must, consistently with the effectiveness of detention, be minimal."

5. The question which then arises is whether a person preventively detained in a prison has any rights which he can enforce in a Court of law. Once his freedom is curtailed by incarceration in a jail, does he have any fundamental rights at all or does he leave them behind, when he enters the prison gate? The answer to this question is no longer res integra. It has been held by this Court in the two *Sunil Batra* cases that "fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration." The prisoner or detenu has all the fundamental rights and other legal rights available to a free person, save those which are incapable of enjoyment by reason of incarceration. Even before the two *Sunil Batra* cases, this position was impliedly accepted in *State of Maharashtra v. Prabhakar Sanzgiri* and it was spelt-out clearly and in no uncertain terms by Chandrachud, J. as he then was, in *D.B. Patnaik v. State of Andhra Pradesh* (1975) 2 SCR 24 : (1975) Cri LJ 556 :

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

6. This statement of the law was affirmed by a Bench of five Judges of this Court in the first *Sunil Batra* case (*supra*) and by Krishna Iyer, J. speaking on behalf of the Court in the second *Sunil Batra* case (*supra*). Krishna Iyer, J. in the latter case proceeded to add in his characteristic style; "*The jurisdictional reach and range of this Court's writ to hold prison caprice and cruelty in constitutional leash is incontestable*" and concluded by observing; "*Thus it is now clear law that a prisoner wears the armour of basic freedom even behind bars and that on breach thereof by lawless officials the law will respond to his distress signals through 'writ' aid. The Indian human has a constant companion-the Court armed with the Constitution.*"
7. It is interesting to note that the Supreme Court of the United States has also taken the same view in regard to rights of prisoners. Mr. Justice Douglas struck a humanistic note when he said in Eve Pall's case :
"Prisoners are still persons entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all the requirements of due process."
8. So also in Charles Wolff's case, Mr. Justice White made the same point in emphatic terms.
"But, though his rights may be diminished by environment, a prisoner is not wholly stripped off constitutional protections, when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." Mr. Justice Douglas reiterated his thesis when he asserted: "Every prisoner's liberty i.e. of courses, circumscribed by the very fact of his confinement, but his interest in the limited liberty left to him is then only the more substantial. Conviction of a crime does not render one a non-person whose rights are subject to the whim of the prison administration, and therefore, the imposition of any serious punishment within the system requires procedural safeguards."
9. Mr. Justice Marshall also expressed himself clearly and explicitly in the same terms:
"I have previously stated my view that a prisoner does not shed his basic constitutional rights at the prison gate, and I fully support the court's holding that the interest of inmates in freedom from imposition of serious discipline is a 'liberty' entitled to due process protection."
10. What is stated by these learned Judges in regard to the rights of a prisoner under the Constitution of the United States applies equally in regard to the rights of a prisoner or detenu under our constitutional system. It must, therefore, now be taken to be well-settled that a prisoner or detenu is not stripped of his fundamental or other legal rights, save those which are inconsistent with his incarceration, and if any of

these rights are violated, the Court which is to use the words of Krishna Iyer, J., "not a distant abstraction omnipotent in the books but an activist institution which is the cynosure of public hope," will immediately spring into action and run to his rescue.

11. We must therefore proceed to consider whether any of the Fundamental Rights of the detenu are violated by sub-clauses (i) and (ii) of clause 3(b) so as to result in their invalidation wholly or in part. We will first take up for consideration the Fundamental Right of the detenu under Article 21 because that is a Fundamental Right which has, after the decision in *Maneka Gandhi's* case (supra), a highly activist magnitude and it embodies a constitutional value of supreme importance in a democratic society. It provides that no one shall be deprived of his life or personal liberty except according to procedure established by law and such procedure shall be reasonable fair, and just. Now what is the true scope and ambit of the right to life guaranteed under this Article? While arriving at the proper meaning and content of the right to life, we must remember that it is a constitutional provision which we are expounding and moreover it is a provision enacting a Fundamental right and the attempt of the court should always be to expand the reach and ambit of the Fundamental right rather than to attenuate its meaning and content.

...

12. The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. Now obviously, the right to life enshrined in Article 21 can not be restricted to mere animal existence. It means something much more than just physical survival. In *Kharak Singh v. State of Uttar Pradesh* Subba Rao J. quoted with approval the following passage from the judgment of Field J. in *Munn v. Illinois* to emphasize the quality of life covered by Article 21:

"By the term "life" as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world."

And this passage was again accepted as laying down the correct law by the Constitution Bench of this Court in the first Sunil Batra case (supra). Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiorari, this would include

the faculties of thinking and feeling. Now deprivation which is inhibited by Article 21 may be total or partial, neither any limb or faculty can be totally destroyed nor can it be partially damaged. Moreover it is every kind of deprivation that is hit by Article 21, whether such deprivation be permanent or temporary and, furthermore, deprivation is not an act which is complete once and for all: it is a continuing act and so long as it lasts, it must be in accordance with procedure established by law. It is therefore clear that any act which damages or injures or interferes with the use of, any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21.

13. But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation protanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights. Now obviously, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Articles 14 and 21. It would thus be seen that there is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights. This right to live which is comprehended within the broad connotation of the right to life can concededly be abridged according to procedure established by law and therefore when a person is lawfully imprisoned, this right to live is bound to suffer attenuation to the extent to which it is incapable of enjoyment by reason of

incarceration. The prisoner or detenu obviously cannot move about freely by going outside the prison walls nor can he socialise at his free will with persons outside the jail. But, as part of the right to live with human dignity and therefore as a necessary component of the right to life, he would be entitled to have interviews with the members of his family and friends and no prison regulation or procedure laid down by prison regulation regulating the right to have interviews with the members of the family and friends can be upheld as constitutionally valid under Articles 14 and 21, unless it is reasonable, fair and just.

14. The same consequence would follow even if this problem is considered from the point of view of the right to personal liberty enshrined in Article 21, for the right to have interviews with members of the family and friends is clearly part of personal liberty guaranteed under that Article. The expression 'personal liberty' occurring in Article 21 has been given a broad and liberal interpretation in *Maneka Gandhi's* case (supra) and it has been held in that case that the expression 'personal liberty' used in that Article is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and it also includes rights which "have been raised to the status of distinct Fundamental Rights and given additional protection under Article 19". There can therefore be no doubt that 'personal liberty' would include the right to socialise with members of the family and friends subject, of course, to any valid prison regulations and under Articles 14 and 21, such prison regulations must be reasonable and non-arbitrary. If any prison regulation or procedure laid down by it regulating the right to have interviews with members of the family and friends is arbitrary or unreasonable, it would be liable to be struck down as invalid as being violative of Articles 14 and 21. Now obviously when an under-trial prisoner is granted the facility of interviews with relatives and friends twice in a week under Rule 559A and a convicted prisoner is permitted to have interviews with his relatives and friends once in a week under Rule 550, it is difficult to understand how sub-clause (ii) of Clause 3(b) of the Conditions of Detention Order, which restricts the interview only to one in a month in case of a detenu, can possibly be regarded as reasonable and non-arbitrary, particularly when a detenu stands on a higher pedestal than an under-trial prisoner or a convict and, as held by this Court in *Sampath Prakash's* case (supra) restrictions placed on a detenu must "consistent with the effectiveness of detention, be minimal." We would therefore unhesitatingly hold sub-clause (ii) of clause 3(b) to be violative of Articles 14 and 21 in so far as it permits only one interview in a month to a detenu. We are of the view that a detenu must be permitted to have atleast two interviews in

a week with relatives and friends and it should be possible for a relative or friend to have interview with the detenu at any reasonable hour on obtaining permission from the Superintendent of the Jail and it should not be necessary to seek the permission of the District Magistrate, Delhi, as the latter procedure would be cumbrous and unnecessary from the point of view of security and hence unreasonable. We would go so far as to say that even independently of Rules 550 and 559A, we would regard the present norm of two interviews in a week for prisoners as furnishing a criterion of what we would consider reasonable and non-arbitrary.

15. The same reasoning must also result in invalidation of sub-clause (i) of clause 3(b) of the Conditions of Detention Order which prescribes that a detenu can have interview with a legal adviser only after obtaining prior permission of the District Magistrate, Delhi and the interview has to take place in the presence of an officer of Customs/ Central Excise/Enforcement to be nominated by the local Collector of Customs/ Central Excise or Deputy Director of Enforcement who has sponsored the case for detention. The right of a detenu to consult a legal adviser of his choice for any purpose not necessarily limited to defence in a criminal proceeding but also for securing release from preventive detention of filing a writ petition or prosecuting any claim or proceeding, civil or criminal, is obviously included in the right to live with human dignity and is also part of personal liberty and the detenu cannot be deprived of this right nor can this right of the detenu be interfered with except in accordance with reasonable, fair and just procedure established by a valid law. A prison regulation may, therefore, regulate the right of a detenu to have interview with a legal adviser in a manner which is reasonable, fair and just but it cannot prescribe an arbitrary or unreasonable procedure for regulating such an interview and if it does so, it would be violative of Articles 14 and 21. Now in the present case the legal adviser can have interview with a detenu only by prior appointment after obtaining permission of the District Magistrate, Delhi. This would obviously cause great hardship and inconvenience because the legal adviser would have to apply to the District Magistrate, Delhi well in advance and then also the time fixed by the District Magistrate, Delhi may not be suitable to the legal adviser who would ordinarily be a busy practitioner and, in that event, from a practical point of view the right to consult a legal adviser would be rendered illusory. Moreover, the interview must take place in the presence of an officer of Customs/Central Excise/Enforcement to be nominated by the local Collector of Customs/Central Excise or Deputy Director of Enforcement who has sponsored the detention and this too would seem to be an unreasonable procedural requirement

because in order to secure the presence of such officer at the interview, the District Magistrate, Delhi would have to fix the time for the interview in consultation with the Collector of Customs/Central Excise or the Deputy Director of Enforcement and it may become difficult to synchronise the time which suits the legal adviser with the time convenient to the concerned officer and furthermore if the nominated officer does not, for any reason, attend at the appointed time, as seems to have happened on quite a few occasions in the case of the petitioner, the interview cannot be held at all and the legal adviser would have to go back without meeting the detenu and the entire procedure for applying for an appointment to the District Magistrate, Delhi would have to be gone through once again. We may point out that no satisfactory explanation has been given on behalf of the respondents disclosing the rationale of this requirement.

16. We are therefore of view that sub-clause (i) of clause 3(b) regulating the right of a detenu to have interview with a legal adviser of his choice is violative of Arts. 14 and 21 and must be held to be unconstitutional and void. We think that it would be quite reasonable if a detenu were to be entitled to have interview with his legal adviser at any reasonable hour during the day after taking appointment from the Superintendent of the Jail, which appointment should be given by the Superintendent without any avoidable delay. We may add that the interview need not necessarily take place in the presence of a nominated officer of Customs/Central Excise/Enforcement but if the presence of such officer can be conveniently secured at the time of the interview without involving any postponement of the interview, then such officer and if his presence cannot be so secured, then any other Jail official may, if thought necessary, watch the interview but not as to be within hearing distance of the detenu and the legal adviser.

Supreme Court of India
AIR 2006 SC 1946
R.D. Upadhyay
vs
State of Andhra Pradesh and Others

Y.K. Sabharwal, CJ., C.K. Thakker and P.K. Balasubramanyan, JJ.

Y.K. Sabharwal, C.J.

1. Concerned by the plight of the undertrial prisoners languishing in various jails in the country, various directions were issued by this Court from time to time. Presently, we are considering mainly the issue of directions for the development of children who are in jail with their mothers, who are in jail either as undertrial prisoners or convicts. Children, for none of their fault, but per force, have to stay in jail with their mothers. In some cases, it may be because of the tender age of the child, while in other cases, it may be because there is no one at home to look after them or to take care of them in absence of the mother. The jail environment are certainly not congenial for development of the children.
7. The National Institute of Criminology and Forensic Sciences conducted a research study of children of women prisoners in Indian jails. The salient features of the study brought to the notice of all Governments in February 2002, are:
 - i) The general impression gathered was the most of these children were living in really difficult conditions and suffering from diverse deprivations relating to food, healthcare, accommodation, education, recreation, etc.
 - ii) No appropriate programmes were found to be in place in any jail, for their proper bio-psychosocial development. Their looking after was mostly left to their mothers. No trained staff was found in any jail to take care of these children.
 - iii) It was observed that in many jails, women inmates with children were not given any special or extra meals. In some cases, occasionally, some extra food, mostly in the form of a glass of milk, was available to children. In some jails, separate food was being provided only to grown up children, over the age of five years. But the quality of food would be same as supplied to adult prisoners.
 - iv) No special consideration was reported to be given to child bearing women inmates, in matters of good or other facilities. The same food and the same facilities were

given to all women inmates, irrespective of the fact whether their children were also living with them or not.

- v) No separate or specialised medical facilities for children were available in jails.
 - vi) Barring a few, most mother prisoners considered that their stay in jails would have a negative impact on the physical as well as mental development of their children.
 - vii) Crowded environment, lack of appropriate food, shelter and above all, deprivation of affection of other members of the family, particularly the father was generally perceived by the mothers as big stumbling blocks for the proper development of their children in the formative years of life.
 - viii) Mother prisoners identified six areas where urgent improvement was necessary for proper upkeep of their children. They related to food, medical facilities, accommodation, education, recreation and separation of their children from habitual offenders.
 - ix) No prison office was deployed on the exclusive duty of looking after these children or their mothers. They had to perform this duty alongside many other duties including administrative work, discipline maintenance, security-related jobs etc. None of them was reported to have undergone any special training in looking after the children in jails.
8. Some of the important suggestions emanating from the study are:

- i) In many States, small children were living in sub-jails which were not at all equipped to keep children. Women prisoners with children should not be kept in such sub-jails, unless proper facilities can be ensured which would make for a conductive environment there, for proper bio-psycho-social growth of children.
- ii) Before sending a woman in stage of pregnancy, to a jail, the concerned authorities must ensure that particular jail has got the basic minimum facilities for child delivery as well as for providing pre-natal and post-natal care for both to the mother and the child.
- iii) The stay of children in crowded barracks amidst women convicts, undertrials, offenders relating to all types of crime including violent crimes, is certainly harmful for such children in their personality development. Children are, therefore, required to be separated from such an environment on priority basis, in all such jails.
- (iv) A permanent arrangement needs to be evolved in all jails, to provide separate food with ingredients to take care of the nutritional needs of children to them on regular basis.

- v) Children of women prisoner should be provided with clothes, bed sheets, etc. in multiple sets. Separate utensils of suitable size and material should also be provided to each mother-prisoner for giving food to her child.
 - vi) Medical care for every child living in a jail has to be fully ensured. Also, in the event of a women prisoner falling ill herself, alternative arrangements for looking after the child should be made by the jail staff.
 - vii) Adequate arrangements should be available in all jails to impart education, both formal and informal, to every child of the women inmates. Diversified recreational programmers/facilities should also be made available to the children of different age groups.
 - viii) A child living in a jail along with her incarcerated mother is not desirable at all. In fact, this should be as only the last resort when all other possibilities of keeping the child under safe custody elsewhere have been tried and have failed. In any case, it should be a continuous endeavour of all the sectors of the criminal justice system that the least number of children are following their mothers to live in jails.
10. It was suggested that arrest of women suspects be made only by lady police. Such arrests should be sparingly made as it adversely affects innocent children who are taken into custody with their mother. To avoid arrest of innocent children the care and custody of such children may be handed over to voluntary organizations which can assist in the growth of children in a congenial and healthy atmosphere. Periodic meeting rights should be available to the women/mother prisoners in order to mother the healthy upkeep of the children.
13. Various State Governments and Union Territories submitted reports which provided detailed answers to the aforestated questions. The following is a brief conspectus of the reports filed:
- In the Andaman & Nicobar Islands, children are allowed to live with their mothers up to the age of 5 years. A special diet is prescribed for children by the Medical Officer including proper vitamins and minerals. As far as the future of the children is concerned, in consultation with the District Magistrate, the children are handed over to the relatives or to some trustworthy person as selected by the District Magistrate himself.*
- In Andhra Pradesh, milk is provided to the children every day with a protein diet for elder kids. Special medical facilities are available as prescribed by the Medical Officer. Vaccines like Polio etc are provided at regular intervals. Education is also provided.*

In Assam, children are allowed to live with their mothers up to the age of 6 years. Literary training is provided to small children who are lodged with their prisoner mothers. Lady teachers are also present. Instructions have been issued to provide sufficient study material to the children, as also adequate playing material. As for their future, in consultation with the District Magistrate, the children are handed over to the relatives or to some trustworthy person as selected by the District Magistrate himself.

In Bihar, children are allowed to live with their mothers up to the age of 2 years and up to 5 years in special cases where there is no other caretaker for child. Provision is made for special ration above and beyond the normal labouring ration for nursing mother and for supplementary cow's milk for children under the age of one year not receiving sufficient milk from the mother. Provision is also made for ration for children from 12-18 months, and from 18-24 months or as specified by the Medical Officer. Health and clothing facilities are provided by the Government. Toys and other forms of entertainment are also available in some jails.

In Chandigarh, a special diet is provided for. Medical facilities are also present.

In Chhattisgarh, children are allowed to live with their mothers up to the age of 6 years. Normal food and additional milk is provided. Polio drops are provided on pulse polio day. Medical treatment is done by full time and part time doctors present in the jail. Children are sent outside for expert medical treatment and advice if required. NGO's have provided for clothes. Inside the jail, a child education center is being run so that they develop interest in education and may learn to read and write. TV and fans for the female prisoners and their kids have been provided by some social service organizations, as also sports and recreation material, swings and cycles. Children are taken to public parks and for public functions to get acquainted with the outside world. After the age of six, these children are sent to the local 'children's home', where their primary education starts. Female children are sent to the Rajkumari Children's Home at Jabalpur where there is adequate arrangement of education.

In Delhi, children are allowed to live with their mothers up to the age of 6 years. A special diet inclusive of 750 gm milk and one egg each is provided to children in jail. Proper diets and vaccine for popular diseases are adequately provided for the children. Clothing is also provided for. Children above 4 years are taught to read and write. They are prepared for admission to outside schools. Sponsorships for the funding of the children education is provided for by the CASP (Community Aid Sponsorship Programme). Two NGO's by the name of Mahila Pratiraksha mandal and Navjyoti Delhi Police Foundation run crhches. Picnics are arranged by NGO's to take them to the Zoo and parks and museums to make them familiar with the outside world. Admission of the children above 5 years of age to Government cottage homes and to residential schools is facilitated through NGO's.

In Goa, the report states that dietary facilities for children are provided by the Government. The Medical Officer of the primary Health center, Candolim visits prisoners and children twice a week. If required, they are sent for better treatment to Government Hospitals.

In Gujarat, a special diet and special medical facilities as prescribed by the Medical Officer are available for children. Cradle facilities are provided for infants.

In Haryana, a standard diet of rice, flour, milk and dal is provided with a special diet provided on the advice of Medical Officer. Health issues are looked after as per the advice of Medical Officer. Regular literacy classes are taken by two lady teachers on deputation from the State Education Dept. at Borstal Jail, Hissar. Books and toys are provided.

In Himachal Pradesh, children are allowed to live with their mothers up to the age of 4 years or in special cases up to 6 years by the approval of the Superintendent. Children under the age of 1 year are provided with milk, sugar and salt. Provision is also made for ration for children from 12- 18 months and from 18-24 months. Extras may be ordered by the Medical Officer. Female prisoners and their children are in a separate ward, with its own toilets. This ensures that there is no mixing between the children and the male prisoners.

In Jammu & Kashmir, a special diet is available, as prescribed by the Medical Officer. Supplements are also provided to breast feeding mothers.

In Jharkhand, children are allowed to live with their mothers up to the age of 5 years. Provisions are made for special ration above and beyond the normal labouring ration for nursing mother and for supplementary cow's milk for children under the age of 1 year not receiving sufficient milk from the mother. Provision is also made for ration for children from 12-18 months and from 18-24 months. Health and clothing are taken care of by the Jail superintendent. Toys and items of entertainment have been provided in some jails.

In Karnataka, children are allowed to live with their mothers up to the age of 6 years. Education is looked after for by various NGO's. When the children are to leave the jail, they are handed over to the relatives or to some trustworthy person, Agency or school.

In Kerala, a special diet and medical facilities are made available as prescribed by the Medical Officer. Special clothing can also be so prescribed.

In Lakshadweep, it was reported that there is no undertrial prisoner lodged in jail along with her child and, therefore, need for making arrangements for children along with mothers is not felt necessary.

In Madhya Pradesh, children are allowed to live with their mothers up to the age of 4 years or in special cases up to 6 years by the approval of the Superintendent. There is provision for special ration above and beyond the normal labouring ration for nursing mother and for supplementary cow's milk for children under the age of 1 year not receiving sufficient milk from the mother. Provision is also made for ration for children from 12-18 months and from 18-24 months. For children who are leaving the jail, in consultation with the District Magistrate the children are handed over to the relatives or to some trustworthy person as selected by the District Magistrate himself.

In Maharashtra, children are allowed to live with their mothers up to the age of 4 years. They are to be weaned away from their mothers between the ages of 3 to 4 years. A special diet is prescribed under the Maharashtra Prison Rules. Changes can

be recommended by the Medical Officer. Specific amounts of jail-made carbolic soap and coconut oil are to be provided for by the authorities. Garments are to be provided as per the Maharashtra Prisons Rules. Two coloured cotton frocks, undergarments and chaddies per child have been prescribed per year. A nursery school is conducted by 'Sathi', an NGO in the female jail on a regular basis. Primary education is provided for by 'Prayas', a voluntary organization in Mumbai Central Prisons. A small nursery with cradles and other reasonable equipments is provided in each women's ward. Toys are also provided for by the authorities. On leaving the jail, children are handed over to the nearest relative, in whose absence to the officer-in-charge of the nearest Government remand home, or institution set up for the care of the destitute children under the Bombay Children Act, 1948.

In Manipur, provision is made for special ration above and beyond the normal labouring ration for nursing mother and for supplementary cow's milk for children under the age of one year not receiving sufficient milk from the mother. Provision is also made for ration for children from 12-18 months and from 18-24 months. The Superintendent is entrusted with the responsibility of providing clothing for children who are allowed to reside with their mothers.

In Meghalaya, children are allowed to live with their mothers up to the age of 6 years. All aspects of the children's welfare are taken care of according to the Rules under the State Jail Manual.

In Mizoram, children are allowed to live with their mothers up to the age of 6 years. A special diet is prescribed under the Rules of the Jail Manual. However, no proper facilities for education or recreation exist.

In Nagaland, the provisions of the Assam Jail Manual have been adopted vis-a-vis facilities for women and for children living with their mothers.

In Orissa, children are allowed to live with their mothers up to the age of 4 years or in special cases up to 6 years by the approval of the Superintendent. A special diet is available, as prescribed by the Medical Officer. Children are provided with suitable clothing. On leaving the jail, in consultation with the District Magistrate, the children are handed over to the relatives or to some trustworthy person, as selected by the District Magistrate himself.

In Pondicherry, a special diet is available as prescribed by the Medical Officer. Play things, toys etc. are provided to the children at Government cost or through NGOs.

In Punjab, children under the age of one year are provided with milk and sugar. Provision is also made for ration for children from 12-18 months and from 18-24 months. Extra diet is available on the advice of the Medical Officer. There is a play way nursery and one aaya or attendant who looks after the children from time to time.

In Rajasthan, a special diet is available under the rules of the Jail Manual. Special medical facilities are also provided for as prescribed in the manual. Clothing and toys are provided for by NGOs.

In Tamil Nadu, children are allowed to live with their mothers up to the age of 6 years. A special diet and special clothing are available as prescribed by the Medical Officer. Children under 3 years of age are treated in the crches and those upto the age of 6 years are treated in the nursery. Oil, soap and hot water are available for children. On leaving the jail, in consultation with the District Magistrate, the children are handed over to the relatives or to some trustworthy person, as selected by the District Magistrate himself.

In Tripura, the diet of children is as per the instructions of the Medical Officer. Medical care and nursing facilities are available. Mothers accompanied by children are kept separately.

In Uttar Pradesh, children are allowed to live with their mothers up to the age of 6 years. A special diet is available under the Rules of the Jail Manual. On leaving prison, in consultation with the District Magistrate, the children are handed over to the relatives or to some trustworthy person, as selected by the District Magistrate himself.

In Uttarakhand, food is provided as under the Rules of the Jail manual. Education provided for by the Government, which also makes arrangement for extra-curricular activities such as sports.

In West Bengal, normal facilities are available and in addition to that Inner Wheel club also runs a Homeopathic clinic for children. A non-formal school is run by an NGO for rendering elementary education to the children.

26. In light of various reports referred to above, affidavits of various State Governments, Union Territories, Union of India and submissions made, we issue the following guidelines:

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

2. **Pregnancy:**

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

b. When a woman prisoner is found or suspected to be pregnant at the time of her admission or at any time thereafter, the lady Medical Officer shall report the fact to the superintendent. As soon as possible, arrangement shall be made to get such prisoner medically examined at the female wing of the District Government Hospital for ascertaining the state of her health, pregnancy, duration of pregnancy,

probable date of delivery and so on. After ascertaining the necessary particulars, a report shall be sent to the Inspector General of Prisons, stating the date of admission, term of sentence, date of release, duration of pregnancy, possible date of delivery and so on.

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

3. Child birth in prison:

- a. As far as possible and provided she has a suitable option, arrangements for temporary release/parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the prison. Only exceptional cases constituting high security risk or cases of equivalent grave descriptions can be denied this facility.
- b. Births in prison, when they occur, shall be registered in the local birth registration office. But the fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned.
- c. As far as circumstances permit, all facilities for the naming rites of children born in prison shall be extended.

4. Female prisoners and their children:

- a. Female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years.
- b. No female prisoner shall be allowed to keep a child who has completed the age of six years. Upon reaching the age of six years, the child shall be handed over to a suitable surrogate as per the wishes of the female prisoner or shall be sent to a suitable institution run by the Social Welfare Department. As far as possible, the child shall not be transferred to an institution outside the town or city where the prison is located in order to minimize undue hardships on both mother and child due to physical distance.
- c. Such children shall be kept in protective custody until their mother is released or the child attains such age as to earn his/her own livelihood.
- d. Children kept under the protective custody in a home of the Department of Social Welfare shall be allowed to meet the mother at least once a week. The Director,

Social Welfare Department, shall ensure that such children are brought to the prison for this purpose on the date fixed by the Superintendent of Prisons.

- e. When a female prisoner dies and leaves behind a child, the Superintendent shall inform the District Magistrate concerned and he shall arrange for the proper care of the child. Should the concerned relative(s) be unwilling to support the child, the District Magistrate shall either place the child in an approved institution/home run by the State Social Welfare Department or hand the child over to a responsible person for care and maintenance.
5. **Food, clothing, medical care and shelter:**
 - a. Children in jail shall be provided with adequate clothing suiting the local climatic requirement for which the State/U.T. Government shall lay down the scales.
 - b. State/U.T. Governments shall lay down dietary scales for children keeping in view the calorific requirements of growing children as per medical norms.
 - c. A permanent arrangement needs to be evolved in all jails, to provide separate food with ingredients to take care of the nutritional needs of children who reside in them on a regular basis.
 - d. Separate utensils of suitable size and material should also be provided to each mother prisoner for using to feed her child.
 - e. Clean drinking water must be provided to the children. This water must be periodically checked.
 - f. Children shall be regularly examined by the Lady Medical Officer to monitor their physical growth and shall also receive timely vaccination. Vaccination charts regarding each child shall be kept in the records. Extra clothing, diet and so on may also be provided on the recommendation of the Medical Officer.
 - g. In the event of a woman prisoner falling ill, alternative arrangements for looking after any children falling under her care must be made by the jail staff.
 - h. Sleeping facilities that are provided to the mother and the child should be adequate, clean and hygienic.
 - i. Children of prisoners shall have the right of visitation.
 - j. The Prison Superintendent shall be empowered in special cases and where circumstances warrant admitting children of women prisoners to prison without court orders provided such children are below 6 years of age.

6. Education and recreation for children of female prisoners:

- a. The child of female prisoners living in the jails shall be given proper education and recreational opportunities and while their mothers are at work in jail, the children shall be kept in crches under the charge of a matron/female warder. This facility will also be extended to children of warders and other female prison staff.
 - b. There shall be a crèche and a nursery attached to the prison for women where the children of women prisoners will be looked after. Children below three years of age shall be allowed in the crèche and those between three and six years shall be looked after in the nursery. The prison authorities shall preferably run the said crèche and nursery outside the prison premises.
7. In many states, small children are living in sub-jails that are not at all equipped to keep small children. Women prisoners with children should not be kept in such sub-jails, unless proper facilities can be ensured which would make for a conducive environment there, for proper biological, psychological and social growth.
 8. The stay of children in crowded barracks amidst women convicts, undertrials, offenders relating to all types of crimes including violent crimes is certainly harmful for the development of their personality. Therefore, children deserve to be separated from such environments on a priority basis.
 9. **Diet:** Dietary scale for institutionalized infants/children prepared by Dr. A.M. Dwarkadas Motiwala, MD (Paediatrics) and Fellowship in Neonatology (USA) has been submitted by Mr. Sanjay Parikh. The document submitted recommends exclusive breastfeeding on the demand of the baby day and night. If for some reason, the mother cannot feed the baby, undiluted fresh milk can be given to the baby. It is emphasized that "*dilution is not recommended; especially for low socio-economic groups who are also illiterate, ignorant, their children are already malnourished and are prone to gastroenteritis and other infections due to poor living conditions and unhygienic food habits. Also, where the drinking water is not safe/reliable since source of drinking water is a question mark. Over-dilution will provide more water than milk to the child and hence will lead to malnutrition and infections. This in turn will lead to growth retardation and developmental delay both physically and mentally.*" It is noted that since an average Indian mother produces approximately 600 - 800 ml. milk per day (depending on her own nutritional state), the child should be provided at least 600 ml. of undiluted fresh milk over 24 hours if the breast milk is not available. The report also refers to the "Dietary Guidelines for Indians - A Manual," published in

1998 by the National Institute of Nutrition, Council of Medical Research, Hyderabad, for a balanced diet for infants and children ranging from 6 months to 6 years of age. It recommends the following portions for children from the ages of 6-12 months, 1-3 years and 4-6 years, respectively: Cereals and Millets - 45, 60-120 and 150-210 grams respectively; Pulses - 15, 30 and 45 grams respectively; Milk - 500 ml (unless breast fed, in which case 200 ml); Roots and Tubers - 50, 50 and 100 grams respectively; Green Leafy Vegetables - 25, 50 and 50 grams respectively; Other Vegetables - 25, 50 and 50 grams respectively; Fruits - 100 grams; Sugar - 25, 25 and 30 grams respectively; and Fats/Oils (Visible) - 10, 20 and 25 grams respectively. One portion of pulse may be exchanged with one portion (50 grams) of egg/meat/chicken/fish. It is essential that the above food groups to be provided in the portions mentioned in order to ensure that both macronutrients and micronutrients are available to the child in adequate quantities.

10. Jail Manual and/or other relevant Rules, Regulations, instructions etc. shall be suitably amended within three months so as to comply with the above directions. If in some jails, better facilities are being provided, same shall continue.
27. In view of above, Writ Petition (Civil) No. 133 of 2002 is disposed of.

Supreme Court of India
AIR 2004 SC 2223

State of Maharashtra and Others
vs
Asha Arun Gawali and Another

Doraiswamy Raju, Arijit Pasayat, JJ

1. The concern for reformation of prisoners and improvement of prison conditions has been judicially recognised. But the same does not countenance “holding of darbars in prisons by prisoners”, “five star hotel comforts for prisoners” or “free entry to and exit from jail” as surface in these cases, that too by statements of admission marked by abashed inefficiency unbecoming of those who are ordained to strictly carry out their duties and responsibilities i.e., state of jail authorities and the highly placed Governmental functionaries. The Bombay High Court while dealing with the legality of order directing detention of one Arun Gawali (hereinafter referred to as “detenu”) gave certain directions, to be noted hereinafter.

....

3. Detenu’s wife Asha Gowali filed a Writ Petition questioning legality of the order of detention passed under Section 3 of the National Security Act, 1980 (in short ‘the Act’). The directions were given while, as noted above quashing the detention taking note of certain baffling fact situations which came to light while hearing the writ petition and which should sound as ‘nightmares’ to any law abiding citizen and law enforcing authorities. While the State of Maharashtra questions the directions relating to launching of prosecution, the other two appeals i.e. Criminal Appeal No. 286 of 1998 has been filed by Mr. P. Subramanyam, who was then functioning as Chief Secretary (Home) and Criminal Appeal No. 285 of 1998 has been filed by Mr. Mahadu Govindrao Narvane, who was then functioning as Inspector General of Prisons. Though the judgment has been assailed by the State of Maharashtra no separate appeal has been filed by Mr. S.C. Malhotra, Commissioner of Police Mumbai, Mr. D.M. Jadhav, Mr. M.G. Ghorpade and Mr. L.T. Samudrawar, who were acting as Superintendents of Jail, though the directions given by the High Court also related to them.

4. The High Court noticed some startling features of monstrosity found prevailing and while dealing with the Habeas Corpus application tried to pierce the veils and noticed

the actual distressing as well as disgusting state of affairs. This was felt necessary because of certain observations in the detention order to the effect that the detenu while in jail had master-minded killings of certain persons in connivance with the active participation of certain persons who had come to meet him in jail.

5. Certain registers like the visitors' register etc. were called for verification and High Court noticed that there was no entry about the alleged visit of so called co-conspirators and there was no record of their having met the detenu. Certain officials were asked to file affidavits. Finding many inconsistent and irreconcilable statements High Court did not give any credence to the affidavits. In the aforesaid background it was observed that the order of detention was passed on irrelevant materials and was indefensible. In view of the sensitive nature of the matter a learned counsel was appointed as Amicus Curie and his assistance was appreciated by the High Court.
6. Taking note of the sad state of affairs in the jail and the total indifference of the concerned authorities, the High Court felt that there was a need for imposition of exemplary costs on the erring officials and that is how the directions quoted above were made.
7. Certain baffling features have emerged on a bare reading of the High Court's Order. The activities in the jail, entry of unauthorised persons and holding of "Darbar" are part of the defensive stand taken by the State Authorities in the affidavits filed before the High Court. We are shocked to find that the norms relating to entry of persons to the jail, maintenance of proper record of persons who entered the jail have been observed more in breach than observance and the rules and regulations have been found thrown to winds. The affidavits filed by the officials amply demonstrate this factor. One used to hear and read about lavish parties being thrown inside the jail. Doubts at times were entertained about the authenticity of such news having regard to the normal good faith to be reposed in the regularity of official activities. But the admissions made in the affidavits filed by the Jail Authorities and the officials, accept it as a fact. What is still more shocking is that persons have entered the jail, met the inmates and if the statements of the officials are seen hatched conspiracies for committing murders. The High Court was therefore justified in holding that without the active cooperation of the officials concerned these things would not have been possible. The High Court appears to have justifiably felt aghast at such acts of omissions and commissions of the jail officials which per se constituted offences punishable under various provisions of the IPC and has, therefore, necessarily directed the launching of criminal prosecution against them, besides mulcting them with exemplary costs.

8. The High Court noticed and in our view correctly that when the names of visitors who allegedly were a part of the conspiracy warranting detention of the detenu were not in the list of visitors during the concerned period, there is a patent admission about people getting unauthorised entry into the jails without their names being recorded in the official records something which would be impossible except with the connivance of those who otherwise should have prevented such things happening. It was noted by the High Court that there was no explanation as to how somebody could gain entry in the jail and meet the detenu and yet no entry would be made therefor. It is not possible unless the jail officials are themselves a party to the same.
9. In the background of what has been noticed by the High Court, one thing is very clear that there is a total casualness by the jail authorities. In the matter of maintaining records of persons who meet the inmates, the factual position as admitted in the affidavit filed is that the authorities themselves were conscious of the prevalent position but yet allowed to go scot free with impunity, except a pretended lip service. The purpose for which the jails are set-up have been totally destroyed by the manner in which the jail officials have acted. If the real purpose for setting up jails is to keep criminals out of circulation in the society and to ensure that their activities are restricted or curtailed, the same appears to have remained only a pious wish on paper and what happens in reality is just the reverse. High sounding words like "Writ of police runs beyond stone wall and iron bar", used in the affidavits have not been reflected in the action of the authorities and does not do real justice to the situation which only apparently necessitated, a hardline of action by the High Court. On the contrary the High Court came to hold on the basis of indisputable material placed before it that the jail officials rendered support to the criminals in their crimes by completely disregarding the mandate of law and this was done with a view to save them and in particular the detenu from punishment. An officer is supposed to act for protection of people, and prevent their criminal activities. Such activities are not merely lapses or omissions but more dangerous than the crimes and criminals who commit them for insulation it officially provides as alibi for avoiding and escaping from actual liability, under law, for those crimes . If they themselves become a party to the crimes by directly or indirectly helping the criminals to carry out their criminal activities using their incarceration as a protective shield to go scot free for their crimes , the credentials of the police officials are bound to suffer severe beating beyond repair and redemption. That is precisely what the High Court has observed and attempted to activate and rectify.

10. But we feel a further detailed enquiry was necessary in the matter. Therefore, the matter should be elaborately enquired into by the State Government. We are conscious that the officials have exhibited a total lack of seriousness and urgency but in the peculiar circumstances of the case where the entire system is under scrutiny, a detailed study of the factual position is necessary. What has happened in the jail to which this case relates, may or may not be different from other jails and that there is no guarantee that such things are now not happening. But a doubt lingers about the position being no better in other jails also.

11. The High Court noticed that the Maharashtra Prisons Facilities to Prisoners Rules, 1962 prescribed the modes of interview of relatives etc. It was noticed that these provisions were not *prima facie* observed. The under-trial detainees and prisoners locked in different prisons are in the custody of the jail officials, and they are responsible for the safety of the prisoners, maintenance of the prisons and the enforcement of discipline amongst the prisoners. In the affidavit dated 2.5.1997 the common plea of the Jail Superintendents was in the following words:

"That absence of entry in the gate register is not conclusive proof to establish that the so called persons have entered the jail. The statement before the Police during investigation is not admissible. It is further stated that First Information Reports in the respective crimes were recorded after long time."

12. We, therefore, dispose of the appeals with the following directions:

- (1) The State Government shall cause enquiry into the matter in depth and whatever action has to be taken departmentally or in accordance with the criminal laws shall be taken within six months from today. The directions for imposition of costs on the appellants - Mahadu Govindrao Narvane and P.Subramanyam personally are waived for the present.
- (2) Since the other officials in respect of whom costs were imposed have not questioned the imposition, the directions of the High Court in relation to such officers remain unaltered.
- (3) So far as the two appellants before this Court i.e. P.Subramanyam and Mahadu Govindrao Narvane are concerned, it shall be open to the Government to initiate actions against them if felt necessary even if they have retired on the basis of enquiry as directed.
- (4) Judicial officers go for inspection of jails periodically. The disturbing features noticed in the case at hand shall be kept in view by them while they make the

inspections and appropriate remedial measures and actions shall be taken on the basis of the reports, if any, submitted by the concerned officers.

- (5) The Government may consider the appointment of a Commission headed by former Judge of the Supreme Court to be assisted by a former Inspector General of Prisons and DG Police to probe into the nature of such lapses and explore the possibilities of effectively curbing their recurrence and devising methods and means to prevent them by appropriate statutory Provisions or Rules, to sufficiently meet the exigencies of the situation.

Mumbai High Court
2004 Cri LJ 4312

Asgar Yusuf Mukadam and Others
vs
State of Maharashtra and the Superintendent of Prison

R Khandeparkar and R Mohite, JJ

3. Few facts relevant for the decision are that, at the relevant time, the petitioners were lodged in Bombay Central Prison at Arthur Road, as under-trial prisoners in Bomb Blast Cases No. 1 of 1993. They were detained for a period exceeding seven years at the time of the filing of the petition. Section 31 of the said Act, which dealt with the provisions relating to the availability of certain facilities regarding food, clothing, bedding and other necessaries to the under-trial prisoners and civil prisoners as well as Section 32 which dealt with restriction on transfer of good and clothing between certain prisoners, were sought to be amended by the Prisons (Maharashtra Amendment) Act, 2000 hereinafter called as "the Amendment Act" by introducing new provisions of law in place of the old Sections 31 and 32 of the said Act. Aggrieved by the consequences which would follow from the amendment to the said provisions of law, the same are sought to be challenged by the petitioners.
8. Section 31 and 32 of the said Act, as they stood prior to amendment, read thus:-
"31. Maintenance of certain prisoners from private sources. - A civil prisoner or an unconvicted criminal prisoner shall be permitted to maintain himself, and to purchase, or receive from private sources at proper hours, food, clothing, bedding or other necessaries, but subject to examination and to such rules as may be approved by the Inspector General.
32. *Restriction on transfer of food and clothing between certain prisoners. - No part of any food, clothing, bedding or other necessaries belonging to any civil or unconvicted criminal prisoner shall be given, hired or sold to any other prisoner; and any prisoner transgressing the provision of this section shall lose the privilege of purchasing food or receiving it from private sources, for such time as the Superintendent thinks proper."*
9. The said provisions are sought to be amended by the Amending Act, and amended Section 31 reads as under:

"31. Maintenance of certain prisoners from private sources:

- (1) *An unconvicted criminal prisoner shall be permitted to maintain himself, and to purchase, or receive from private sources at proper hours, clothing and bedding but subject to examination and to such rules as may be approved by the Inspector General:*

Provided that, if such prisoner is a Satyagrahi, who is remanded on account of his participation in a Satyagrahi (non-violent public agitation), he shall be permitted to maintain himself and to purchase or receive from the private sources at proper hours food, clothing, bedding or other necessaries, subject to examination and to such rules as may be framed by the Inspector General, with the approval of the State Government.

- (2) *A civil prisoner shall be permitted to maintain himself and to purchase, or receive from the private sources at proper hours food, clothing, bedding or other necessaries but subject to examinations and to such rules as may be approved by the Inspector General."*

As regard Section 32, the amended provision reads thus:-

"No part of any clothing and bedding belonging to any unconvicted criminal prisoner, and no part of any food, clothing, bedding or other necessaries belonging to a civil prisoner or an unconvicted criminal prisoner who is a Satyagrahi, who is remanded on account of his participation in a Satyagraha (non-violent public agitation) shall be given, hired or sold to other prisoner; and any prisoner transgressing the provisions of this section shall lose the privilege of purchasing food or receiving it from private sources, for such time as the Superintendent thinks proper."

15. Constitutional Bench of the Apex Court in *Sunil Batra v. Delhi Administration and Ors.*, held that

Article 21 guarantees protection of life and personal liberty and though couched in negative language, it confers fundamental right to life and personal liberty. Relying upon the earlier decisions in the matter of *Kharak Singh v. State of U.P., and D. Bhuvan Mohan Patnail and Ors. v. State of Andhra Pradesh and Ors.*, , it was held that the following explanation by Field, J. in *Munn v. Illinois*, (1877) 94 US 113, as regards the scope of the words, "life and liberty" in Vth and XIVth Amendments of U.S. Constitution are to some extent precursor of Article 21:

"By the term 'life' as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all these limits and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world..... by the term liberty, as used in the provision something more is meant than mere freedom from physical restraint or the bonds of a prison."

It was further ruled that "*personal liberty as used in Article 21 has been held to be a compendious term to include within itself all the varieties of rights which go to make personal liberties of the man other than those dealt with in Clause (d) of Article 19(1). The burden to justify the curtailment thereof must squarely rest on the State.*"

21. The provision of Sub-section (2) of Section 167 of the Code of Criminal Procedure therefore empowers the Magistrate to continue the detention of the accused in custody for a total period of 90 days or 60 days, as the case may be, when there are adequate grounds for doing so. The expression "adequate grounds" relates essentially to the reasonableness and justification for continuation of detention of the accused in custody. But the same cannot be considered ignoring the provisions of Section 49 of the Code of Criminal Procedure as also the constitutional mandate in relation to the provision for basic needs of the human being. It is pertinent to note that no Magistrate is empowered to authorise detention in any custody under the said provision unless the accused is produced before him. This is not an empty formality. It is mandatory for the investigating agency to ensure production of the accused before the Magistrate before seeking detention of such person in custody. Obviously, this is in the interest of the accused. It is not merely to ensure avoidance or ill treatment to the accused at the hands of the investigating agency but also to facilitate the accused person to bring to the Magistrate his grievances including the need for making provision to satisfy his basic needs and reasonable requirements as also to ensure that the accused is not subjected to restraint more than necessary. The food is necessary for the survival of human being, and being so, the Magistrate who is required to get himself satisfied about the existence of adequate grounds for continuation of detention of the accused in custody is obviously empowered to grant the facility of home food to the under-trial while he is in custody, albeit which could be subject to conditions and bearing in mind the facts and circumstances of each case.
22. The need for home food may arise for various reasons. A person may not be able to digest the food other than the one prepared in accordance with his health conditions or for other medical grounds. It is not to say that the food served in prisons is of sub-standard quality or that it is not the good food. Infact, the petitioners have not been able to make out any case to that effect. Besides, if the food is of sub-standard quality then it would be of the same quality for all inmates of the jail including the convicts.
25. In *Chameli Singh v. State of Uttar Pradesh*, referring to Article 21 of the Constitution held that the requirements of a decent and civilized life would include the right to food, water and decent environment, and ruled that:-

"In any organised society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this object. Right to live guaranteed in any civilized society, implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilized society."

28. The view that we are taking in the matter and bearing in mind the practice which is followed by the Courts below in the matter of grant of facility of home food to the under-trial prisoners whenever asked for and reasons to be recorded, the contention that the power to order facility of home food was exercised by the Courts below in terms of the unamended Sections 31 and 32 is to be held as totally devoid of substance. Those provisions do not deal with the powers of the Magistrate or the trial Courts. Those are the powers which are given to the Jail Administrative Authorities, and similar is a situation in relation to the amended provisions of law. The power to order home food vests in the Magistrate or the trial Court under Section 167 of the Code of Criminal Procedure and the same is not controlled by virtue of Sections 31 and 32 of the Prisons Act, 1894. In this view of the matter, it is not necessary to deal with the issue of vires of the amended Sections 31 and 32 of the said Act sought to be raised by the petitioner. Suffice to observe that the petitioners are entitled to move before the concerned trial Court, and if such application is filed, the concerned Court should pass an appropriate order in that regard considering the facts and circumstances of the case.
29. For the reasons stated above, the petition is allowed in above terms and rule is made absolute accordingly with no order as to costs.

**Supreme Court of India
AIR 1997 SC 1739**

Rama Murthy

vs

State of Karnataka

Kuldip Singh, B.L. Hansaria & S.B. Majmudar, JJ

7. As alluded, this petition has its origin in a letter from one Rama Murthy, a prisoner in Central Jail, Bangalore, addressed to the Hon'ble Chief Justice of this Court. In the letter the main grievance was about denial of rightful wages to the prisoners despite doing hardwork by them in different sections of the prison. Mention was also made about "non-eatable food" and "mental and physical torture". On the matter being taken up judicially, a need was felt, in view of the denial of the allegations in the objection filed on behalf of the respondent, that the District Judge, Bangalore, should visit the Central Jail and should find out the pattern of payment of wages and also the general conditions of the prisoners such as residence, sanitation, food, medicine etc. This order was passed on 26.11.1992 and the District Judge, after seeking time for submitting report from this Court, did so on 28.4.1993. His report runs into more than 300 pages (alongwith voluminous annexures), which shows the earnestness and pains which the District Judge evinced and took in submitting the report.
8. It would be enough for our purpose to note the various conclusions arrived at by the District Judge, which have been incorporated in para 23 of the report reading as below:
 23. *Therefore, on the basis of a thorough and proper enquiry by me in the Central prison, Bangalore as directed by the Hon'ble Supreme Court, I have reached the following conclusion:*
 1. *The general condition of the prisoners is satisfactory. Their treatment by the Jail Authorities is also satisfactory.*
 2. *The quality, quantity and timely supply of food to the prisoners are satisfactory.*
 3. *The pattern of payment of wages is as per Annexure-F and it is being followed properly. The wages are correctly recorded and paid to the prisoners as per rules.*
 4. *The sanitation is not satisfactory due to acute scarcity of water. The jail premises is normally maintained clean and tidy with great efforts. But it is improving since about a month after opening 3 or 4 borewells.*

6. *The medical facilities in the Jail Hospital and supply of medicines to the prisoners are satisfactory. Due to over population in the jail the two Doctors and their staff at present in the jail Hospital are unable to cope up with the demands but still there is no slackness or negligence in their work. For want of Lady Doctor and women staff in the hospital the Medical attendance to women prisoners is not proper or satisfactory.*
7. *Visit of prisoners to their homes or their places is not prompt or regular as per rules due to want of Police Escorts. This has caused lot of dissatisfaction and depression among the prisoners.*
8. *The production of prisoners in Courts on the dates of hearing in their cases is not regular or prompt due to want of Police Escorts and vehicles. This has affected the expeditious disposal of custody cases in Courts. The prisoners are very much agitated over this.*
9. *The production of prisoners in the Hospitals outside the jail for examination or treatment by the experts is not prompt or regular due to want of Police Escorts.*
10. *Mental patients in the jail and the prisoners with serious diseases requiring treatment outside the jail are compelled to remain in jail for want of accommodation in such hospitals.*
11. *The place and procedure followed for interviews between the prisoners their kith and kin, friends and visitors is not satisfactory.*
12. *Canteen facilities should improve. The sale of articles in the Canteen at the price above market prices to make profit is causing great hardship to the prisoners.*
9. In view of the above conclusions, the District Judge made certain recommendations which are contained in para 24 of the report reading as below:
 24. *In view of the above conclusions the following recommendation are made for consideration and implementation:*
 1. *P.W.D. Authorities in charge of the maintenance of the buildings and the premises of the jail are to be directed to maintain the buildings properly as per the requirement in the jail by getting necessary funds from the Government on priority basis. Necessary instructions may be issued to the Government in this regard to provide funds and to accord permission.*
 2. *Sanitation in the jail premises requires lot of improvement. P.W. 10 Authorities are to be directed to repair the existing pipe lines and the sewerage lines in addition to providing Electric pumps to the bore-wells in the jail premises.*
 3. *The staff in the jail hospital has to be increased by providing at least 2 more Doctors preferably who have specialised in the particular field where the prisoners may require their services in special cases. Once Lady Medical*

Officer, a Lady Nurse and two lady attendants for the purpose of attending the women prisoners. The location of their office may be provided in the separate block meant for women prisoners. If regular posting of Doctors cannot be made for the purposes stated above, the services of the Doctors from other Government Hospitals in Bangalore may be secured as a routine periodically or in case of emergencies by providing them some conveyance. It is suggested that Doctors incharge of the Hospital may visit each barrack at least once in a week and meet the inmates to know their health problems and to treat them, in jail Hospital. In case of emergency as agreed by them, they may visit the prisoners whenever their services are required.

4. *The Jail Authorities may be directed to arrange for the regular visit of the prisoners to their homes or their places periodically as per the rules without insisting any deposit or security or police report unless it is inevitable and in case of emergency like death, serious illness and other important festivals, functions arrangements should be made for their visit relaxing all the required formalities. By way of follow up action, the Jail Authorities may be instructed to submit the report of the returns to the prl. City Civil & Sessions Judge, Bangalore. For this purpose the Home Department has to be requested to spare sufficient number of police Escorts and the vehicles as and when it is required by the Jail Authorities. If possible as suggested by the Superintendent of Jail, some fixed number of escorts the jail to assist the Jail Authorities in cases of visits due to emergencies.*
5. *The Superintendent of the jail may be instructed to produce the UTPs before the Courts in which their cases are pending on the dates of hearing fixed by the Courts regularly and promptly. For this purpose, the Home Department of the Government may be requested to spare sufficient number of police Escorts and the vehicles as and when it is required by the Jail Authorities. The Superintendent of the Jail has to be instructed to submit a report in this regard at least once in a month to the prl. City Civil & Sessions Judge, Bangalore compliance of such instructions.*
6. *The Superintendent of the jail should take all the steps to produce the prisoners to the Hospitals outside the jail for the purpose of examination and treatment whenever necessary as per the opinion of the Jail Doctors and for this purpose also, the same procedure may be followed regarding police Escort as stated above.*
7. *All the hospitals under the control of the Government who are expected to treat the prisoners either in the normal cases or in special cases may be strictly instructed to treat the prisoners either as in-patients or otherwise as per the recommendation of the jail Doctors and the Superintendent of the Jail without referring them back to the jail for treatment, particularly in case of mental patients, the NIMHANS authorities may be requested to treat them as in-patients till they become normal without referring them back to the jail.*

8. *It is absolutely necessary to provide proper accommodation with sufficient space for the interviews between the prisoners with their kith and kin, friends and visitors. The procedure which is being followed at present also required to be modified as suggested in the discussion stated above in para-20. If possible separate portions may be made in the accommodation for the purpose of interviews. The Superintendent of the jail may be instructed to submit the report in this regard at least once in a months to the prl. City civil & Sessions Judge, Bangalore who may review the same issue instructions as and when it is necessary.*
9. *Canteen facilities in the jail require improvements. Some more articles for day to day use of the inmates may be sold in the Canteen. The superintendent of the Jail may in consultation of the prisoners submit a report in this regard to the prl. City Civil & Sessions Judge, Bangalore mentioning the articles which may be sold in the Canteen. The Jail authorities should be strictly instructed not to sell any of the articles to the prisoners at a rate more than the market price or for profit. For this purpose, they may adopt any procedure whereby the articles can be held on the Principle 'no loss no profit' basis.*
10. *It may be necessary to instruct follow up action by all the concerned Authorities in regard to the implementation of the items stated above.*

Overcrowding

15. That our jails are overcrowded is a known fact. To illustrate, in Tihar Jail as against the housing capacity of 2,500 persons in 1994-95, there were 8,500 prisoners, as mentioned in Chapter 16 of '1 Dare'. a biographical work on Ms. Kiran Bedi. Of course, the percentage of over-crowding varies from prison to prison.
24. There is yet another baneful effect of overcrowding. The same is that it does not permit segregation among convicts - Those punished for serious offences and for minor. The result may be that hardened criminals spread their influence over others. Then, juvenile offenders kept in jails (because of inadequacy of alternative places where they are required to be confined) get mixed up with others and they are likely to get spoiled further. So, problem of overcrowding is required to be tackled in right earnest for a better future.

Delay in Trial

25. It is apparent that delay in trial finds an undertrial prisoner (UTP) in jail for a longer period while awaiting the decision of the case. In the present proceeding, we are really not concerned regarding the causes of delay and how to remedy this problem. Much has been said in this regard elsewhere and we do not propose to burden this

judgement with this aspect. We would rather confine ourselves as to how to take care of the hardship which is caused to a UTP because of the delay in disposal of this case. The recent judgements of this Court (noted above) requiring release of UTP on bail where the trial gets protracted would hopefully take care to a great extent the hardship caused in this regard. We desire to see full implementation of the directions given in the aforesaid cases.

Torture and ill-treatment

34. May we say that the ideal prison and the advance prison system which the enlightened segment of the society visualise would not permit torture and ill-treatment of prisoners. Of course, if for violating prison discipline some punishment is required to be given, that would be a different matter.

Neglect of health and hygiene

35. The Mulla Committee has dealt with this aspect in Chapter 6 and 7 of its Report, a perusal of which shows the pathetic position in which most of the jails are placed insofar as hygienic conditions are concerned. most of them also lack proper facilities for treatment of prisoners. The recommendations of the Committee in this regard are to be found in Chapter 29. We have nothing useful to add except pointing out that society has an obligation towards prisoners' health for two reasons. First, the prisoners do not enjoy the access to medical expertise that free citizens have. Their incarceration places limitations on such access; no physician of choice, no second opinions, and few if any specialists. Secondly, because of the condition son their incarceration, inmates are exposed to more health hazards than free citizens. Prisoners therefore, suffer from a double handicap.

Insubstantial food and inadequate clothing

37. There is not much to doubt that the rules contained in concerned Jail Manual dealing with food and clothing etc. to be given to prisoners are not fully complied with always. All that can usefully be said on this aspect is the persons who are entitled to inspect jails should do so after giving shortest notice so that the reality becomes known on inspection. The system of complaint box introduced in Tihar Jail during some period needs to be adopted in other jails also. The complaint received must be fairly inquired and appropriate actions against the delinquent must be taken. On top of all, prisoners must receive full assurance that whoever would lodge a complaint would not suffer any evil consequence for lodging the same.

Prison vices

38. On this aspect nothing more is required to be said than what was pointed out in Sunil Batra (II). It may only be stated that some vices may be taken care of if what is being stated later on the subject of jail visits is given concrete shape. We have said so because many of the vices are related to sexual urge, which remains unsatisfied because of snapping of marital life of the prisoner. If something could be done to keep the thread of family life unbroken some vices many take care of themselves, as sexual frustration may become tolerable.

Deficiency in communication

40. While in jail, communication with outside world gets snapped with a result that the inmate does not know what is happening even to his near and dear ones. This causes additional trauma. A liberalised view relating to communication with kith and kin specially is desirable. It is hoped that the model All India Jail Manual, about the need of which we have already adverted, would make necessary provision in this regard. It may be pointed out that though there may be some rationale for restricting visits, to which aspect we shall presently address, but insofar as communication by post is concerned, there does not seem (sic) be any plausible reason to deny easy facility to an inmate.

Streamlining of jail visits

41. Prison visits fall into three categories: (1) relatives and friends; (2) professionals; and (3) lay persons. In the first category comes the spouse. Visit by him/her has special significance because a research undertaken on Indian prisoners sometime back showed that majority of them were in the age group of 18 to 34, which shows that most of them were young and were perhaps having a married life before their imprisonment. For such persons, denial of conjugal life during the entire period of incarceration creates emotional problems also. Visits by a spouse is, therefore, of great importance.

Management of open air prisons

45. Open air prisons play an important role in the scheme of reformation of a prisoner which has to be one of the desideratum of prison management. They represent one of the most successful applications of the principle of individualization of penalties with a view to social readjustment as stated by B. Chandra in the Preface to his book titled "Open Air Prisons". It has been said so because release of offenders on probation, home leave to prisoners, introduction of wage system, release on parole, educational,

moral and vocational training of prisoners are some of the features of the open air prison (camp) system. Chandra has stated in the concluding portion of Chapter 3 at page 150 (of 1984 edition) that in terms of finances, open institution is far less costly than a closed establishment and the scheme has further advantage that the Government is able to employ in work, for the benefit of the public at large, the jail population which would have otherwise remained unproductive. According to the author, the monetary returns are positive, and once put into operation, the camps pay for itself.

51. Let us, therefore, resolve to improve our prison system by introducing new techniques of management and by educating the prison staff with our constitutional obligations towards prisoners. Rest would follow, as day follows the night. Let the dawning ray (of hope) see the end of gloom cast on the faces of majority of prisoners and let a new awakening percolate every prison wall. Let it be remembered that "where there is will, there is way". Will there is, way would be found.
52. We had desired to dispose of the writ petition accordingly. But as we could not hear all the States, because of constraint of time and as they have to be heard before giving directions as detailed above, let notices be issued on the Secretary to the Government of India, Ministry of Home and the Chief Secretaries of all the States and Union Territories, as to why they should not be asked to act for above. Let causes be shown within three months and let the case be placed for further hearing thereafter soon.

Supreme Court of India
AIR 1998 SC 3164

State of Gujarat and Another
vs
Hon'ble High Court of Gujarat

M. M. Punchhi, CJI., K.T. Thomas and D.P. Wadhwa, JJ.

1. A delicate issue requiring very circumspective approach is mooted before us: Whether prisoners, who are required to do labour as part of their punishment should necessarily be paid wages for such work at the rates prescribed under Minimum Wages law. We have before us appeals filed by some State Governments challenging the judgements rendered by the respective High Courts which in principle upheld the contention that denial of wages at such rates would fringe on infringement of the constitutional protection against exaction of forced labour.
2. Shri Rajeev Dhawan, senior counsel put before us the view points of National Human Rights Commission (NHRC) which favours the principle that prisoners should be paid wages at the rates prescribed under the Minimum Wages law. On the request of this Court Shri Kapil Sibal, senior counsel addressed arguments as Amicus Curiae. During the course of hearing we felt the need to hear the Attorney General for India on this important question. Shri Soli J. Sorabjee, Attorney General, in response to our request addressed arguments substantially in tune with the approach made by the other two senior counsel. We are grateful to all the learned counsel who assisted us with their valuable contributions.
4. A Division Bench of the High Court of Kerala (Subramoniam Poti CJ and Chandrasekhara Menon, J) in the decision entitled as "In the matter of prison reform enhancement of wages of prisoners" 1983 KLT 512, seems to have taken the lead in this area and suggested that the wages given to prisoners must be at par with the wages fixed under the Minimum Wages Act (for short MW Act) and the request to deduct the cost for providing food and clothes to the prisoner from such wages was spurned down. The Division Bench directed the State Government to design a just and reasonable wage structure for the inmates of the prisons who are employed to do labour, and in the meanwhile to pay the prisoners at the rate of Rs. 8 per day until Government is able to decide the appropriate wages to be paid to such prisoners. Learned counsel for

the State submitted before us that the challenge is limited to the . question whether deduction of cost of food and clothes is permissible.

10. There are principally two categories of prisoners: (1) under-trial prisoners and (2) convicted prisoners (besides them there are those detained as preventive measure, and those undergoing detention for default of payment of fine). Those in the first category cannot be required to do any labour while they remain in jail, but they far outnumber all the remaining categories put together. Statistics show that in most of the States the under-trial prisoners have overwhelming majority when compared with the number of convicted prisoners, e.g. Under-trial prisoners in Bihar jails are 84.04% of the total inmates of the jails. In U.P. the percentage is 85.17. In Madhya Pradesh it is 64.22% and in most other States the percentage of under-trial prisoners is above 50.
12. A person sentenced to simple imprisonment cannot be required to work unless he volunteers himself to do the work. Section 374 or the IPC makes imposition of work on an unwilling person as an offence. The section reads thus :
"Whoever unlawfully compels any person to labour against the will of that person shall be punished with imprisonment of either descriptions, for a term which may extend to one year or with fine or with both."
36. Having thus found that like any other workman a prisoner is also entitled to wages for his work the question next to be considered is - what is the rate at which the prisoner should be paid for their work? We have no doubt that paying a pittance to them is virtually paying nothing. Even if the amount paid to them is a little more than a nominal sum the resultant position would remain the same. Government of India had set up in 1980 a committee on jail reforms under the Chairmanship of Mr. Justice AN Mulla, a retired judge of the Allahabad High Court. The report submitted by the said Committee is known as 'Mulla Committee Report.' It contains a lot of very valuable suggestions, among which the following are contextually apposite.

"All prisoners under sentence should be required to work subject to their physical and mental fitness as determined medically. Work is not to be conceived as additional punishment but as a means of furthering the rehabilitation of the prisoners, their training for work, the forming of better work habits, and of preventing idleness and disorder....Punitive, repressive and afflictive work in any form should not be given to prisoners. Work should not become a drudgery and a meaningless prison activity. Work and training programmes should be treated as important avenues of imparting useful values to inmates for their vocational and social adjustment and also for their ultimate rehabilitation in the free community...."

Rates of Wages should be fair and equitable and not merely nominal or paltry. These rates should be standardised so as to achieve a broad uniformity in wage system in all the prisons in each State and Union Territory."

37. While considering the quantum of wages payable to the prisoners we are persuaded to take into account the contemporary legislative exercises on wages. Minimum wages law has now come to stay. This Court has held that minimum wage which is sufficient to meet the bare physical needs of a workman and his family irrespective of the paying capacity of the industry must be something more than subsistence wage which may be sufficient to cover the bare physical needs of the worker and its family including education, medical needs, amenities adequate for preservation is his efficiency. **Express Newspapers Ltd. v. Union of India**, (1961) ILLJ 339 SC .
40. It is true that State Government has the obligation to bear the expenses needed for providing food and clothes and other amenities to every prisoner, whether his detention is during post conviction period or pre-conviction period as under-trial prisoner or has been preventively detained or is interned as a consequence of defaulting payment of fine imposed as punishment. If that is the only angle through which this question has to be looked at there is, perhaps, a point to castigate deduction of the amount spent on food and clothes of a prisoner from the minimum wages rate. But the issue has to be looked at from three other angles also.
50. The above discussion leads to the following conclusions :
 - (1) It is lawful to employ the prisoners sentenced to rigorous imprisonment to do hard labour whether he consents to do it or not.
 - (2) It is open to the jail officials to permit other prisoners also to do any work which they choose to do provided such prisoners make a request for that purpose.
 - (3) It is imperative that the prisoner should be paid equitable wages for the work done by them. In order to determine the quantum of equitable wages payable to prisoners the State concerned shall constitute a wage fixation body for making recommendations. We direct each State to do so as early as possible.
 - (4) Until the State Government takes any decision on such recommendations every prisoner must be paid wages for the work done by him at such rates or revised rates as the Government concerned fixes in the light of the observations made above. For this purpose we direct all the State Government to fix the rate of such interim wages within six weeks from today and report to this Court of compliance of this direction.

- (5) We recommend to the State concerned to make law for setting apart a portion of the wages earned by the prisoners to be paid as compensation to deserving victims of the offence the commission of which entailed the sentence of imprisonment to the prisoner, either directly or through a common fund to be created for this purpose or in any other feasible mode.
51. The appeals and the writ petitions are disposed of in the above terms. Registry will despatch a copy of this judgement to the Chief Secretary to every State Government.
- D.P. Wadhwa, J.**
52. I agree with the directions issued by my learned brother K.T. Thomas, J. I, however, find myself unable to subscribe to the view that putting prisoner to hard labour and not paying wages to him would be violative of Clause (1) of Article 23 of the Constitution and this violation is saved only under Clause (2) thereof which provides that nothing in Article 23 shall prevent the State from imposing compulsory service for public purposes.
69. It is not necessary to detail various contentions raised by the State Governments to justify their stand. Broadly, they say wages are given to the prisoners for the purpose of:
1. (a) Offering incentive and stimulus for effect, work and industry;
 - (b) making prison work purposive and meaningful;
 - (c) developing a sense of self-responsibility and self respect amongst the inmates;
 - (d) enabling prisoners to purchase their sundry daily extra requirements from the prison canteen;
 - (e) helping inmates to effect saving for their post release rehabilitation and also for extending economic help to their families; and
 - (f) payment effected should not be compared to the kind of wages paid outside but it should be seen as payment for learning skills and therefore only as stipend.
82. For the work to be taken from the prisoners and remuneration to be paid, paras 71, 72, 73 and 76 may be referred to, which are as under :-
- "71. (1) Prison labour must not be of an afflictive nature.*
- (2) *A11 prisoners under sentence shall be required to work, subject to their physical and mental fitness as determined by the medical officer.*
- (3) *Sufficient work of a useful nature shall be provided to keep prisoners actively employed for a normal working day.*

- (4) *So far as possible the work provided shall be such as will maintain or increase the prisoners ability to earn an honest living after release.*
 - (5) *Vocational training in useful trades shall be provided for prisoners able to profit thereby and especially for young prisoners.*
 - (6) *Within the limits compatible with proper vocational selection and with the requirements of institutional administration and discipline, the prisoners shall be able to choose the type of work they wish to perform.*
72. (1) *The organization and methods of work in the institutions shall resemble as closely as possible those of similar work outside institutions, so as to prepare prisoners for the conditions of normal occupational life.*
- (2) *The interests of the prisoners and of their vocational training, however, must not be subordinated to the purpose of making a financial profit from an industry in the institution.*
73. (1) *Preferably institutional industries and farms should be operated directly by the administration and not by private contractors.*
- (2) *Where prisoners are employed in work not controlled by the administration, they shall always be under the supervision of the institution's personnel. Unless the work is for other departments of the government the full normal wages for such work shall be paid to the administration by the persons to whom the labour is supplied, account being taken of the output of the prisoners.*
76. (1) *There shall be a system of equitable remuneration of the work of prisoners.*
- (2) *Under the system prisoners shall be allowed to spend at least a part of their earnings on approved articles for their own use and to send a part of their earnings to their family.*
- (3) *The system should also provide that a part of the earnings should be set aside by the administration so as to constitute a savings fund to be handed over to the prisoner on his release, Education and recreation."*
111. The question then arises for consideration is if Article 300A bars payment of any compensation to the victim or his family out of the earnings of the prisoner. To bar any such objection to the validity of deduction rules can be framed under the Prisons Act or otherwise. When a body is set up to consider the amount of equitable wages for the prisoners a Prison Fund can be created in which a certain amount from the wages of the prisoners be credited and out of that an amount be paid to the victim or for the upkeep of his family, as the rules may provide for the purpose. Creation of fund, to my mind, is necessary as any amount of compensation deducted from the wages of the prisoner and paid directly to the victim or his family may not be acceptable considering the psyche of the people in our country.

Conclusion

The states in India need to address the situation of prisons on a far more serious note than what is being done today. The Prisons Act, 1894 is outdated, in spite of various state amendments to the act. The Act lacks the ability to deal with issues of prison facilities when assessed from the view point of various international instruments. As per the resolution 45/111 (*Basic Principles for the Treatment of Prisoners, 1988*) passed by the General Assembly of the United Nations, and the International Covenant on Civil and Political Rights, 1966, a state should ensure strict implementation and provision of the following facilities to the prisoners: (a) cultural and religious facilities, (b) educational facilities, (c) recreational and exercise facilities, (d) healthcare facilities, (e) segregation units, (f) protective custody units, (g) well maintained visiting areas and (h) employment facilities. A legislation needs to be implemented in an effective manner in order to successfully curb the inadequacy of facilities to prisoners in over populated prisons and calculated steps need to be taken for building new and better prisons.

SECURITY LEGISLATION

Introduction

Terrorism in India is a result of various unresolved issues like Kashmir insurgencies, Khalistani Sikhs, Naxalites, North-eastern rebels, LTTE, etc. The Government of India with a view to curb the terrorist activities in India introduced a security legislation by the title *Terrorist and Disruptive Activities (Prevention) Act, 1985*. The number of people arrested under TADA had exceeded 76,000, by 30 June 1994 and only 35% of cases were brought before the Courts. TADA was repealed in 1995 on account of major human rights violations of the people arrested and detained by the security agencies. In the aftermath of the 9/11 attacks on USA and the terrorist attack on the Indian Parliament, a new security legislation *Prevention of Terrorist Activities Act, 2002* was enforced, replacing the *Terrorist and Disruptive Activities (Prevention) Act*. Due to various human rights abuses committed by the security personnel under the guise of POTA, the act was repealed in the year 2004. After the Bombay attacks of November 26, 2008, the Parliament enacted another anti terrorist security legislation known as *Unlawful Activities (Prevention) Amendment Act, 2008*. Chapter VII –*Miscellaneous*, of the 2008 amendment act prescribes the special and liberal procedures to be followed by investigating authorities. The need for monitoring the activities of the investigating authorities has become essential in order to prevent any violations of human rights of the accused or the arrested/detained under the powers conferred by the legislature to them. Armed Forces Special Powers Act is another such draconian legislation imposed on the North Eastern State under the guise of Maintaining Security. The case-laws cited in this chapter show how various human rights violations occurred during the period when previous security legislations were in force and are helpful in establishing and understanding a nexus with the present security legislation.

In *Balbir Singh vs. State of Haryana*, (1987 (1) SCC 533), the Supreme Court held that the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) though intended to effectively deal with terrorists and disruptionists contains drastic provisions for punishing terrorists and disruptionists under Sections 3 and 4 of the Act. Furthermore, against any judgment, sentence or order rendered under the Terrorist and Disruptive Activities (Prevention) Act, an appeal would lie directly to the Supreme Court and not to the High Court. Therefore the investigation of the cases under the Act has not only to be thorough but also of a high order.

In *Anil Vasant Chitnis and Others vs. Senior Inspector of Police, Alibaug Police Station, Raigad and Others*, (1994 Mah LJ 1743), the Bombay High Court, while deciding on the question of applicability of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), held that the application of the Act is not mere ipse dixit of a statement of the investigating officer. It does not appeal to common sense that the consequences envisaged under Section 3 of the Act were intended by the accused persons and the activity is such which cannot be tackled by a normal law enforcement agency. The Court noted with grave concern that TADA has unfortunately become a necessity in the country. But unless its application is discriminate and only in appropriate rare cases, the very purpose of enacting the TADA Act can be defeated. Indiscriminate use of the provisions of the TADA Act is a remedy which can be worse than the disease.

In *Kartar Singh v. State of Punjab* case, (1994 (3) SCC 569), the Constitutional Bench of the Supreme Court upheld the validity of TADA, except for Section 22 which provides for identification on the basis of photographs. The majority held that the Act was not violative of Articles 14, 20 and 21. Justice K. Ramaswamy and Justice Sahai in their separate dissenting judgements held that Section 15 which provides for use of confessional statements recorded by police as violative of Articles 20 and 21, while the majority laid down certain guidelines for the same. The Court also stated that the jurisdiction of the High Courts under Article 226 of the Constitution of India should be exercised only in rare and exceptional cases.

In *Hitendra Vishnu Thakur and Others vs. State of Maharashtra and Others*, (1994 (4) SCC 602) the Supreme Court while dealing with the true ambit and scope of Section 3(1) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) relied on the observation made by the Constitution Bench in *Kartar Singh* case. The Court held that 'Section 3 operates when a person not only intends to overawe the Government or create terror in people etc. but he uses the arms and ammunition which results in death or is likely to cause death and damage to property etc. In other words, a person becomes a terrorist or is guilty of terrorist activity when intention, action and consequence all the three ingredients are found to exist.'

With regard to the true ambit and scope of Section 20(4) and Section 20(8) of TADA in the matter of grant of bail, the Court held that with the amendment of clause (b) of sub-section (4) of Section 20 of TADA read with the proviso to sub-section (2) of Section 167 of CrPC an indefeasible right to be enlarged on bail accrues in favour of the accused if the police fails to complete the investigation and put up a challan against him in accordance with law under Section 173 CrPC. An obligation, in such a case, is cast upon the court,

when after the expiry of the maximum period during which an accused could be kept in custody, to decline the police request for further remand except in cases governed by clause (bb) of Section 20(4). There is yet another obligation also which is cast on the court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf (*Hussainara Khatoon case*, (1980) 1 SCC 98).

The Court further held, the objection to the grant of bail to an accused on account of the 'default' of the prosecution to complete the investigation and file the challan within the maximum period prescribed under clause (b) of sub-section (4) of Section 20 of TADA or within the extended period as envisaged by clause (bb) has to be limited to cases where either the factual basis for invoking the 'default' clause is not available or the period for completion of investigation has been extended under clause (bb) and the like.

However, no bail can be granted under Section 20(8) unless the Designated Court is satisfied after notice to the public prosecutor that there are reasonable grounds for believing that the accused is not guilty of such an offence and that he is not likely to commit any offence while on bail.

In *Sanjay Dutt vs. State through C.B.I., Bombay* (1995 Cri LJ 477), the following questions of law were referred to be decided by the Constitution Bench of the Supreme Court:

- (i) The proper construction of Section 5 of the TADA Act indicating the ingredients of the offence punishable thereunder and the ambit of the defence available to a person accused of that offence?
- (ii) The proper construction of Clause (bb) of Sub-section (4) of Section 20 of the TADA Act indicating the nature of right of an accused to be released on bail thereunder, on the default to complete investigation within the time allowed therein? And
- (iii) The proper construction and ambit of Sub-section (8) of Section 20 of the TADA Act indicating the scope for bail thereunder?

The Bench while answering the first question held that for an offence punishable under Section 5 of the TADA Act, the prosecution is required to prove that the accused was in conscious 'possession', 'unauthorisedly', in 'a notified area' of any arms and ammunition specified in columns 2 and 3 of Category I or Category III (a) of Schedule I to the Arms Rules, 1962 or bombs, dynamite or other explosive substances. The accused is entitled to prove by adducing evidence, that the purpose of his unauthorised possession of any such arms and ammunition etc. was wholly unrelated to any terrorist or disruptive activity. If the accused succeeds in proving the absence of the said third ingredient, then his mere

unauthorised possession of any such arms and ammunition etc. is punishable only under the general law by virtue of Section 12 of the TADA Act and not under Section 5 of the TADA Act.

On the right of an accused to be released on bail, the Bench held that Section 20(4)(bb) of the TADA Act only requires production of the accused before the court in accordance with Section 167(1) of the CrPC and this is how the requirement of notice to the accused before granting extension beyond the prescribed period of 180 days in accordance with the further proviso to Clause (bb) of Sub-section (4) of Section 20 of the TADA Act has to be understood in the judgment of the Division Bench of this Court in *Hitendra Vishnu Thakur*. The ‘indefeasible right’ of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the CrPC in default of completion of the investigation and filing of the challan within the time allowed, is a right which ensues to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith.

On the third question, the view taken by the Constitution Bench in *Kartar Singh* was affirmed wherein it was held,

“The conditions imposed under Section 20(8)(b), as rightly pointed out by the Additional Solicitor General, are in consonance with the conditions prescribed under Clauses (i) and (ii) of Sub-section (1) of Section 437 and Clause (b) of subsection (3) of that section.... Therefore, the condition that “there are grounds for believing that he is not guilty of an offence,” which condition in different form is incorporated in other Acts such as Clause (i) of Section 437(1) of the Code ..., cannot be said to be an unreasonable condition infringing the principle of Article 21 of the Constitution.”

In *Khudeswar Dutta vs. State of Assam* (1998 (4) SCC 492) the Supreme Court set aside the conviction of the appellant under section 5 of TADA stating that mere knowledge that the said two guns and cartridges were kept at someone’s house cannot amount to conscious possession of those things.

In *Vijay Pal Singh vs. State, N.C.T. of Delhi* (2001 Cri LJ 3294) the Supreme Court held that to be convicted under Section 5 of TADA in regard to the complicity of the appellant in the crime, if the allegation against the accused is that he is found in possession of the weapon which was used in murdering of the deceased, there is an area of reasonable doubt as to whether the appellant had only the polythene bag with him without knowing the entire contents therein, and that benefit of doubt is available to him.

In *Bonky Alias Bharat Shivaji Mane and Others vs. State of Maharashtra*, (1995 (6) SCC 447) the Supreme Court while relying on the position held in *Hitendra Vishnu Thakur* case held that the criminal activity in order to invoke TADA must be committed with the requisite intention as contemplated by Section 3(1) of the Act by use of such weapons as have been enumerated therein and which cause or are likely to result in the commission of offences as mentioned in that section. If it is only as a consequence of the criminal act that fear, terror or/and panic is caused but the intention of committing the particular crime cannot be said to be the one strictly envisaged by Section 3(1), it would be impermissible to try or convict and punish an accused under TADA.

In *Balbir Singh and Another vs. State of Uttar Pradesh* (1999 (5) SCC 682) the Supreme Court set aside the conviction under section 4(1) of TADA noting that to attract Section 4 of TADA it is obligatory for the prosecution to establish that the accused committed or conspired or attempted to commit or abetted, advocated, or advised or knowingly facilitated the commission of any disruptive activity or any act preparatory to a disruptive activity.

In *Kishore Prabhakar Sawant and Others vs. State of Maharashtra* (1999 (2) SCC 45) the Supreme Court upheld the conviction of the three accused under Section 3 of the TADA Act holding that it can be said without any doubt that the intention of the accused was to create terror so that they could carry on their terrorist activity in future also without being opposed by members of the public.

In *Paramjit Singh and Others vs. State of Punjab and Others* (1997 (4) SCC 156), the Supreme Court held that the conviction of the accused u/s 3 of TADA could not be sustained as the prosecution failed to prove the two vital circumstances upon which the entire prosecution case rested.

In *Sagayam vs. State of Karnataka*, (2000 (4) SCC 454) the Supreme Court opined that an attempt in order to be criminal need not be the penultimate act foreboding death. It is sufficient in law if there is present an intent coupled with some overt act in execution thereof, such act being proximate to the crime intended and if the attempt has gone so far that it would have been complete but for the extraneous intervention which frustrated its consummation. There are different stages in a crime. First, the intention to commit it; second, the preparation to commit it; third, an attempt to commit it. If at the third stage, the attempt fails, the crime is not complete but the law punishes for attempting the same. An attempt to commit crime must be distinguished from an intent to commit it or preparation of its commission.

In *Yusuf @ Babu Kahn vs. State of Rajasthan*, (2003 (4) SCALE 428), the Supreme Court allowed the appeals stating that the only circumstance connecting the accused with the crime is the fact that they were found in the van with the explosives and there being no other charges especially connecting the accused of involvement in any other terrorist activity, there can be no conviction.

In *State vs. Navjot Sandhu* (2003 (6) SCC 641) the Supreme Court while deciding the question whether the High Court could or should have exercised power under Article 227 of the Constitution of India or jurisdiction under Section 482 of the Criminal Procedure Code, held that it is settled law that the power of judicial superintendence, under Article 227, must be exercised sparingly and only to keep subordinate courts and tribunals within the bounds of their authority and not to correct mere errors. Further, when the statute bans the exercise of revisional powers it would require very exceptional circumstances to warrant interference under Article 227 of the Constitution since the power of superintendence was not meant to circumvent statutory law. It is settled law that the jurisdiction under Article 227 could not be exercised "as the cloak of an appeal in disguise".

The Court further held that the inherent jurisdiction of the High Court under Section 482 of the Criminal Procedure Code can be exercised even when there is a bar under section 397 or some other provisions of CrPC. However, this power cannot be exercised if there is a statutory bar in some other enactment (*Satya Narayan Sharma case*). The inherent power is to be used only in cases where there is an abuse of the process of the court or where interference is absolutely necessary for securing the ends of justice.

In *State of Gujarat vs. Salimbhai Abdul Gaffar Shaikh and Others*, (2003 (8) SCC 50), the Supreme Court said that Section 482 CrPC saves the inherent power of the High Court. The High Court possesses the inherent powers to be exercised ex-debito justitiae to do real and substantial justice for the administration of which alone courts exist. The power has to be exercised to prevent abuse of the process of the court or to otherwise secure the ends of justice. But this power cannot be restored to if there is a specific provision in the Code for the redressal of the grievance of the aggrieved party.

In *State of West Bengal and Another vs. Mohd. Khalid and Others*, (1995 (1) SCC 684) the Supreme Court considered the scope of the jurisdiction of the High Court under Article 226 to interfere with: (a) according sanction; and (b) taking cognizance. The Court in *Stree Atyachar Virodh Parishad* case had held, "It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The court, therefore, need not undertake an elaborate enquiry in sifting and weighing the material. Nor is it

necessary to delve deep into various aspects. All that the court has to consider is whether the evidentiary material on record if generally accepted, would reasonably connect the accused with the crime. No more need be enquired into." The Court further relying on the rulings in *Maharashtra v. Abdul Hamid Haji Mohammed, State of Bihar v. PP Sharma, Gokulchand Dwarkadas Morarka v. King, Ajay Aggarwal, Kartar Singh v. State of Punjab, Hitendra Vishnu Thakur v. State of Maharashtra, Niranjan Singh K.S. Punjabi, Satya Narain Musadi v. State of Bihar* cases held that the High Court has clearly exceeded its powers under Article 226 of the Constitution in quashing the orders of sanction and taking of cognizance.

In *R.M. Tewari, Advocate vs. State (NCT of Delhi) and Others AND Government of NCT of Delhi vs. Judge, Designated Court II (TADA) AND Mohd. Mehfooz vs. Chief Secretary and Another*, (AIR 1996 SC 2047) the Supreme Court directed the public prosecutors to apply for withdrawal cases under TADA on the basis of the recommendation of the High Power Committee constituted by the Government as per the directions of the Apex Court in *Kartar Singh's* case. The Court held that the initial invocation of the stringent provisions of the TADA is itself subject to sanction of the Government and, therefore, the revised opinion of the Government formed on the basis of the recommendation of the High Power Committee after Scrutiny of each case should not be lightly disregarded by the Court except for weighty reasons such as malafides or manifest arbitrariness.

In *Rambhai Nathabhai Gadhvi and Others vs. State of Gujarat*, (1997 (7) SCC 744) the apex Court noted that the Director General of Police, apparently, acted in a very casual manner and instead of discharging his statutory obligations under Section 20-A(2) of TADA to grant (or not to grant) sanction for prosecution proceeded to deal with the request of the DSP contained in his letter as if it was a letter seeking permission to apply the provisions of TADA. The exercise exhibits that the Director General of Police did not even read, let alone consider "carefully", the FIR and the letter of the DSP. Therefore, it was held that it is not an order of sanction to prosecute the appellants as required by Section 20-A(2) of the Act.

In *Shaheen Welfare Association vs. Union of India and Others*, (1996 Cri LJ 1986), the Supreme Court has laid down the criteria for release of undertrials incarcerated under TADA on the lines of its decision in *Supreme Court Legal Committee vs. Union of India* (1994) 6 SCC 731.

In *Lal Singh vs. State of Gujarat and Another*, (2001 (3) SCC 221) the Supreme Court held that in case of conspiracy and particularly terrorist activities, better evidence than acts and statements including that of co-conspirators in pursuance of the conspiracy is

hardly available. In such cases, when there is confessional statement it is not necessary for the prosecution to establish each and every link as confessional statement gets corroboration from the link which is proved by the prosecution. In any case, the law requires establishment of such a degree of probability that a prudent man may on the basis, believe in the existence of the facts in issue.

In *Suthenthiraraja and Others vs. SIT/CBI, Chennai*, (1999 (5) SCC 253) the appeals in death reference cases of assassins of the former Prime Minister Rajiv Gandhi were referred to before the Supreme Court. Justice D.P. Wadhwa in a separate judgement, while upholding the convictions of some of the assassins, laid down the broad principles governing the law of conspiracy.

In *Gurdeep Singh alias Deep vs. State (Delhi Administration)*, (2000 (1) SCC 498) the Supreme Court held that under Section 15 and Rule 15 of the TADA Act and Rule, it has to be kept in mind that a confessional statement is only recorded when one makes it voluntarily. First, confession could only be recorded by a police officer of the rank of Superintendent of Police or above. Such police officer has to record in his own handwriting, he has to clearly tell such accused persons that such confession made by him shall be used against him and if such police officer after questioning comes to the conclusion that it is not going to be voluntary he shall not record the same. Keeping this in the background which is complied with and keeping the administrative exigencies under which an accused is kept under handcuffs with armed guards etc. which maybe for the antecedent activities of the appellant as a terrorist, for the purpose of security, then that could in no way be constituted to be a threat or coercion to the accused for making his confessional statement.

In *Devender Pal Singh vs. State (NCT of Delhi) and Another*, (AIR 2002 SC 1661), the Court considered the questions whether the confessional statement of the accused was true and voluntary and whether there was any corroboration to the said statement. Relying on the *Gurdeep Singh* case above, the Court held that before solely relying upon the confessional statement, the court has to find out whether it is made voluntarily and truthfully by the accused. Even if it is made voluntarily, the court has to decide whether it is made truthfully or not. Per Justice M.B. Shah, it was held that when rest of the accused who are named in the confessional statement are not convicted or tried, this would not be a fit case for convicting the appellant solely on the basis of so called confessional statement recorded by the police officer. However, dissenting with this view, Justice Pasayat relied on *Jayawant Dattatray's* case in which it was held that "confessional statement before the police officer under Section 15 of the TADA is substantive evidence and it can be relied upon in the trial of such person or co-accused, abettor or conspirator for an offence punishable under the

act or the rules." Since the confessional statement was voluntary, no corroboration for the purpose of its acceptance is necessary. With the Bench in agreement with the view taken by Justice Pasayat, the death sentence of the accused was confirmed.

In *Kalpnath Rai vs. State (through C.B.I.)*, (1997 (8) SCC 732), the Supreme Court held that a confession made admissible under Section 15 of TADA can be used as against a co-accused only in the same manner and subject to the same conditions as stipulated in Section 30 of the Evidence Act. Under Section 30 of the Evidence Act, the confession made by one accused is not substantive evidence against a co-accused. It has only a corroborative value. (*Kashmira Singh v. State of M.P. AIR 1952 SC 159, Nathu v. State of U.P. AIR 1956 SC 56, Haricharan Kurmi v. State of Bihar AIR 1964 SC 1184*)

In *Sahib Singh vs. State of Haryana*, (1997 (7) SCC 231) the Supreme Court reiterated that under TADA, although a confession recorded by a police officer, not below the rank of Superintendent of Police, is admissible in evidence, such confessional statement, if challenged, has to be shown, before a conviction can be based upon it, to have been made voluntarily and that it was truthful. If the confessional statement does not admit even substantially the basic facts of the prosecution story, the confessional statement is not truthful and is part of the hallucination with which the prosecution and its witnesses were suffering, then it cannot be acted upon.

In *Suresh Budharmal Kalani alias Pappu Kalani vs. State of Maharashtra* (1998 (7) SCC 337) the Supreme Court relying upon the law laid down in *Kashmira Singh v. State of M.P.* (AIR 1952 SC 159) held that the confessional statements of the three accused cannot be taken into consideration in the absence of any other material to connect the appellant with the accusation leveled against him.

In *S.N. Dube vs. N.B. Bhoir and Others*, (2000 (2) SCC 254) the Supreme Court held that though giving of the statutory warning, ascertaining the voluntariness of the confession and preparation of a contemporaneous record in the presence of the person making the confession are mandatory requirements of Rule 15(3) of the TADA Rules, however there is no good reason why the form and the words of the certificate and memorandum should also be held mandatory. The purpose of the provision is to see that all formalities are performed by the recording officer himself and by others to ensure full compliance with the procedure and seriousness of recording a confession. Sanctity of the confession would not get adversely affected merely because the certificate and the memorandum are not separately written but are mixed up or because different words conveying the same thing as is required are used by the recording officer.

In *Jameel Ahmed and Another vs. State of Rajasthan*, (AIR 2004 SC 588) the Supreme Court laid down the requirements with regard to making confessions under TADA:

- (i) If the confessional statement is properly recorded, satisfying the mandatory provision section 15 of the TADA Act and the Rules made thereunder, and if the same is found by the court as having been made voluntarily and truthful then the said confession is sufficient to base a conviction on the maker of the confession.
- (ii) Whether such confession requires corroboration or not, is a matter for the court considering such confession on facts of each case.
- (iii) In regard to the use of such confession against a co-accused, it has to be held that as a matter of caution, a general corroboration should be sought for but in cases where the court is satisfied that the probative value of such confession is such that it does not require corroboration then it may base a conviction on the basis of such confession of the co-accused without corroboration. But this is an exception to the general rule of requiring corroboration when such confession is to be used against a co-accused.
- (iv) The nature of corroboration required both in regard to the use of confession against the maker as also in regard to the use of the same against a co-accused is of general nature, unless the court comes to the conclusion that such corroboration should be on material facts also because of the facts of a particular case. The degree of corroboration so required is that which is necessary for a prudent man to believe in the existence of facts mentioned in the confessional statement.
- (v) The requirement of sub-rule 5 of Rule 15 of the TADA Rules which contemplates a confessional statement being sent to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate who in turn, will have to send the same to the Designated Court is not mandatory and is only directory. However, the court considering the case of direct transmission of the confessional statement in the facts of the case creates any doubt as to the genuineness of the said confessional statement.

In *People's Union for Civil Liberties (PUCL) and Another vs. Union of India*, (2004 (9) SCC 580), the Supreme Court relying on *Kartar Singh's* case upheld the constitutional validity of the various provisions of the Prevention of Terrorism Act, 2002 (POTA).

In *Naga People's Movement of Human Rights and Others vs. Union of India*, (1998 (2) SCC 109), the validity of the Armed Forces (Special Powers) Act, 1958 and the Assam Disturbed Areas Act, 1955 and the notifications issued under the said enactments declaring disturbed areas in the States of Assam, Manipur and Tripura were challenged. The Constitutional

Bench of the Supreme Court stated that by virtue of Article 355 the Union owes a duty to protect the States against internal disturbance and since the deployment of armed forces in aid of civil power in a State is to be made by the Central Government in discharge of the said constitutional obligation, the conferment of the power to issue a declaration on the Central Government cannot be held to be violative of the federal scheme as envisaged by the Constitution. The Court however laid down various guidelines with respect to the implementation of the Acts. The Bench held that keeping in view the fact that the declaration about an area being declared as a 'disturbed area' can be issued only in a grave situation of law and order, a periodic review of the declaration under Section 3 of the Act should be made every six months.

It was held that while exercising the powers conferred under Section 4(a) of the Central Act, the officer in the armed forces shall use minimal force required for effective action against the person/persons acting in contravention of the prohibitory order. A person arrested and taken into custody under Section 4(c) of the Central Act should be handed over to the officer-in-charge of the nearest police station with least possible delay so that he can be produced before nearest magistrate within 24 hours of such arrest. Further, while exercising the powers conferred under clauses (a) to (d) of Section 4 the officers of the armed forces were directed to strictly follow the instructions contained in the list of "Do's and Don'ts" issued by the army authorities which are binding and that any disregard to the said instructions would entail suitable action under the Army Act, 1950.

**Supreme Court of India
1987 (1) SCC 533**

**Balbir Singh
vs
State of Haryana**

A.P.Sen, S. Natarajan, JJ

.....

2. The appellant who holds the degrees of MA and BT was originally a Lieutenant in the Armed Forces. On account of some mental ailment he was discharged from the army. Thereafter he joined the Haryana Education Department and was appointed as a Lecturer in the Government Higher Secondary School at Siwah. After about 7 years of service in that school he was transferred to the Government Senior Secondary School at Sanauli Khurd. He, however, continued to reside at Siwah since he could not get accommodation at Sanauli Khurd.
3. The circumstances under which the appellant has come to be convicted under Section 4 of the Act are to be found in the evidence of two prosecution witnesses viz. PW 1 Jagdish Chander, a Police Constable and PW2, Gian Chand, a Head Constable. One other witness Ramji Lal (PW 3), an Assistant Sub-Inspector of Police is also a prosecution witness but since he speaks only about the filing of the charge-sheet his evidence is not very material.
 - 1 **The evidence of PWs 1 and 2 is to the following effect:** Pursuant to a call given by the Bhartiya Kisan Union for a Rail Roko Abhiyan on September 2, 1985 a crowd of about 1500 persons had gathered on the forenoon of that day at a place near the railway line in the village Siwah, Tehsil Panipat, District Karnal. To safeguard the railway line and to maintain the law and order, the authorities had posted a large contingent of police at the place of gathering of the demonstrators. In spite of the presence of the police force the demonstrators became violent and attempted to cause damage to the railway line and also indulged in throwing brickbats at the police force. To control the situation the police party had to resort to lathi charge on four or five occasions and also to firing tear-gas shells. At one point of time, as the violence did not abate the police had to resort to shooting also. One of the demonstrators died on account of gun shot injuries and some others sustained injuries due to the lathi charge.

5. The appellant, it is stated, came at about 8 or 8.30 p. m. to the place where the lathi charge and shooting had taken place and addressed the demonstrators and incited them to violence. In his inflammatory speech the appellant is said to have condemned the actions of the Central Government and the State Government in trying to appease the rebel elements and extremists of Punjab by sacrificing the interests and welfare of the people of Haryana and further stated that if the people of Haryana want to protect their rights they should also resort to the ways and methods adopted by the Punjab extremists and that for this part he was prepared to lead their struggle since he had an eight-chamber revolver and that he had on an earlier occasion attempted to kill Ch. Bhajan Lal, Chief Minister of Haryana and hence the demonstrators may lend him their cooperation so that the government can be forced to safeguard the interests of the people of Haryana.
6. PWs 1 and 2, who were on intelligence duty, carefully listened to the speech and on the next morning PW 1 presented a report (Ex. PA) at the police station at Nissing. Thereupon a case was registered against the appellant under Section 4 of the Act and after completion of investigation he was charge-sheeted in the court of Shri S. K. Jain, Judge, Karnal, the Designated Court under the Act.
7. As already stated the prosecution rested its case on the testimony of PWs 1 and 2, they being the material witnesses. The appellant denied the prosecution case and stated in defence that on compassionate grounds he went to the place of congregation of the demonstrators to make inquiries when he came to know in the evening, on his return from school, that the police had resorted to lathi charge and firing to disperse the demonstrators and that one person had died on account of the firing. In support of his defence the appellant examined two witnesses besides himself and further sought to contend that about 60 persons who had been arrested were let off without being prosecuted while he alone has been unjustly charge-sheeted on false averments.
8. The learned Judge of the Designated Court has accepted the prosecution evidence and found the appellant guilty and convicted him under Section 4 of the Act. After hearing the appellant on the question of sentence the court has awarded him the minimum sentence of three years' RI.
9. Arguing the case of the appellant before us Mr. Gopal Kishan Bansal, learned counsel levelled many criticisms against the prosecution case and submitted that the learned Judge of the Designated Court ought not to have acted on the testimony of PWs 1 and 2 and convicted the appellant. The learned Counsel took us through the evidence

of PWs 1 and 2 and also the relevant portions of the judgement under appeal and adverted to several infirmities in the evidence of the witnesses and also drew our attention to the lack of credible evidence in the case.

10. Section 16 of the Act provides for an appeal against a judgement rendered by a Designated Court to the Supreme Court alone and to no other court. Consequently, this appeal constitutes the first appeal as well as the final appeal against the judgement of the Designated Court. Such being the case, we have to necessarily scrutinise the evidence in its entirety and reappraise the testimony of witnesses to determine its evidentiary value. On making such scrutiny and reappraisal of the evidence we find the contentions of the appellant's counsel to have merit and substance in them. We find the prosecution evidence to be not only lacking in credibility but also to suffer from numerous infirmities.
11. At the outset we would like to point out that even according to the prosecution a crowd of about 1000 to 1500 persons had gathered near the railway line in the village of Siwah on the morning of September 2, 1985 in response to the call given by the Bhartiya Kisan Union for a Rail Roko Abhiyan. It is the further case of the prosecution that the demonstrators became violent and attempted to cause damage to the railway line and in order to safeguard the railway property and maintain law and order the police force, assembled in adequate numbers, had resorted to lathi charge four or five times during the day and in addition the police had also to fire tear-gas shells and even to resort to shooting. One man had died on account of the shooting and several persons had sustained injuries on account of the lathi charge. Nevertheless the crowd had not dispersed but continued to remain at the scene to carry on their agitation. In such circumstances it is natural to expect the police force to have remained in strength at the scene to maintain effective control over the demonstrators and to safeguard the railway line. Curiously enough, the entire force comprised of a Deputy Superintendent of Police, Inspectors, Sub-Inspectors, Assistant Sub-Inspectors, Head Constables and constables is said to have left the place en masse except PWs 1 and 2. It is significant to note PWs 1 and 2 were not on security duty at that place but were only to submit intelligence reports. When a lathi charge had been made even at 4.30 p. m. it is inconceivable that the entire police force would have left the place in the evening and gone away elsewhere. We are, therefore, led to think that this unnatural version is put forward to cover up the lacuna for not examining any police officer of a higher rank than PWs 1 and 2 regarding the inflammatory speech alleged to have been made by the appellant at about 8.30 p.m. on that day.

12. Even assuming for argument's sake that the entire police force had left the scene and only PWs 1 and 2 were left at the place, the prosecution could have certainly examined some independent witnesses to prove that the appellant had spoken on that night. Surely, it cannot be said that among the 1500 or 2000 persons present there, no one would have come forward to give evidence about what the appellant spoke on that night. No explanation has been offered as to why no independent witness has been examined. In fact PWs 1 and 2 have not even stated that they tried to find out the names of any of the people assembled there or made any effort to note down their names so that they can later be summoned to appear as witnesses if a case was to be filed against the appellant.
13. Admittedly, the appellant was a stranger to PWs 1 and 2 and hence they could not have known who he was and what was his occupation. PWs 1 and 2 had not made any enquiries to find out who the appellant was and where he was residing. The strange version given by PW 1 is that before the appellant began his speech he introduced himself to the demonstrators by giving out his name, address and occupation. The statement, apart from its artificiality is not corroborated even by PW 2. Another discrepancy noticed is that while PW 1 has stated that the appellant addressed the gathering from the Chaubara with a microphone in his hand, PW 2 has stated that the appellant stood in the midst of the demonstrators and addressed them and moreover PW 2 makes no reference to the appellant having any microphone. While PW 2 has stated that he did not apprehend any violent reaction from the public on account of the speech made by the appellant, PW 1 would say that from the moment the appellant started introducing himself to the demonstrators he anticipated things and began to take notes of the appellant's speech.
14. A noticeable feature in the case is that the report Ex. PA is said to have been prepared on the basis of the "rough notes" prepared by PW 1 but the "rough notes" is not forthcoming and has not been marked in evidence and it is said to have been destroyed. Since the "rough notes" constitute the first recorded entry of the speech it is an important document and in the absence of it the fair report cannot be given unreserved acceptance. Even in the matter of the preparation of the report, one would expect PW 2 holding a higher rank than PW 1 to have prepared it. Not only has PW 2 not prepared any report but his own admission is that he did not sign or even initial the "rough notes" or the fair report Ex. PA.
15. Apart from the failings in the evidence of PWs 1 and 2 we also find that virtually no investigation has been done before the appellant was charge-sheeted. The

Investigating officer has not taken any steps to find out the antecedents of the appellant and whether he was a member of any political party. No investigation has been made to find out whether the appellant had an eight-chamber revolver as he is alleged to have claimed and whether he had make any attempt on the life of Ch. Bhajan Lal on an earlier occasion. Without making any effective investigation the police authorities have lightly launched a prosecution against the appellant solely on the basis of the report given by PW 1.

16. Having regard to the numerous infirmities which are apparent in the prosecution case, we are clearly of the opinion that the learned Judge of the Designated Court was not justified in holding the prosecution case proved beyond reasonable doubt and finding the appellant guilty under Section 4 of the Act and convicting him accordingly.
17. We are constrained to observe that it is highly regrettable that the authorities concerned should have launched a prosecution under the Act in a manner which can be easily termed as cavalier. The Act though intended to effectively deal with terrorists and disruptionists contains drastic provisions for punishing terrorists and disruptionists under Sections 3 and 4 of the Act. Anyone convicted under Section 3(2) (i) of the Act is liable to be punished with death and whoever is convicted under Section 3(2)(ii) of the Act is liable to be punished with imprisonment for a term which shall not be less than 5 years but which may extend to term of life and shall also be liable to fine. Whoever is convicted under Section 4 of the Act is liable to be punished with imprisonment for a term which shall not be less than 3 years but which may extend to term of life and shall also be liable to fine. Furthermore, against any judgement, sentence or order rendered under the Act, an appeal would lie directly to the Supreme Court and not to the High Court. Having regard to all these features the investigation of cases under the Act has not only to be thorough but also of a high order. In this case we find the investigation to be nowhere near the required standards and likewise the evidence adduced in the case to be far from satisfactory to justify the conviction of the appellant under Section 4 of the Act. The appeal has, therefore, to be necessarily allowed and the conviction and sentence awarded to the appellant set aside.

Bombay High Court
1994 Mah. LJ 1743

Anil Vasant Chitnis and Others

vs

Senior Inspector of Police

Alibaug Police Station, Raigad and Others

V.A. Mohta and Vijay Bahuguna, JJ.

1. Ultimate questions that fall for determination in these petitions under Article 226 of the Constitution are : (a) whether the following First Information Report discloses an offence under the Terrorist and Disruptive Activities (Prevention) Act, 1987, ('the TADA ACT') and if not, (b) whether case for quashing the proceedings under the TADA Act at such initial stage exists.
2. These three petitions are by in all nine accused arrayed in the F.I.R. Since common questions arise, they are heard together and are being disposed of by this common judgement.
3. Final Information Report :

On 21.11.1993 at 6.30 p.m. C.R. No. 92/93 Nagaon, Bahirichi Wadi,
Complainant : Manik Damodar Sawant, Residence Nagaon, High School.
Accused

- i) Anil Chitnis.
- ii) Moreshwar R. Khot,
- iii) Deepak Bhatkar,
- iv) Raju Vartak,
- v) Dattatraya V. Thakur,
- vi) Pradeep @ Bana Kare,
- vii) Hemant R. Narvankar,
- viii) Pradeep S. Pradhan,
- ix) Ramakant R. Wadkar,

All residents of Nagaon.

On the abovementioned time, date and place the abovenamed accused bearing grudge over the misunderstanding that took place in the meeting of Congress workers conspired together armed with knife and iron-bars and fist blows assaulted to the Complainant and Satish Lele and attempted to kill them. Because of this, they created terror in the village.

Manik Damodar Sawant

I reside at the above mentioned address and there I have my own house and field. I reside with my wife and children and brother in a joint family. I am Congress worker. One Anil Vasant Chitnis who is of bad character man who is always formed in the company of antisocial elements in the village. Hence people are afraid of them. He is the editor of a weekly called 'THINGI' and by this media he publishes false and defamatory articles about the village and a terror is created. Because of his acts, there is a terror created among the ordinary people. People residing nearby are afraid of him.

Several complaints are failed against him at Alibaugh Police Station. Yet due to fear, common people are afraid of complaining against him. In the month of June 1993 Gram Panchayat election held at Nagaon in which myself.

- i) Satish Narayan Lele,
- ii) Anil Vasant Chitnis,
- iii) Bhalchandra Pralhad Apte,
- iv) Madhuri Chavan Patil,
- v) Shaila Patwardhan.

Were declared elected from the Congress Party as members. Gram Panchayat. Against us several members of joint ally of S.K. Shivasena and B.J.P. were elected as members of the Gram Panchayat. Arun Balkrishna Mhatre of Shiv Sena was elected as Sarpanch and Raghunath Pandurang Dhule as Vice-Sarpanch, Anil Chitnis aspired for the post of Sarpanch but he was not elected. He was, therefore, displeased. Thereafter before the first meeting of the Gram Panchayat a meeting of co-members of the Congress was held and in which it was decided to extend full co-operation to Sarpanch Arun Mhatre. Before the second meeting Anil Chitnis published articles against Sarpanch Mhatre and another in his weekly 'THINGI'. Thereafter I and Satish Lele asked Anil Chitnis as to why he published the same when it was decided to co-operate Sarpanch Mhatre. He was, therefore, displeased with us. Thereafter continuously on 2 or 3 occasions

Anil chitins published articles against Anil Chitnis and Satish Lele. He stopped the said writing when we complained to the Collector of Raigad. He was therefore, angry with us. On 21.11.1993 at 10.00 a.m. there was meeting in the house of Sadanand Bagaon at Lagobandar. At the said meeting Ramesh Naik, Taluka Congress Present, Umesh Mhatre, Sagar Patil and they were to discuss about the misunderstanding between the Congress workers of our village. Hence upon the order of President I and Satish Lele were present at the said meeting. Sailesh Narayan Lele, brother of Satish Lele was also present at the said meeting. At the said Meeting hot exchange of said meeting were took place and in order to avoid any serious incident, the President asked me and Satish Lele to go home. Accordingly we went to our home. Every year at Nagaon Port races of Bullock-carts are held. For that purpose proper cleaning and other ceremony are performed. Accordingly. I, Satish Lele, Sarpanch, Vice-Sarpanch and other people of the village went at port at about 5.00 p.m. on 21.11.93. At the said place at 5.30 p.m. the coconut was broken and when we all were returning by road jeep No. Mh-4-A-110 and another one No. M.P./6845 were stopped near us. (1) Anil Chitnis, (2) Moreshwar Khot, (3) Raju Vartak, (4) Dattatraya Thakur, (5) Pradeep @ Bana Kate, (6) Hemant Narvankar, (7) Ramakant Wadkar were get down from jeep. At that time by the sign of white by Raju Wartak, (1) Deepak Bhaskar, (2) Pradeep Pradhan came to us and were stopped. At the same time, the people who got down from jeep. (1) Anil Chitnis, (2) Deepak Bhaskar, (3) Moreshwar Khot, (4) Raju Vartak were having iron-bars in their hands. Anil Chitnis said that, 'they are traitors and they should be killed. They have cheated me, kill them', saying so he came running at me. At that time Pradeep @ Bana Kate and Hemant Narvankar who were by his side held my both hands and Anil Chitnis with the knife in his hand, pierced it through the left side of my eye as well as on my forehead. At that time Pradeep Dattatraya Thakur was also giving first blows. My associate Satish Lele was also assaulted by Deepak Bhaskar, Moreshwar Khot, Vartak, Ramakant Wadkar, Pradeep Pradhan with the knife and first blows. He was also injured on his stomach and body. Similarly people with us Sarpanch Arun Mahtre, Vice-Sarpanch Thatte and Shailesh Lele, brother of Satish Lele were also attacked and ran away as these people went to assault them. While we were returning home after breaking the coconut for bullock-cart race I was pillion on a scooter of Satish Lele who was driving and Up-Sarpanch was pillion on the Kawasaki motor-cycle with Sarpanch Mhatre. Hence I have to complain against (1) Anil Chitnis, (2) Moreshwar Khot, (3) Deepak Bhaskar, (4) Raju Vartak, (5) Dattatraya Thakur, (6) Pradeep @ Kate, (7) Hemant Narvankar, (8) Pradeep Pradhan, (9) Ramakant Wadkar, all are residing at Nagaon. Owing to the misunderstanding that arose at the meeting

of Congress members today the abovenamed accused in conspiracy together armed with iron-bars attempted to murder me and my friend Satish Lele by stabbing with the knife at various paces on his body as well as by fist-blows. Because of this act a tension and terror is prevailing in the atmosphere of the village. Hence, this is my complaint against them.

Before me.

Sd/-

4. At the time of the first and second rounds, police applied Sections 307, 147, 148, 323, 120B and 506 of the Indian Penal Code against the petitioners. At the time of the third remand, Section 3 of the TADA Act was also applied.
5. Having heard learned Counsel for the parties at length, we are satisfied that allegations in the FIR even if taken at their face value and accepted in entirety as gospel truth, do not constitute any offence under the TADA Act and hence this is a pre-eminently fit case for exercising writ jurisdiction to quash the proceedings so far as application of the TADA Act to an incident which unfortunately is not unusual before in or after the elections in rural area these days and is capable of being tackled by ordinary law enforcement agencies.
6. The learned Public Prosecutor appearing for the respondents vehemently defended the application of the TADA Act to the FIR and contended that alternate remedy of approaching the designated Court for quashing the proceedings exists under the TADA Act and hence these petitions should be thrown out only on that ground. We do not agree. The law on the point is by now well settled. Latest two leading decisions of the Supreme Court at :
 - i) *Kartar Singh Vs. State of Pun-jab*, Jt (1994) (2) SC 423 and
 - ii) *Hitendra Vishnu Thakur and Other Vs. State of Mah. and Other* decided on 12.7.1994 in Criminal Appeals Nos. 732-735 of 1993 along with connected matters.
7. As per Section 2(1)(h) of the TADA Act, the expression 'terrorist act' has the meaning assigned to it in section 3(1) which reads as under:

"3. Punishment for terrorist acts : (1) Whoever with intent to overawe the Government as by law established or to strike terror in the people or any Section of the people or to alienate any Section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemical

or by any other substances (whether biological or otherwise of a hazardous nature in such a manner as to cause or as is likely to cause, death of, or injuries to any person or persons, or loss of, or damage to, or destruction of property or disruption of any supply supplies or services essential to the life of the community or detains any person and threaten to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act."

Close analysis of the above provisions will indicate that many of the criminal activities punishable under the ordinary penal laws can also constitute terrorist acts. There is to an extent overlapping. But that does not mean that every criminal activity can fall under the net of Section 3(1). There are various varieties of criminal activities. Some can disturb 'law and order' and some can disturb 'public order' – the distinction between the two being well-known. Ordinary penal laws and preventive detention laws are meant to tackle those situations. Merely because the crime belongs to later category, it does not become a terrorist act. The main distinguishing feature is in the fall out of intended activity. If it travels beyond the capacity of ordinary law enforcement agencies to tackle it, it may be covered by the TADA Act. But as observed by the Supreme Court in the case of *Kartar Singh Vs. State of Punjab*, JT 1994(2) SC 423, a person is guilty of a terrorist activity only when (i) intention, (ii) action and (iii) consequences – the ingredients contemplated under Section 3(1) – exist. Mere consequences of the criminal act is not decisive of the matter. Intention to achieve the result envisaged by Section 3(1) is vital to attract the provisions. This view is consistently taken and is reiterated in the case of *Hitendra Vishnu Thakur Vs. State of Maharashtra* decided on 127-1994 in Criminal Appeals Nos. 732-735 of 1993 along with connected matters. Law on the point is thus well crystallized and is not amorphous. Applying these tests to the incident, it is impossible to categorise the crime as a terrorist act.

8. Can and/or should the High Court interfere under Article 226 of the Constitution of the TADA Act at the stage of FIR is the next question. Answer to the question of jurisdiction is simple. No statute can bar a constitutional remedy. The TADA Act has not chosen to undertake that exercise – directly or impliedly. Principal question is about appropriate use of the power and jurisdiction. TADA Act or no, jurisdiction to quash FIR lies in very limited areas, some of which are stated as guidelines in *State of Haryana Vs. Bhajanlal*, (1992) Supp. (1) SCC 335. The following is the list of myriad kind of cases – which list again cannot be exhaustive – where such jurisdiction can and should be exercised:

- i) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
- ii) Where the allegations in the first information report and other materials, if any accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
- iii) Where the uncontested allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
- iv) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
- v) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
- vi) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted to the instituted) to the institution and continuance of the proceedings and / or where there is a specified provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
- vii) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance or the accused and with a view to spite him due to private and personal grudge.

Guidelines Nos. 1 and 3 are relevant in the present matter.

9. The subject of High Court's power under Article 226 of the Constitution in the context of the TADA Act has been considered in quite details by the Supreme Court in the case of *Kartar Singh* (Supra). It has been held that power should be exercised most sparingly and only in rare and appropriate cases in extreme circumstances. It is observed that the circumstances justifying the entertaining of applications under Article 226 cannot be put in straight jacket. However, the Supreme Court emphasised that 'the judicial discipline and comity of Courts require that the High Courts should refrain from

exercising their jurisdiction in entertaining bail applications in respect of an accused indicated under the special Act since this Court has jurisdiction to interfere and correct the orders of the High Courts under Article 136 of the Constitution'. Though the observations of the High Court pertain to entertaining the bail applications, we take it that nearly the same principles will apply even in the matter of quashing the FIR for which the guidelines in *Bhajanlal's* case (*supra*) will be relevant. Applying the ratio of *Kartar Singh, Hitendra Vishnu Thakur and Bhajanlal* (*Supra*) to the instant matter, conclusion is inevitable that the first information report even if taken at its face value and accepted in its entirety, does not make out even a *prima facie* case under Section 3(1) of the TADA Act as a result the FIR to that extent has to be quashed and set aside. We consider it unfortunate that even it an election dispute of this type belatedly Section 3(1) of the TADA Act is applied perhaps with the object of stalling the release of the accused on bail. For such considerations only, the TADA Act cannot be applied. Application of TADA is not mere *ipse dixit* of a statement of the investigating officer. It does not appeal to common sense that the consequences envisaged under Section 3 were intended by the accused persons and the activity is such which cannot be tackled by a normal law enforcement agency. TADA Act has unfortunately become necessity in our country. But unless its application is discriminate and only in appropriate rare cases, the very purpose of enacting the TADA Act can be defeated. Indiscriminate use of the provisions of the TADA Act is a remedy which can be worse than the disease.

10. Under the circumstances, it is declared that no offence under the TADA Act is disclosed in the FIR. To that limited extent, the FIR in C.R. 92/93 is quashed and set aside. All the three petitions are allowed and the rules made absolute in the above terms.
11. The matters be transferred to the appropriate Court. The petitioners are on bail pursuant to the order dated 7.2.1994 passed by this Court at the time of admission of these petitions. The said order shall continue for a period of two weeks from today to enable the petitioners to move the appropriate concerned Court. Certified copy expedited.
12. Petitions allowed.

**Supreme Court of India
1994 (3) SCC 569**

**Kartar Singh
vs
State of Punjab**

S. Ratnavel Pandian, M.M. Punchhi, K. Ramaswamy S.C. Agrawal, and R.M. Sahai, JJ.

1. Terrorist and Disruptive Activities (Prevention) Act, 1987 - Terrorist and Disruptive Activities (Prevention) Act, 1985 - Terrorist Affected Areas (Special Courts) Act, 1984 Criminal Procedure Code (U.P. Amendment) Act, 1976, Section 9 - Constitutionality - Held, all these statutes are constitutional, except Section 22 of TADA Act, 1987 which declared unconstitutional and struck down
2. The petitioners challenged the constitutional validity of the Terrorist Affected Areas (Special Courts) Act (No. 61 of 1984), the Terrorist and Disruptive Activities (Prevention) Act, 1985 (No. 31 of 1985) and the Terrorist and Disruptive Activities (Prevention) Act, 1987 (No. 28 of 1987) and Section 9 of the Code of Criminal Procedure (U.P. Amendment) Act, 1976 (U.P. Act NO. 16 of 1976) by which the Legislative Assembly of Uttar Pradesh has deleted Section 438 of the Code of Criminal Procedure as applicable to the State of Uttar Pradesh.
3. Three judgements have been delivered in this case, the leading judgement authored by Pandian, J. and two separate judgements, one by K. Ramaswamy, J. and the other by Sahai, J.
4. In the certified copy of the judgement of Pandian, J. the last page shows the same to have been signed by all the five learned Judges who constituted the Bench, that is, signed also by K. Ramaswamy, J. and' Sahai, J. who in their separate judgements have dissented on certain aspects. To our query on this aspect addressed to the respective Hon'ble Judges, Justice Ramaswamy has stated: 'The said sheet supplied by the Court without our endorsement is not correct one. I have written therein in my language that I agree with the conclusions except on the issues I dealt with in the judgement', and the P.S. to Justice Sahai, as directed by his Lordship, conveyed: 'the judgement of Hon'ble Mr. Justice S. R. Pandian was signed by Hon'ble Mr. Justice R.M. Sahai as well but it was mentioned therein that he is concurring with Hon'ble Mr. Justice S.R. Pandian except on the matters dealt by him'. The position in the certified copy that both Justice Ramaswamy and Justice Sahai also signed the leadHng judgement by

Justice Pandian must therefore be understood in the light of the above clarifications received.

5. Ramaswamy, J. in his separate judgement has dissented from the majority judgement in respect of constitutionality of Section 9(7), and Section 15 of TADA Act. On the question of the High Courts' jurisdiction under Article 226 to entertain application for bail of persons indicted under the TADA Act, Ramaswamy, J., has adopted a different approach. Sahai, J. also while generally agreeing with the majority view, has dissented on the aspect of constitutionality of Section 15. He has also taken a different stand from the majority on Section 19 (regarding appeal direct to Supreme Court). He has also given an opinion in respect of validity of Section 5 of TADA Act on which other judges have expressed no opinion. According to him the legislative competence for enacting TADA Act is to be found in Entry 1 of List III and not Entry 1 of List II. The Court unanimously declared Section 22 of the TADA Act, 1987 as invalid.
6. Terrorist and Disruptive Activities (Prevention) Act, 1985 - Terrorist and Disruptive Activities (Prevention) Act, 19087 - Terrorist Affected Area (Special Courts) Act, 1984 - Held, per curiam, Parliament competent to enact the said Acts - Per majority, K. Ramaswamy, J. concurring, Act, covered by Article 248 r/w List I Entry 97 and not by List II Entry 1 of Sch. VII - Per majority, terrorist and disruptive activities are not merely virulent from of disruption of public order within List II Entry 1 but are threat to the very existence and sovereignty of the country - Acts therefore also covered by 'Defence of India' under List 1 Entry 1 - Per Sahai, J., TADA Act does not fall under List 11 Entry 1 but, falls under List III Entry 1 of Sch. VII - Sch. VII List III Entry 1, List II Entry 1 & List I Entries 1 & 97 and Articles 245, 246 and 248.
7. Constitution of India - Sch. VII List II Entry 1 - 'Public order' - Denotes disorders of lesser gravity having impact within the State Activities of more serious nature which threaten the security and sovereignty of the country as a whole fall within List I Entry 1 or within residuary provision of Article 248 r/w List I Entry 97. (Per majority)
8. Constitution of India - Sch. VII List III Entry 1 - Scope Legislative competence of Parliament - "Criminal Law" - Meaning of - Includes law relating to terrorist and disruptive activities If the Act does not pertain to 'public order' referred to under List II Entry 1, Parliament will have competence under List III Entry 1 - 'Public order' under List II Entry 1 is different from terrorism Hence Parliament and not the State legislature competent to enact law relating to terrorist and disruptive activities - Words and phrases. (Per Sahai, J.)

Per majority

9. Terrorist Affected Areas (Special Courts) Act, 1984 - Section 3(1) - Power vested in Central Government to declare any area as 'terrorist affected area' - Provision does not suffer from vagueness and invalidity - power vested in Central Government, for making such declaration, not unguided - Essential prerequisites for declaring an area as 'terrorist affected area' stated Constitution of India, Article 14.

Per curiam

10. The prerequisite conditions which are sine qua non for declaring any area as 'terrorists affected area' by the Central Government by virtue of the authority conferred on it under Section 3(1) of the Act of 1984 are :

- (i) The offences of the nature committed in any area to be declared as 'terrorists affected area' should be one or more specified in the Schedule;
- (ii) The offences being committed by terrorists should satisfy the definition of the nature of the offence mentioned in Section 2(1)(h), namely, indulging in wanton killing of persons or in violence or in the disruption of services or means of communications essential to the community or in damaging property with a view to commit any of the offences enumerated under any of the Clauses (i) to (iv) indicated under the definition of the word 'terrorist';
- (iii) The Scheduled offences committed by terrorists should be on such a scale and in such a manner that it is expedient for the purpose of coping with the activities of such terrorists to have recourse to the provisions of this Act.

11. Unless all the above three conditions are fully satisfied, the Central Government cannot invoke the power under Section 3(1) to declare any area as 'terrorist affected area'. In other words, in the absence of any of the conditions, Section 3(1) cannot be invoked. Therefore, the contention that Section 3(1) suffers from vagueness and lacks guidance is unmerited. (paras 137 and 368(3); Para 372; Para 449)

12. There is also some force in the submission that the legislature considered it proper to prescribe a uniform procedure for serious offences having a direct relationship with peace and tranquillity of the area in the notified area after the notified date' and that serious offences which are likely to create terror and panic in the minds of the people were/are sought to be dealt with under the Act by prescribing a speedier trial so that disturbed situations could be brought under control without loss of time to prevent the situation from getting deteriorated and spreading to other areas. (Para 138; Para 372; Para 449)

13. Statute Law - Vagueness - Vague law is void - Jurisprudence - Constitution of India, Articles 14 and 21 - Substantive due process of law.

Per curiam

14. An enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasised that laws should give the person ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to 'steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked'. (Para 130)

15. Terrorist and Disruptive Activities (Prevention) Act, 1987 - Section 2(1)(a)(i) - 'Abet' - Mens rea if essential - Clause (i) of the definition *vague* inasmuch as in absence of expression of intention or knowledge, even an innocent person communicating or associating can be held to be an abettor - since substantive provision expressly require an intention or knowledge the same should be read as a requirement into Clause (i) for an abettor - Criminal Law - Abetment - Penal Code, 1860, Sections 107 and 108 - Words and phrases.

16. H. Criminal Trial - Mens rea - Exclusion of - Must be by express words or by necessary implication in the statute - Court can go behind the words to ascertain legislative intendment - Interpretation of Statutes - Legislative intent.

Per Curiam

17. Clause (i) of Section 2(a) which defines 'abet' is impermissibly vague and communicates or associates without any knowledge or having no reason to believe or suspect that the person or class of persons with whom he has communicated or associated is engaged in assisting in any manner terrorists or disruptionists, can be arrested and prosecuted by abusing or misusing or misapplying this definition. In ultimate consummation of the proceedings, perhaps that guiltless and innocuous innocent person may also be convicted. Since the substantive provisions of the Act expressly require the intention as an essential ingredient to constitute an offence, exclusion of mens rea or intention or knowledge on the part of the abettor cannot be justified. Therefore, the expressions 'communication' and 'association' deployed in

the definition should be qualified so as .save the definition, in the sense that ‘actual knowledge or reason to believe’ on the part of a person to be roped in with the aid of that definition should be read into it instead of reading it down and Clause (i) of the definition 2(1)(a) should be read as meaning ‘the communication or association with any person or class of persons with the actual knowledge or haVing reason to believe that such person or class of persons is engaged in assisting in any manner terrorists or disruptionists’ so that the object and purpose of that Clause may not otherwise be defeated and frustrated. Clauses (ii) and (iii) need not require any exposition since both the Clauses themselves are self-explanatory. [Paras 131, 120, 121, 122, 128, 129 to 134 adn 368(2); Para 372; Para 499]

18. In a criminal -action, the general conditions of penal liabilities are indicated in old maxim ‘actus nonfacit reum, nisi mens sit rea’ i.e. the act alone does not amount to guilt, it must be accompanied by a gUilty mind. But there are exceptions to circumstances, in its wisdom may think it so important, in order to prevent a particular act from being committed, to forbid or rule out the element of mens rea as a constituent part of a crime or of adequate proof of intention or actual knowledge. However, unless a statute either expressly or by necessary implication rules out ‘mens rea’ in cases of this kind, the element of ‘mens rea’ must be read into the provisions of the statute. The question is no What the word means but whether there are sufficient grounds for inferring that the Parliament intended to exclude the general rule that mens rea is an essential element for bringing any person under the definition of ‘abet’. (Para 1,15)
19. It is generally necessary to go behind the words of the enactment and take other factors into consideration as to whether the element of ‘mens rea’ or actual knowledge should be imported into the definition. (para 116)
20. *Brand Vs. Wood*, 62; *Sherras Vs. De Rutzen*, (1895) 1 QB 918; 11 TLR 369; *Nichollas Vs. Hall*, LR (1873) 8 CP 322 : 28 LT 473 *State of Maharashtra Vs. Mayer Hans George*, (1965) SC 722 : (1965)1 Cri. LJ 641; *Nathulal Vs. State of M. P.* AI R 1966 SC 43 : 1966 Cri. LJ 71; *Srinivas Mall Bairoliya Vs. King-Emperor*, AI R 1947 PC 135;49 Bom LR 688; (1947) 2 MLJ 328; *Ravula Hariprasada Rao Vs. State* 1951 SCR 322; AIR 1951 SC 204; 52 Cri. LJ 768, relied on.’
21. *State Vs. Abdul Aziz*, AIR 1962 Bom 243; 64 Bom LJ 16 : (1962) 2 Cri. LJ 472, approved *Sarjoo Prasad Vs. State of U. P.*, (1961) 3 SCR 324 : AIR 1961 SC 631; (1961) 1 Cri. LJ 747; *Pukhraj Vs. D.R. Kohli*, 1962 Supp 3 SCR 866; AIR 1962 SC 1559; *Nathulal Vs. State of M.P.*, AIR 1966 SC 43; 1966 Cri. LJ 71; *Y.S Parmar (Dr) Vs. Hira Singh Paul*, 1959 Supp 1 SCR 213; AIR 1959 SC 244 : 16 ELR 483; *State*

of Maharashtra Vs. Mayer Hans George, (1965) 1 SCR 123; AIR 1965 SC 722: (1965) 1 Cri. LJ 641; *Jagdish Prasad Vs. State of W.B.*, (1972) 1 SCC 326 : 1972 SCC (Cri.) 63; (1972) 2 SCR 845; *Collector of Customs Vs. Chetty Nathela Sampathu*, (1962) 3 SCR 786; AI R 1962 SC 316; (1962) 1 Cri. LJ 364; *Inder Sain Vs. State of Punjab*, (1973) 2 SCC 372; 1973 SCC (Cri.) 813, referred to.

22. *Corpus Juris Secundum*, Vol. 1 at page 306; *Collins English Dictionary*, relied on.
23. *Terrorist and Disruptive Activities (Prevention) Act, 1987* - Sections 3 and 4 - Held, valid - Legality and efficaciousness of, cannot be questioned on grounds of overlapping of offences under Ss. 3 and 4 with those under ordinary penal laws and absence of guiding principle as to when to proceed under ordinary laws and when under the Act - Question of discrimination also does not arise in view of separate machinery provided for trial under the Act - Provisions to be strictly construed and invoked only in extreme situations - *Constitution of India, Article 14*.
24. The legality and the efficaciousness of Sections 3 and 4 of 1987 Act were assailed on the grounds:
 - (i) These two Sections cover the acts which constitute offences under ordinary laws like the Indian Penal Code, Arms Act and Explosive Substances Act;
 - (ii) There is no guiding principle laid down when the executive can proceed under the ordinary laws or under the impugned Act of 1987; and
 - (iii) The Act and Section 3 and 4 thereof should be struck down on the principle laid down in *State of W.B. Vs. Anwar " Ali Sarkar*, 1952 SCR 284; AIR 1952 SC 75 and followed in many other cases including *A.R. Antulay Vs. Union of India*, (1988) 2 SCC 764.

Held

Per Curiam

25. The contention that Sections 3 and 4 of the Act of 1987 are liable to be struck down on the grounds that both the Sections cover the acts which constitute offences under ordinary laws and that there is no guiding principle as to when a person is to be prosecuted under these Sections is rejected. [Para 368(4); Para 372; Para 449J'
26. Having regard to the object and purpose of the Act of 1987 as reflected from the preamble and the Statement of Objects and Reasons of the Act, the submission made questioning the legality and efficaciousness of Sections 3 and 4 on the grounds (1) and

- (2) mentioned above cannot be countenanced. The validity of these two provisions cannot be challenged under the third ground also as there is no, discrimination in view of the separate machinery provided for the trial of the cases under this Act to achieve the object of it. (Para 148)
27. True, the offences arising out of the acts enumerated in Sections 3 and 4 may be similar to the offences falling under the ordinary penal laws and various offences arising out of the terrorist or disruptive activities may overlap some of the offences covered by the other ordinary penal laws. (Para 142)
28. The Act tends to be very harsh and drastic containing the stringent provisions and provides minimum punishments and to some other offences enhanced penalties also. The provisions prescribing special procedures aiming at speedy disposal of cases, departing from the procedures prescribed under the ordinary procedural law are evidently for the reasons that the prevalent ordinary procedural law was found to be inadequate and not sufficiently effective to deal with the offenders indulging in terrorist and disruptive activities. Secondly the incensed offences are arising out of the activities of the terrorists and disruptionists which disrupt or are intended to disrupt even the sovereignty and territorial integrity of India or which may bring about or support any claim for the cession of any part of India or the secession of any part of India from the Union, and which create terror and a sense of insecurity in the minds of the people. Further the Legislature being aware of the aggravated nature or the offences have brought this drastic change in the procedure under this law so that the object of the legislation may not be defeated and nullified. (Para 145)
29. *Niranjan Singh Karam Singh Punjabi Vs. Jitendra Bhimraj Bijuaya*, (1990) 4 SCC 76; 1991 SCC (Cri.) 47; *Usmanbhui Oawoodbhui Memon Vs. State of GUjarat*, (1988) 2 SCC 271; 1988 SCC (Cri.) 318, relied on.
30. *State of W.B. Vs. Anwar Ali Sarkar* 1952 SCR 284; AIR 1952 SC 75; 1952 Cri. LJ 510; *A. R. Antulay Vs. Union of India* (1988) 2 SCC 64, referred to.
31. J. Terrorist and Disruptive Activities (Prevention) Act, 1987 - Section 5 - Mere possession of specified arms and ammunition made substantive offence under - Held, provision harsh - To save it from arbitrariness, it should be invocable only where possession of the arms and ammunitions is connected with use thereof Constitution of India, Article 14.

Per Sahai, J.

32. Section 5 is much serious in nature and graver in impact as it results in prosecution of a man irrespective of his association or connection with a terrorist or terrorist Activity. A comparison of this Section with Sections 3 and 4 demonstrates the arbitrariness inherent in it. A terrorist or a disruptionist and a person possessing any of the arms and ammunition mentioned in the Section have ·been placed on a par. In Section 3 and 4 the offence arises on the act having been done whereas in Section 5 it is founded only on possession. The Act, therefore, visualises prosecution of the terrorist or disruptionist for offences under Sections 3 and 4 and of others only if they are associated or related with it. That is in keeping wit the objective of the Act. The legislation have been upheld as the legislature is competent to. enact in respect of a crime which is not otherwise covered by any Entry in List II of the Seventh Schedule. The definition of the crime, is contained in Sections 3 and 4 of the Act and it is true that while defining the crime it is open to the legislature to make provision which may serve the objective of the legislation and from a wider point of view one may say that possession of such arms, the use of which may lead to terrorist activity, should be taken as one of the offence as a preventive or deterrent provision. Yet ther must be some inter-relation between the two, howsoever, remote it may be. The harshness of the provisions is apparent as all those provisions of th.e· Act for prosecuting a person including forfeiture of property, denial of bail etc., are applicable to a person accused of possessing any arms and· ammunition as one who is charged for an offences under Sections 3 and 4 of the Act, Though no one has justification to have such arm and ammunitions as are mentioned in Section 5, but unjustifiable possession does not make a person a terrorist or disruptionist. Since both the substantive and procedural law apply to a terrorist anddisruptionist or a terrorist act or a disruptive act, it is necessary that this Section if it has to be immune from attack of arbitrariness may be invoked only if there is some material to show that the person who was possessed of the arms intended it to be used for terrorist or disruptionist activity or it was an arm and ammunition which in fact was used. [Paras 451 and 460(2)]

33. Terrorist and Disruptive Activities (Prevention) Act, 1987 - Section 8(1) and (2) Forfeiture of property - Discretionary power of Designated Court - Held, not violative of Articles 21 and 14 on grounds of the discretion being unguided and forfeiture free from all encumbrances being an unmerited punishment to third parties haVing interest in the forfeited property Constitution of India, Articles 14 and 21 - Words and phrases - 'Order', meaning of -

34. It was contended that Section 8 is violative of Articles 21 and 14 on the grounds that (1) no guidelines have been provided for when the property of a convicted person should or should not be forfeited; and (2) forfeiture to Government 'free from all encumbrances' may amount in many cases to unmerited punishment of third parties who have no concern whatsoever with the offence with which the person under this provision has been convicted and who have got interest by advancing money on the security of the forfeited property. Rejecting the contention.

Held

35. The discretionary power given to the Designated Court under Section 8(1) and (2) is to be exercised under strict contingencies, namely that (1) there must be an order of forfeiture and that order must be in writing; (2) the property either moveable or immovable or both must belong to the accused convicted of any offence of T ADA Act or rule thereunder; (3) the property should be specified in the order; (4) even though attachment can be made under Section 8(2) during the trial of the case, the forfeiture can be ordered only in case of conviction and not otherwise. (Para 156)

36. The very fact that the order should be in writing implies that the Designated Court must give reasons for such an order even though the Section does not specifically require the Designated Court to record its reasons for so doing, because the word 'order' even according to the lexicon meaning is that it is a decision or direction either interlocutory or preliminary or final by the Court trying the offence. Secondly, under Section 19 of the Act, an appeal lies straight to the Supreme Court as a matter of *right* from any order not being interlocutory order both on facts and law. (Para 157) .

37. Therefore Section 8 of the T ADA Act is not violative of Articles 14 and 21 of the Constitution. [Para 368(5); Para 372; Para 451]

38. Terrorist and Disruptive Activities (Prevention) Act, 1987 : Section 15 - Confession recorded by police officer, not lower in rank than Superintendent of Police, made admissible ~ Such special provision based on classification, made by the Act, of terrorists and disruptionists being a separate class of offenders from ordinary criminals under normal law and of offences specified under the Act being aggravated offences requiring special provision of Section 15 - Held, (Per majority) provision non-discriminatory, the classification of offenders and offences by the Act having a reasonable nexus with the object and purpose of the Act - Parliament has legislative competence to enact it - Procedure for recording confession, being subject to certain conditions under Section 15 as well as under rules, not in the circumstances unjust

unfair or oppressive - Severe safeguards required when confession recorded by mechanical devices - Hence provision not violative of Articles 14 and 21 - However, recording of confession by Magistrate under Section 164 Cr.P.C. not excluded by the Act - Guidelines laid down for recording confession by police officer - Central Government directed to incorporate the guidelines in the Act and the Rules - Constitution of Screening/Review Committees by Central and State Governments also suggested - Held (per K. Ramaswamy, J. Dissenting), vesting of power to record confession on police officer, whatever may be his rank, violates fundamental principles of fair justice and shock the conscience and is violates fundamental principles of fair justice and shocks the conscience and is violative of Articles 14, 20(3), 21 and 50 - it is not the hierarchy of the police officer but the suspicion in mind of the common man about adherence to procedural safeguards which are relevant, for, appearance of injustice is denial of justice - Moreover, even if the offenders and the offences under the Act constitute a separate class, the harsher procedure prescribed for dealing with them must satisfy the test of Articles 21 and 14 which Section 15 fails - Held, (per Sahaj, J., dissenting), Section 15 is violative of Articles 20(3) and 21 - Approach of police is basically different from that of judicial officer as the former is concerned with the result and not with procedural fairness and this approach does not change by hierarchy of the officer - Police culture is not yet mature enough for such a drastic change in procedure - It is destructive of basic values of the Constitution - Legislative competence does not empower Parliament to enact the law curtailing or violating fundamental rights - law must still be just and fair - Constitution of India, Articles 14, 20(3) 21 and 50 - Administrative Law - Natural justice - Fair justice - Concept of - Words and phrases 'Confession' and 'compelled'.

39. P. Constitution of India - Articles 21 and 14 - Procedure established by law classification - Where two procedures exist for two class of persons, both must satisfy the test of Articles 14 and 21 - if one of the procedures is harsh, oppressive, unconsciousness, unfair, unjust and unreasonable the same would be unconstitutional.

Per majority

40. If the procedural law is oppressive and violates the principle of just and fair trial offending Article 21 of the Constitution and is discriminatory violating Article 14 of the Constitution, then Section 15 of TADA Act is to be struck down. As a distinction has been made in TADA Act grouping the terrorists and disruptionist as a separate class of offenders from ordinary criminals under the normal laws and the classification of the offences under TADA Act as aggravated form of crimes distinguishable from the

ordinary crimes; it has to be tested and determined as to whether this distinction and classification are reasonable and valid within the term of Article 14. Hence it is essential to examine the classification of offenders' and 'offences' so as to decide whether Section 15 is violative of Article 14. (paras 217, {~20 and 236)

41. The persons who are to be tried for offences specified under the provisions of T ADA Act are distinct class of persons and the procedure prescribed for trying them for the aggravated and incensed nature of offences are under different classification distinguishable from the ordinary criminals and procedure. This distinction and classification of grouping of the accused and the offences to be tried under T ADA Act are to achieve the meaningful purpose and object of the Act as reflected from the preamble as well as the 'Statement of Objects and Reasons'. (Para 22)
42. The classification of 'offenders' and 'offences' to be tried by the Designated Court under the T ADA Act or by the Special Courts under the Act of 1984, are not left to the arbitrary and uncontrolled discretion of the Central Government but the Act itself has made a delineated classification of the offenders as terrorists and disruptionists, the TADA Act and the terrorists under the Special Court Act 1984 as well as the classification of offences under both the Acts. Therefore, the complaint of incorporation of invidious discrimination in the Act has to be turned down. All that the Court has to see is whether the power is used for any extraneous purpose i.e. to say not for achieving the object for which the power is granted and whether the Act (TADA) has been made on grounds which are not germane or relevant to the policy and purpose of this Act and whether it is discriminatory so as to offend Article 14. The classifications have rational nexus with the object sought to be achieved by the TADA Acts and Special Courts Act and consequently there is no violation of Article 14. (Paras 243, 244 and 368(9))
43. *State of Bombay Vs. F.N. Balsara*, AIR 1951 SC 318 : 1951 SCR 682 : 52 Cri. LJ 1361, relied on.
44. *N.B. Khare (Dr.) Vs. State of Delhi*, 1950 SCR 519 : AIR 1950 SC 211 : 1951 Cri. LJ 550; *Kathi Raning Rawat Vs. State of Saurashtra*, 1952 SCR 435: AIR 1952 SC 123: 1952 Cri. LJ 805 ; *Kedor Nath Bajoria Vs. State of W. B.* 1954 SCR 30 : AIR 1953 SC 404; 1953 Cri. LJ 1621; *State of Bombay Vs. R.M.D. Chamarbaugwala*, 1955 SCR 874 : AIR 1957 SCR 699; *Pannalal Binjraj Vs. Union of India*, 1957 SCR 233; AIR 1957 SG 397; (1957) 31 ITR 565; *Taftb Haftb Haji Hussain Vs. Madhukar P. Mondkar*, 1958 SCR 1226; AIR 1958 SC 376; 1958 Cri. LJ 701; *Kangsari Haldar Vs. State of W. B.* (1960) 2 SC R 646 : AI R 1960 SC 457: 1960 Cri. LJ 654, referred to.

45. *State of W.B. Vs. Anwar Aft Sarkar*, 1952 SCR 284 : AIR 1952 SC 75 : 1952 Cri~ LJ 510, explained and distinguished.
46. Willis: '*Constitutional of Law*', 1st Edn. p.578, relied on.
47. Parliament has got the legislative competence to enact the T ADA Act as also the Special Courts Act of 1984. Having regard to the legal competence of the legislature to make the law prescribing a different mode of proof, the meaningful purpose and object of the legislation, the gravity of terrorism unleashed by the terrorist and disruptionists endangering not only th sovereignty and integrity of the country but alsO the norm al life of the citizens, and the reluctanca of even the victims as well as the public in coming forward, at the risk of their life, to give evidence, Section 15 cannot be said to be suffering from any vice of unconstitutionality. In fact, if the exigencies of certain situations warrant such legislation then it is constitutionally permissible! prov:cled none of the fundamental rights und Chapter III of the Constitution is infringed. [Para 223 and 253]
48. *Asbury Hospital Vs. Cass Country*, 90 L Ed 6 : 326 US 207 (1945); *Goesaert Vs. Cleary*, 93 L Ed 163: 335 US 464 (1948); *Railway Express Agency Vs. New York*, 93 L Ed 533 (F); 336 US 106 (1948), relied on.
49. An accused or a person accused of any offence is protected by the constitutional provisions as well as the statutory provisions to the extent that no self-incriminating statement made by an accused to the police officer while he. is in custody, could be used against such maker. Hence the submission on behalf of the State that while a confession by an accused before a specified officer either under the Railway Protection Force Act or Railway Property (Unlawful Possession) Act or Customs Act or Foreign Exchange Regulation Act is made admissible, the special procedure prescribed under the T ADA Act making a confession of a person indicated under that Act given to a police officer admissible cannot be questioned, is misnomer because all the officials empowered to record statements under those special Acts are not police officers.
50. *State of u.P. Vs. Durga Prasad*, (1975) 3 SCC 210 : 1974 SCC (Cri.) 828 : AIR 1974 SC 2136; *Balkishan A. Devidayal Vs. State of Maharashtra*, (1980) 4 SCC 600 : 1981 SCC (Cri.) 62 : AIR 1981 SC 379; *Ramesh Chandra Mehta Vs. State of W.B.*, (1969) 2 SCR 46: AIR 1970 SC 940 Cri. LJ 863; *Poolpandi Vs. Superintendent, Central Excise*, (1992) 3 SCC 259: 1992 SCC (Cri) 620; *Ekambaran Vs. State of T.N.*, 1972 MLW (Cri.) 261; *Directorate of Enforcement Vs. Deepak Mahajan*, (1994) 3 SCC 440; JT (1994) 1 SC 290, relied on.

51. *M. P. Sharma Vs. Satish Chandra, District Magistrate, Delhi*, 1954 SCR 1077 : AIR 1954 SC 300 : 1954 Cri. LJ 865; *Raja Narayan/a/ Bansi/a/ Vs. Maneck Phiroz Mistry*, (1961) 1 SCR 417: AIR 1961 SC 29 : (1960) 30 Comp Cas 644 ; *State of Bombay Vs. Kathi Ka/u Oghad*, (1962) 3 SCR 10 : AIR 1961 SC 180 : (1961) 2 Cri. LJ 856; *Nandini Satpathy Vs. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cri.) 236, referred to.
52. In view of the legal position vesting authority on higher police officer to record the confession hitherto enjoyed by the judicial officer in the normal procedure, there should be no breach of procedure and the accepted norms of recording the confession which should reflect only the true and voluntary statement and there should be no room for hyper criticism that the authority has obtained an invented confession as a source of proof irrespective of the truth and creditability. (Para 254)
53. As per Section 15(1), a confession can either be reduced into writing or recorded on any mechanical device like cassettes, tapes or sound tracks from which sounds or images can be reproduced. Since the recording of evidence on mechanical device can be tampered, tailored, tinkered, edited and erased etc., there must be some severe safeguards which should be scrupulously observed while recording a confession under Section 15(1) so that the possibility of extorting any false confession can be prevented to some appreciable extent. (Para 257)
54. Sub-section (2) of Section 15 enjoins a statutory obligation on the part of the police officer recording the confession to explain to the person making it that he is not bound to make a confession and to give a statutory warning that if he does so it may be used as evidence against him. Also Rule 15 of the TADA Rules imposes certain conditions on the police officer with regard to the mode of recording the confession and imposes certain requirements on the police officer recording the confession. For these and foregoing reasons it must be held that Section 15 is not liable to be struck down since that section does not offend either Article 14 or Article 21 of the Constitution. [Paras 259, 260 and 368(9)]
55. Nonetheless, the recording of a confession by a Magistrate under Section 164 of the Code is not excluded by any exclusionary provision in the TADA Act, contrary to the Code but on the other hand the police officer investigating the case under the TADA Act can get the confession or statement of a person indicted with any offence under any of the provisions of the TADA Act recorded by any Metropolitan Magistrate, Judicial Magistrate, Executive Magistrate or Special Executive Magistrate of whom the two latter Magistrates are included in Section 164(1) by sub-section (3) of Section 20 of the TADA Act and empowered to record confession. (Para 261)

56. Accordingly, any confession or statement of a person under the T ADA Act can be recorded either by a police officer not lower in rank than of a Superintendent of Police, in exercise of the powers conferred under Section 15 or by a Metropolitan *Magistrate* or Judicial Magistrate or Executive Magistrate or Special Executive Magistrate who are empowered to record any confession under Section 164(1) in view of sub-section (3) of Section 20 of the T ADA Act. (Para 262)
57. *Bhubone Sahu Vs. King*, AIR 1949 PC 257 : 76 IA 147 : 50 Cri. LJ 872; *Periyaswamti Moppan Vs. Emperor*, ILR (1931) 54 Mad 75 : AIR 1931 Mad 177 : 32 Cri. LJ 448; *Hari Charan Kurmi and Jogia Hajam Vs. State of Bihar*, (1964) 6 SCR 623 : AIR 1964 SC 1184: (1964) 2 Cri. LJ 344; *Olga Tellis Vs. Bombay Municipal Corp.*, (1985) 3 SCC 545: 1985 Supp 2 SCR 51; *E.P. Royappa Vs. State of T.N.*, (1974) 4 SCC 3 : 1974 SCC 544: 1978 SCC (Cri.) 468 : (1979) 2 SCR 1085; *Sunil Batra (II) Vs. Delhi George Varghese Vs. Bank of Cochin*, (1980) 2 SCC 360 : (1980) 2 SCR 913; *Kasturi Lal Lakshmi Reddy Vs. State of J&K*, (1980) 4 SCC 1 : (1980) 3 SCR 1338; *Francis Coralie Mullin Vs. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608 : 1981 SCC (Cri) 212 : (1981) 2 SCR 516; *Gurbachan Singh Vs. State of Bombay*, 1952 SC R 737 : AI R 1952 SC 221 : 1952 Cri. LJ 1147, referred to.
58. However, following guidelines are laid down so as to ensure that the confession obtained in the pre-indictment interrogation by a police officer not lower in rank than a Superintendent of Police is not tainted with any vice but is in strict conformity with the well-recognised and accepted aesthetic principles and fundamental fairness.
- (i) The confession should be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him;
 - (ii) The person from whom a confession has been recorded under Section 15(1) of the Act, should be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under Rule 15(5) along with the original statement of confession, written or recorded on mechanical device without unreasonable delay;
 - (iii) The Chief Metropolitan Magistrate or the Chief Judicial magistrate should scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person should be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon;
 - (iv) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no police officer below the rank of an Assistant Commissioner of Police in the

Metropolitan cities and elsewhere of a Deputy Superintendent of Police or a police officer of equivalent rank, should investigate any offence punishable under this Act of 1987;

This is necessary in view of the drastic provisions of this Act, more so when the Prevention of Corruption Act, 1988 under Section 17 and the Immoral Traffic Prevention Act, 1956 under Section 13, authorise only a police officer of a specified rank to investigate the offences under those specified Acts;

- (v) The police officer if he is seeking the custody of any person for pre-indictment or pretrial interrogation from the judicial custody, must file an affidavit sworn by him explaining the reason not only for such custody but also for the delay, if any, in seeking the police custody;
- (Vi) In case, the person, taken for interrogation, on receipt of the statutory warning that he is not bound to make a confession and that if he does so, the said statement may be used against him as evidence, asserts his right to silence, the police officer must respect his right of assertion without making any compulsion to give a statement of disclosure

59. The Central Government may take note of those guidelines and incorporate them by appropriate amendments in the Act and the Rules. [Paras 263 and 368 (9)]

60. Though it is entirely for the Court trying the offences to decide the question of admissibility or reliability of a confession in its judicial wisdom strictly adhering to the law, it must, while so deciding the question should satisfy itself that there was no trap, no trick and no importune seeking of evidence during the custodial interrogation and all the conditions required are fulfilled. (Para 264)

61. In order to ensure level of scrutiny and applicability of TADA Act, there must be a Screening Committee or a Review Committee constituted by the Central Government consisting of the Home Secretary, Law Secretary and other secretaries concerned of the various Departments to review all the TADA Act cases instituted by the Central Government as well as to have a quarterly administrative review, reviewing the States' action in the application of the TADA Act provisions in the respective States, and the incidental questions arising in relation thereto. Similarly, there must be a Screening or Review Committee at the State level constituted by the respective States consisting of the Chief Secretary, Home Secretary, Law Secretary, Director General of Police (Law and Other) and other officials as the respective Government may think it fit, to review the action of the enforcing authorities under the Act and screen the cases

registered under the provisions of the Act and decide the further course of action in every matter and so on. [Para 265]

62. When the validity of Section 15 is scrutinised in the above background, it must be held that the procedure prescribed under this Act cannot be said to be unjust, unfair and operative, offending Articles 14 and 21. [Para 368(9))]

Per K. Ramaswamy, J. (Dissenting)

63. It is settled law that conferment of power in a high ranking officer is presumed to be exercised according to law or rules. Such conferment of power may be *prima facie* presumed to be valid. But the crux of the question would be whether the power given as to the police officer unlike an independent agency from which the suspicion least generates is a civilised procedure. (Para 393)

64. Any officer not below the rank of the Superintendent of Police, being the head of the District Police Administration responsible to maintain law and order is expected to be keep on cracking down the crime and would take all tough steps to put down the crime to create terror in the heart of the criminals. It is not the hierarchy of officers but the source and for removal of suspicion from the mind of the suspect and the objective assessor that built-in procedural safeguards have to be scrupulously adhered to in recording the confession and trace of the taint must be absent. It is, therefore, obnoxious to confer power on police officer to record confession under Section 15(1). If he is entrusted with the solemn power to record a confession, the appearance of objectivity in the discharge of the statutory duty would be seemingly suspect and inspire no public confidence. If the exercise of the power is allowed to be done once, may be conferred with judicial powers in a lesser crisis and be normalised in grave crisis, such an erosion is anathema to rule of law, spirit of judicial review and a clear negation of Article 50 of the Constitution and the constitutional creases. It is, therefore, unfair, unjust, and unconscionable, offending Article 14 and 21 of the Constitution. (Para 406)

65. The procedure envisaged in Article 21 means the manner and method of discovering the truth. The constitutional human rights perspectives; the history of working of the relevant provisions in the Evidence Act and the wisdom behind Section 164 of the Code ignites inherent invalidity of Subsection (1) of Section 15 and the Court would little afford to turn Nelson's blind eye to the above scenario and blissfully bank on Section 114 III. (e) of the Evidence Act that official acts are done according to law and put the seal that sub-section (1) of Section 15 of the Act passes off the test of "fair procedure and is constitutionally valid. (Paras 406 and 399)

66. Conferment of judicial powers in higher degree on the police will erode public confidence in the administration of justice. The veil of expediency to try the cases by the persons acquainted with the facts and to track the problems posed or to strike down the crime or suppression thereof can not be regarded as a valid ground to give primacy to the arbitrary or irrational or ultra vires action taken by the Government in appointing the police officers as Special Executive Magistrate, nor is the right of revision against his decision as solace. It not only sullies the stream of justice at its source but also chills the confidence of the general public and erodes the efficacy of rule of law and is detrimental to the rule of law. (Para 399)
67. *State of Maharashtra Vs. Sukhdev Singh*, (1992) 3 sce 700: 1992 SCC (Cri.) 705 : JT 1992) 4 SC 73; *Sheela Barse Vs. State of Maharashtra*, (1983) sce (Cri.) 353; AIR 1983 SC 378; *V.M. Ranga Rao Vs. State of A.P.*, (1985) 2 APLJ 361; *Andrew R. Mallory Vs. USA*, 354 US 449 : 1 L Ed 2d 1479 (1957); *Winston Massiah Vs. United States*, 377 US 201: 12 L Ed 2d 246 (1964); *William Malloy V~. Patrik J. Hogan*, 378 US 1 : 12 L Ed 2d 653 (1964); *William Murphy Vs. Waterfront Commission of New York Harbor*, 378 US 52 L Ed 2d 678 (1964); *Ernesto A. Miranda Vs. State of Arizona*, 384 US 436 : 16 L Ec1 2d 694 (1966); *Edward Vs. Arizona*, 451 US 477 (1981); *Arizona Vs. Robertson*, 486 US 675 (1988), referred to.
68. The further contention that the Parliament being competent to enact Section 15(1) of the Act, the effect of Sections 24 to 30 of Evidence Act can equally be taken away by employing non-obstante Clause and that the legislature adopted the above device in its legislative claim to contain the escalated large scale crimes by organised terrorists and gangsters and the apprehended misuse is eliminated as it was vested in high ranking officer, cannot be given acceptance for the aforestated reasons. (Para 407)
69. Article 50 enjoins the State to separate the judiciary from the executive. Having done so by the Code and having entrusted under Article 164 judicial duty on the Judicial Magistrate of First Class, conferment of selfsame power on Superintendent of Police under Section 15 by employing a non-obstante would not be just, fair and reasonable. Where two procedures coexist and classify one procedure to one set of accused and another one for some other accused, both must satisfy the test of Articles 14 and 21. It is true and Courts also would take judicial notice that terrorists or organised criminals have committed and have been committing murders of innocent people in countless number, thereby rudely shaking the foundations' of stable social order. Equally the lawless elements who flout the law with impunity need to be dealt with separately. But suppression of crime by harsh procedure should be meet the test of Articles 14 and 21. (para 395)

70. A police officer is clearly a person in authority and insistence on the accused/suspect to answer his interrogation is a form of pressure, especially in the atmosphere of police station unless certain safeguards erasing duress are adhered to. Policy or rationale or object of the Act have little relevance in determining the constitutional validity of the offending provision. The Court is not sitting over the policy of the State in enacting the law, nor at this stage to sift the evidence. The standard of fairness in recording confession under Section 15(1) of the Act must be within constitutionally sustainable parameters. (Paras 398 and 394)
71. Thus it must be held that the confession recorded by police officer under Section 15(1) is unconstitutional. Yet the confession so recorded shall remain valid and should be considered at the trial or in appeal in accordance with law by virtue of the de facto doctrine and Article 233-A. Any judgement or order made and conviction rendered exercising powers under the Act and sentence imposed relying thereon does not become invalid or void. The operation of this judgement is postponed for a year from the date of the judgement and it is open to the parliament to amend the section suitably. If no amendment is effected within the period or extended period Section 15(1) would thereafter become void. (Paras 422 and 423)

Per Sahai, J. (Dissenting)

72. There is a basic difference between the approach of a police officer and a judicial officer. A judicial officer is trained and tuned to reach the final goal by a fair procedure. The basis of a civilized jurisprudence is that the procedure by which a person is sent behind the bars should be fair, honest and just. A conviction obtained unfairly has never been countenanced by a system which is wedded to rule of law. A police officer is trained to achieve the result irrespective of the means and method which is employed to achieve it. So long the goal is achieved the means are irrelevant and this philosophy does not change by hierarchy of the officers. By their training and approach they are different. Procedural fairness does not have much meaning for them. Dignity of the individual and liberty of person - the basic philosophy of Constitution - has still not percolated and reached the bottom of the hierarchy as the constabulary is still not accountable to public and unlike British police it is highly centralised administrative instrumentality meant to wield its stick and spread awe by harsh voice more for the executive than for the law and society. (para 453)
73. The inadmissibility attaches to a confession recorded by a police officer not because of him but because of uncertainty if the accused was not made a witness against himself by forcing out something which he would not have otherwise stated.

Further a confession made to a police officer for an offence committed irrespective of its nature in non-notified area is inadmissible. But the same police officer is beyond reproach when it comes to notified area. An offence under TADA Act is considered to be more serious as compared to the one under Indian Penal Code or any other Act. Normally graver the offence more strict the procedural interpretation. But here it is just otherwise. What is inadmissible for a murder under Section 302 is admissible even against a person who abets or is possessed of the arms under Section 5 of the Act. Giving power to police office to record confession may be in line with what is being done in England and America. But that requires a change in outlook by the police. Before doing so the police force by education and training has to be made aware of their duties and responsibilities, as observed by Police Commission. The defect lies not in the personnel but in the culture. In a country where few are under law and there is no accountability, the cultural climate was not conducive for such a drastic change. Even when there was no Article 21, Article 20(3) and Article 14 of the Constitution any confession to police officer was inadmissible. It has been the established procedure for more than a century and an essential part of criminal jurisprudence. It was, therefore, necessary to bring about change in outlook before making a provision the merits of which are attempted to be justified on law existing in other countries. Section 15 of the TADA Act throws all established norms by making a confession to a police officer admissible only because it is recorded by a high police officer. Our social environment was not nature for such a drastic change as has been effected by Section 15. It is destructive of basic values of the constitutional guarantee. (Paras 454 and 455)

74. A confession is an admission of guilt. The person making it states something against himself. Therefore it should be made in surroundings which are free from suspicion. Otherwise it violates the constitutional guarantee under Article 20(3) that no person accused of an offence shall be compelled to be a witness against himself. The word 'offence' used in the Article should be given its ordinary meaning. It applies as much to an offence committed under TADA Act as under any other Act. The word, 'compelled' ordinarily means 'by force'. This may take place positively and negatively. When one forces one to act in a manner desired by him it is compelling him to do that thing. Same may take place when one is prevented from doing a particular thing unless he agrees to do as desired. It either case it is compulsion. A confession made by an accused or obtained by him under coercion suffers from infirmity unless it is made freely and voluntarily. No civilised democratic country has accepted confession made by an accused before a police officer as voluntary and above suspicion, therefore, admissible

in evidence. One of the established rule or norms accepted everywhere is that custodial confession is presumed to be tainted. The mere fact that the Legislature was competent to make the law, as the offence under TADA Act is one which did not fall in any State entry, did not mean that the Legislature was empowered to curtail or erode a person of his fundamental rights. Making a provision which has the effect of forcing a person to admit his guilt amounts to denial of the liberty. The class of offences dealt by TADA Act may be different than other offences but the offender under TADA Act is as much entitled to protection of Articles 20 and 21 as any other. The difference in nature of offence or the legislative competence to enact a law did not affect the fundamental rights guaranteed by Chapter III. Section 115 cannot be held to be valid merely because it is as a result of law made by a body which has been found entitled to make the law. The law must still be fair and just. A law which entitles a police officer to record confession and makes it admissible is thus violative of both Articles 20(3) and 21 of the Constitution. Thus the conclusion is that Section 15 is violative of Articles 20 and 21 of the Constitution and, therefore, is liable to be struck down. [Paras 456 and 460(4)]

75. *A. K. Gopalan Vs. State of Madras*, AIR 1950 SC 27 : 1950 SCR 88: 51 Cri. LJ 1383, referred to.
76. Terrorist and Disruptive Activities (Prevention) Act, 1987 - Section 16(1) (as amended by Act 43 of 1993) - Designated Court's discretion to hold proceedings in camera - Held, provision not unconstitutional - Constitution of India, Article 14.
77. Constitution of India - Articles 14 and 21 - Open or public trial - Right to, not absolute - In exceptional circumstances trial can be held in camera - Criminal Procedure Code, 1973, Sections 237(2), 327(2).
78. Terrorist and Disruptive Activities (Prevention) Act, 1987 - Section 16(2) and (3) Identity, names and addresses of witnesses Should normally be disclosed before commencement of trial when no application made by witness or by Public Prosecutor for keeping the identity and address secret not any decision taken by Court on its own motion in that regard - But can be kept secret in exceptional circumstances by the Designated Court in exercise of its discretion.
79. Criminal Trial - Cross-examination - Object of - Identity, names and addresses of witnesses can be kept secret by Court in exceptional circumstances - Fair trial would not be affected thereby - Evidence Act, 1872, Sections 137 to 145.

80. It was argued that Section 16(1) is violative of the provisions of Article 14 of the Constitution on the ground that this provision destroys the guarantee of an open trial and the proviso thereto transfers to the Public Prosecutor the rights of the accused as well as of the public in demanding an openness in conformity with fair trial to the discretion of the Public Prosecutor.

Per curiam

81. The challenge made to Section 16(1) does not require any consideration in view of the substitution of the newly introduced sub-section by Amendment Act 43 of 1994 giving discretion to the Designated Court either to hold or not to hold the proceedings in camera: [Para 368(10); Para 372]

- (i) The trials are traditionally open which is an indispensable attribute of the criminal justice. This characteristic flowed not merely from the public interest in seeing fairness and proper conduct in the administration of criminal trials, but, more important, the ‘therapeutic value’ to the public of seeing its criminal laws in operation, purging the society of the outrage felt with the commission of many crimes. This is the accepted practice of guaranteeing a public trial to an accused as having its roots in the English Common Law heritage. However, though it is an indispensable attribute of the criminal justice, in exceptional circumstances there cannot be any legal ban in having the trial in camera. Though the criminal justice prevailing in our country recognises and accepts the practice of only open trial, there IS an exception to such trial as contemplated under Section 237(2) of the Code of Criminal Procedure.
- (ii) It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are:
 - (a) to destroy or weaken the evidentiary value of the witness of his adversary;
 - (b) to elicit facts in favour of the crossexamining lawyer’s client from the mouth of the witness of the adversary party;
 - (c) to show that the witness is unworthy of belief by impeaching the credit of the said witness;and the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character. (Para 278)

82. The identity of the witness is necessary in the normal trial of cases to achieve the above objects and the right of confrontation is one of the fundamental guarantees so that he could guard himself from being victimised by any false and invented evidence that may be tendered by the adversary party. (Para 279)
83. However, notwithstanding the provisions of the Evidence Act and the procedure prescribed under the Code, there is no imposition of constitutional or statutory constraint against keeping the identity and address of any witness secret if some extraordinary circumstances or imperative situations warrant such non-disclosure of identity and address of the witnesses. (Para 281)
84. *Gurbachan Singh Vs. State of Bombay*, 1952 SCR 737 : AIR 1952 SC 221 : 1952 Cri. LJ A. K. Roy Vs. Union of India, (1982) 1 SCC 271 : 1982 SCC (Cri) 152 : (1982) 2 SCR 272, relied on.
85. Under the provisions of the TADA Act, the right of cross-examination is not taken away but the identity, and addresses of the witnesses are permitted to be withheld. There is no substance in the submission that the Withholding or the issuance of any direction not to disclose the identity, names and addresses of the witnesses prevents the accused from having a fair trial to which right he is otherwise legitimately entitled, This difficulty does not arise, In fact when the copies of the documents on which the prosecution proposes to rely upon are furnished to the accused with a memo of evidence under Section 173 of the Code, he is informed of the names and addresses of the witnesses. (Para 280)
86. Under Section 16(2) of the 1987 Act, the Designated Court is given only a discretionary authority to keep the identity and address of any witness secret on the following three contingencies:
- (i) On an application made by a witness in any proceedings before it; or
 - (ii) On an application made by the Public Prosecutor in relation to such witness; or
 - (iii) On its own motion. (Para 286)
87. If neither the witness nor the Public Prosecutor has made an application in that behalf nor the Court has taken any decision of its own then the identity and addresses of the witnesses have to be furnished to the accused. The measures are to be taken by the Designated Court under anyone of the above contingencies so that a witness or witnesses may not be subjected to any harassment for having spoken against the accused. (Para 287)

88. Generally speaking, when the accused persons are of bad character, the witnesses are unwilling to come forward to depose against such persons fearing harassment at the hands of those accused. The persons who are put for trial under this Act are terrorists and disruptionists. Therefore, the witnesses will all the more be reluctant and unwilling to depose at the risk of their life. The Parliament having regard to such extraordinary circumstances has thought it fit that the identity and addresses of the witnesses be not disclosed in any one of the above contingencies. (Para 288)
89. *Hira Nath Mishra Vs. Principal, Rajendra Medical College*, (1973) 1 SCC 805; *Russell Vs. Duke of Norfolk*, (1949) 1 All ER 1091 ; *Byrne Vs. Kinematograph Renters Society Ltd.*, (1958) 2 All ER 579: (1958) 1 WLR 762, referred to.
90. Nevertheless, in order to ensure the purpose and object of the cross-examination, the identity, names and addresses of the witnesses may be disclosed before the trial commences; but it should be subject to an exception that the court for weighty reasons in its wisdom may decide not to disclose the identity and addresses of the witnesses especially of the potential witnesses whose life may be in danger. [Paras 290 and 368(11)]
91. *Bimal Kaur Khalsa Vs. Union of India*, AIR 1988 P&H 95: (1988) 93 Punj LR 189: 1988 Cri. LJ 169, approved.
92. Hence sub-sections (2) and (3) of Section 16 are not liable to be struck down. [Para 368(11); Para 372J]
93. Terrorist and Disruptive Activities (Prevention) Act, 1987 - Section 19 - Appeal Traditional right of appeal and revision under Cr.P.C. denied - Provision for appeal direct to Supreme Court involving high expenditure and hardship - Held, not unconstitutional - However, having regard to the practical difficulties to be faced by the aggrieved person under the appeal provisions, the Parliament may devise a suitable mode of redress by making the necessary amendments in the appeal provisions.

Per majority

94. The indisputable reality is that the Supreme Court is beyond the reach of an average person considering the fact of distance, expense etc. One could understand the right of appeal directly to the Supreme Court under Section 19 of the Act against any judgement pronounced, sentence passed or order made by a Designated Court solely under the provisions of TADA Act or under both the provisions of TADA Act and the ordinary criminal law. But it would be quite unreasonable to compel a person to

prefer an appeal only to the Supreme Court even in a case wherein the trial was for charges under both the provisions of T ADA Act and the ordinary or general criminal law and the trial has ended in acquittal of the offences punishable under the T ADA Act but in conviction of the offences under the penal provisions of general law alone. (Para 294)

95. There is no logic or convincing reasoning in providing no choice but forcing a person aggrieved by the judgement, sentence or order of the Designated Court passed only under the ordinary criminal law to prefer an appeal to the Supreme Court directly in which case the aggrieved person has to deny himself firstly, the right of appeal to the High Court and secondly, the benefit of approaching the Supreme Court under Article 136 of the Constitution. If every such person aggrieved by the judgement and order of the Designated Court passed under any criminal law other than the TADA Act has to approach the Supreme Court from far-flung areas, many of the persons suffering from financial constraints may not even think of preferring an appeal at all but to languish in jail indefinitely on that count. The statutory compulsion, in such a situation, would not only deny fair play and justice to such person but also amount to destruction of the professed object of criminal justice system in the absence of any other valid reason for an abnormal procedure. (Para 295)
96. This predicament and practical difficulty an aggrieved person has to suffer can be avoided if a person who is tried by the Designated Court-for offences under the TADA Act but convicted only under other penal provisions and is acquitted of the offences under the provisions of T ADA Act, is given the right of preferring an appeal before the next appellate Court as provided under the Code of Criminal Procedure and if the State prefers an appeal against the acquittal of the offence under the provisions of T ADA Act then it may approach the Supreme Court for withdrawal of the appeal or revision, as the case may be, preferred by such person to the Supreme Court so that both the cases may be heard together. (Para 296)
97. Parliament may take note of the practical difficulties faced by the aggrieved persons under the appeal provisions and devise a suitable mode of redress by making the necessary amendments in the appeal provisions. This does not, however, mean that the existing appeal provisions are constitutionally invalid. [Paras 297 and 368(12)]
98. *Syed Qasim Razvi Vs. State of Hyderabad*, 1953 SCR 589 : AIR 1953 SC 156: 1953 Cri. LJ 862; *V. C. Shukla Vs. State (Delhi Admn.)*, 1980 Supp SCC 249 : 1980 SCC (Cri.) 849 : AI R 1980 SC 1382, referred to.

Per K. Ramaswamy, J. (concurring)

99. Though expeditious trial and disposal of the cases and appeals is one of the aims of the Act, but there is considerable force in the contention that many an accused being indigent, cannot effectively pursue the remedy of appeal in the Supreme Court due to oppressive distance and heavy litigation costs, conferment of appellate power on the High Court would be just and fair remedy. Yet it being a legislative policy, it would be left to the wisdom of the Parliament to decide and suitably amend the Act, keeping in view Article 39-A which itself is a fundamental right to the indigent. The remedy of appeal to the High Court would be easily accessible at the State level, lest the poor may be constrained to forego the remedy of appeal. The right to approach the Supreme Court under Article 136 has constitutionally been preserved to everyone. (Para 420)

Per Sahai, J. (concurring)

100. The effect of extension of the Act even to far off States is that for every sentence, may be under Section 3 or 4 or any other Section, one has to approach the Supreme Court,. In many cases, the remedy of appeal may be illusory. For Instance, one may be 'prosecuted under Sections 3, 4 and 5 or under any other Section and provision, He may be acquitted for the offences under Sections 3 and 4 yet may be convicted under other Sections or provisions for minor offences which were tried by the Designated Court by virtue of Section 12 of the Act, He may not be able to approach the Supreme Court because of enormous expenditure and exorbitant legal expenses involved in approaching the Supreme Court. It should not be forgotten that ours is a vast country with majority on the poorer side, The knowledge of economic inability of sizeable section of the society to approach the Supreme Court by way of appeal may result in arbitrary exercise of power and excesses of the police, A provision for appeal to the Supreme Court in minor cases may result in defeating the remedy itself. Inability to file appeal due to financial reasons in petty matters may amount to breach of guarantee under Articles 14 and 21 of the Constitution, It may in many cases be denial of justice, I would, therefore, suggest that it may be examined if a proviso to sub-section (1) of Section 19 can be added that a person convicted of any offence other than Sections 3 and 4 of the Act shall be entitled to file an appeal in the High Court under whose jurisdiction the Designated Court is situated. Further in case the State files an appeal against acquittal of the accused under Sections 3 and 4 in the Supreme Court then the appeal of the

accused filed in the High Court shall stand, automatically, transferred to the Supreme Court and shall be connected and heard along with appeal filed by the State. The State on such transfer should allow the accused to have a counsel of his choice the expenses for which should be borne by the State. [Paras 457 and 460(5)]

101. Terrorist and Disruptive Activities (prevention) Act, 1987 - Sections 20(3) and (4) (a) (as amended by Act 43 of 1993) - Inclusion of Executive Magistrate or Special Executive Magistrate within the purview of Sections 164 and 167 Cr.P.C. - Held, not violative of Articles 50,14 and 21 " Likewise Section 15(a) of Special Courts Act also does not suffer from any infirmity Executive Magistrates also constitute a class of criminal Court. Executive Magistrates are judicial officers - However, whenever Judicial Magistrate is available, he should record confession or statement in presence of Executive Magistrate Terrorist Affected Areas (Special Courts) Act, 1984, Section 15(a) - Criminal Procedure Code, 1973, Sections 164(1), 167, 3,6, 20(1), (4) - Constitution of India, Articles 50, 14 and 21.
102. A reading of sub-section (3) of Section 20 of TADA Act and sub-section (1) of 'Section 164 Cr.P.C. in juxtaposition shows that Section 1611(1) of the Code is mainly substantially rtJJJ-IIIIClbt in relation to a case involving an offence punishable under the TADA Act or any rule made thereunder. But the modification is only to the extent that the Executive Magistrate and Special Executive Magistrate are included along with the Metropolitan Magistrate and Judicial Magistrate and they are all empowered to record the confession or statement. It was contended that the inclusion of the Executive Magistrate or Special Executive Magistrate to record any confession or statement is with an oblique motive of making it possible that the confession or statement may be recorded and admitted in evidence even if the confessions or statements are not made voluntarily but are extorted under coercion or inducement. The empowering of these two Magistrates, it was contended, is against the very principle of separation of judiciary from the executive enunciated in Article 50 of the Constitution, and therefore, this provision is bad under Articles 14 and 21 of the Constitution. It was further stated that the conferment of judicial functions on the newly added non-judicial authorities, who cannot be expected to have judicial integrity and independence, is totally opposed to the fundamental principle of governance contained in Article 50 of the Constitution.

Held

103. The Executive Magistrates are also brought in as one of the classes of criminal Courts in every State. This revised set up and the allocation of magisterial functions between the two categories of Magistrates, judicial under the control of the High Court and the executive under the control of the State Government, the new Code has provided for, make for the simple scheme of separation of 'the judiciary from the executive on an all India basis. The Executive Magistrates have not been further classified evidently for the reason that the judicial functions to be performed by the Executive Magistrates under the new Code are very few. Broadly speaking the functions which are of police and administrative nature are for the Executive Magistrates as appears from the rules of construction contained in sub-section (4) of Section 3. When Section 6 brings Executive Magistrates' Courts as one of the classes of criminal Courts, it must be held that it is acting as a criminal Court. The orders passed by the criminal Courts inclusive of the Executive Magistrates are revisable as having been passed in 'judicial proceedings'. There is no classification or gradation of the Courts of Executive Magistrates but the Special Executive Magistrate is the one appointed by the State Government for a particular area or for the purpose of particular functions. (Para 305)

104. *R. Subramaniam Vs. Commissioner of Police*, AIR 1964 Mad 185 : (1964) 1 Cri LJ 519, relied on.

105. Therefore, merely because the Executive Magistrates and Special Executive Magistrates are included along with the other Judicial Magistrates in Section 164(1) of the Code and empowered with the authority of recording confessions in relation to the case under the T ADA Act, it cannot be said that it is contrary to the accepted principles of criminal jurisprudence and that the Executive Magistrates and Special Executive Magistrates are personnel outside the ambit of machinery -for adjudication of criminal cases. (Para 309)

106. The Executive Magistrates while exercising their judicial or quasi-judicial functions tough in a limited way within the frame of the Code of Criminal Procedure, which judicial functions are normally performed by Judicial Magistrates can be held to be holding the judicial office. Therefore, the contention that the conferment of judicial functions on the Executive Magistrates and Special Executive Magistrates is opposed to the fundamental principle of governance contained in Article 50 of the Constitution can not be

countenanced. Resultantly, it is held that subsection (3) of Section 20 of the T ADA Act does not offend either Article 14 or Article 21 and hence this sub-section does not suffer from any constitutional invalidity. (Para 316)

107. *Stateman (P) Ltd .. Vs. H.R. Deb*, (1968) 3 SCR 614 : AIR 1968 SC 1495 ; *Shree Hunuman Foundries Vs. H.R. Deb*, Matter No. 120 of 1961, decided on July 28, 1965; *Shri. Kumar Padma Prasad Vs. Union of India*, (1992) 2 SCC 428; 1992 SCC (L & S) 56 : (1992) 20 Jawaya Kapur Vs. State of Punjab, AIR 1955 SC 549; (1955) 2 SCR 225, relied on.

108. Though Section 20(3) is constitutionally valid, but in order to remove the apprehension that the Executive Magistrates and the special Executive magistrates who are under the control of the State may not be having judicial integrity and independence as possessed by the Judicial Magistrates and the recording of confessions and statements by those Executive Magistrates may not be free from any possible oblique motive, it would be always desirable and 'appreciable that a confession or statement of a person is recorded by the Judicial Magistrate whenever the Magistrate is available in preference to the Executive Magistrates unless there is compellin'g and justifiable reason to get the confession or statement, recorded by the Executive or Sp~cial Executive Magistrates.

109. The modification in sub-section (4)(a) of Section 20 is in the same line of sub-section (3); in that the Executive Magistrate and the Special Executive Magistrate are included along with the Judicial Magistrate. Therefore, whenever a person is arrested for an offence under the provisions of T ADA Act, the arrestee can be transmitted to the Judicial Magistrate or the Executive Magistrate or the Special Executive Magistrate though the transmission of the accused under Section 167(1) for other offences is still only to the Judicial Magistrate. For the reasons mentioned above while disposing the submission made with reference to sub-section(3) of Section 20, it must be held that the criticism that the inclusion of Executive Magistrate and Special Executive Magistrate in sub-section (1) of Section 167 is with an ulterior motive, cannot be countenanced and this provision cannot be said to be unconstitutional. (Paras 319 and 322)

110. *Bimal Kaur Khalsa Vs. Union of India*, AI R 1988 P&H : (1988) 93 Punj LR 189 : 1988 Cri LJ 169, overruled.

111. Thus sub-section (3) and (4)(a) of Section 20 do not suffer from any infirmity on account of the inclusion of the Executive Magistrate and Special Executive

Magistrate within the purview of Section 164 and 167 of the Code of Criminal Procedure in respect of their application in relation to a case involving an offence punishable under the TADA Act or any rule made thereunder. Likewise, Clause (a) of Section 15 of the Special Courts Act, 1984 does not suffer from any infirmity. [Para 368(13); Para 372]

112. Terrorist and Disruptive Activities (Prevention) Act, 1987 - Section 20(7) - Exclusion of benefit of Section 438 Cr. P.C. regarding anticipatory bail - Held, not violative of Article 21 - Constitution of India, Article 21.
113. Statute' Law - New provision in the statute creating a new right - Can be taken away by subsequent enactment.
114. Criminal Procedure Code (U.P. Amendment) Act, 1976 - Section 9 - Deleting the operation of Section 438 Cr.P.C.-Held, provision valid and not violative of Articles 14, 19 and 21 - State legislature competent to do so - Act having been applied throughout the State, there is no discrimination - Constitution of India 254(2).

Per curiam

115. Both the Parliament as well as the State Legislatures have got legislative competence to enact any law relating to the Code of Criminal Procedure. No provision relating to anticipatory bail was in the old Code and it was introduced for the first time in the present Code of 1973 on the suggestion made of the Forty-first Report of the Law Commission and the Joint Committee Report. One of the reasons given by the Law Commission for its suggestions to introduce the provision for anticipatory bail, that reason being '..... where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail'. Thus a person accused of non-bailable offence, who is likely to abscond or otherwise misuse his liberty while on bail, will have no justification to claim the benefit for anticipatory bail. Can it be said with certainty that terrorists and disruptionists who create terrorism and disruption and inject sense of insecurity, are not likely to abscond or misuse their liberty if released on anticipatory bail. Evidently, the Parliament has thought it fit not to extend the benefit of Section 438 to such offenders. (Paras 327 and 328)

116. Section 438 is a new provision incorporated in the present Code creating a new right. If that new right is taken away, it cannot be said that the removal of Section 438 is violative of Article 21. In *Gurbaksh Singh*, there is no specific statement that the

- removal* of Section 438 at any time will amount to violation of Article 21. [Paras 329 and 368(14); Para 372]
117. *Gurbaksh Singh Sbbia Vs. State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri.) 465: (1980) 3 SCR 383, distinguished.
118. *Bimal Kaur Khalsa Vs. Union of India*, AIR 1988 P&H95 : (1988) 93 Punj LR 189: 1988 Cri LJ 169, approved.
119. In view of the discussion made in relation to Section 20(7) of the T ADA Act and of the legislative competence of the State, the contention that Section 9 of the Code of Criminal Procedure (U. P. Amendment) Act, 1976 is violative of Article Section 14, 19 and 21 of the Constitution has no merit and as such has to be rejected. [Paras 334 and 368(15); Para 372]
120. The State Legislature is competent to amend Central Act. The Legislature has passed Act No. 16 of 1976 in exercise of powers under List III (Concurrent List) of the Seventh Schedule and deleted Section 438 of the Code. Moreover, the Amendment Act which has received the assent of the President of India on 30.04.1976 by 'Virtue of Article 254(2) of the Constitution prevails in U.P. State, notwithstanding any prior law made by the Parliament. As the Act is applied throughout the State, there is no question of discrimination in the application of this provision in the State of Uttar Pradesh. [Paras 333 and 368(15); Para 372]
121. *U.P. Electric Supply Co. Ltd" Vs. R.K. Shukla* (1969) 2 SCC 400, relied on.
122. Terrorist and Disruptive Activities (Prevention) Act, 1987 - Section 20(8) and (9) Conditions for release on bail - Held, provisions not violative of Article 21 - Sub-section (8) is in consonance with Section 437 Cr.P.C. and source of power for release on bail is Section 437 and not Section 439 Cr.P.C. - While exercising power Court should keep in mind not only liberty of the accused but also the interest of the victims, collective interest of the community and safety of the nation - Criminal Procedure Code, 1973, Sections 437 and 439.
123. Sub-section (8) which imposes a complete ban on release on bail against the accused on an offence punishable under this Act minimises or flouts that ban under two conditions, those being (1) the Public Prosecutor must be given an opportunity to oppose the bail application for such release; and (2) where the Public Prosecutor opposes the bail application the Court must be satisfied that the two conditions, namely, (a) there are reasonable grounds for believing that the person accused is not guilty of such offence and (b) he is not likely to commit any offence while on bail.

Sub-section (9) qualifies sub-section (8) to the effect that the above two limitations imposed on grant of bail specified in sub-section (8) are in addition to the limitation under the Code or any other law for the time being in force on granting of bail. If either of the two conditions mentioned therein is not satisfied, the ban operates and the accused person cannot be released on bail but of course it is subject to Section 167(2) as modified by Section 20(4) of the TADA Act in relation to a case under the provisions of TADA Act. The conditions imposed under Section 20(8)(b) are in 'consonance with the conditions prescribed under Clauses (i) and (ii) of sub-section (1) of Section 437 and Clause (b) of sub-section (3) of that Section. Section 439 Cr.P.C. cannot be availed of for believing that he is not guilty of an offence, which condition in different form is incorporated in other Acts such as 'Clause (i) of Section 437(1) of the Code and Section 35(1) of FERA and 104(1) of the Customs Act, cannot be said to be an unreasonable condition infringing the principle of Article 21. [Paras 342, 345, 347 and 349 and 368(16); Para 372]

124. *Usmanbhai Oawoodbhai Menon Vs. State of GUJARAT*, (1988) 2 SCC 271 : 1 ~88 SCC (Cri.) 318, affirmed.
125. *Gudikanti Narasimhulu Vs. Public Prosecutor*, (1978) 1 SCC 240: 1978 SCC !Cri.) 115; (1978) 2 Scr 371, referred to.
126. *Balchand Jain Vs. State of M. P.* (1976) 4 SCC 572; 1976 SCC (Cri.) 689 : (1977) 2 SCR 52; *Ishwar Chand v. State of H.P.*, ILR 1975 : HP 569, distinguished.
127. *Bimal Kaur Khalsa Vs. Union of India*, AIR 1988 P&H 95: (1988) 93 Punj LR 1989: 1988 Cri. LJ1969, overruled.
128. No doubt, liberty of a citizen must be zealously safeguarded by the Courts; nonetheless the Courts while dispensing justice in cases like the one under the TADA Act, should keep in mind not only the liberty of the accused but also the interest of the victim and their near and dear and above all the collective interest of the community and the safety of the nation so that the public may not lose faith in the system of judicial administration and indulge in private retribution. (Para 351)
129. However the invocation of the provisions of TADA Act in cases, the facts of which do not warrant, is nothing but sheer misuse and abuse of the Act by the police. Unless, the public prosecutors rise to the occasion and discharge their onerous responsibilities keeping in mind that they are prosecutors on behalf of the public but not the police and unless the Presiding Officers of

the Designated Courts discharge their judicial functions keeping in view the fundamental rights particularly of the personal right and liberty of every citizen as enshrined in the Constitution to which they have been assigned the role of sentinel of the qui vive, it cannot be said that the provisions of T ADA Act are enforced effectively in consonance with the legislative intendment. (Para 352)

130. *State of Maharashtra Vs. Anand Chintaman Oighe*, (1990) 1 SCC 397; 1990 SCC (Cri.) 132, relied on.
131. Terrorist and Disruptive Activities (Prevention) Act, 1987 - Sections 20(8) and 19 High Court's jurisdiction under Art. 226 to entertain application for bail of persons indicated under the Act or against the proceedings or other offences committed in the course of same transaction covered by T ADA Act - Considerations of judicial pragmatism, concomitance between Supreme Court and High Courts calling for observance of comity and self-imposed limitation - Held, per majority, Sahai, J. concurring, High Court should not normally entertain such applications, but in extreme circumstances its jurisdiction is not 'excluded' - Per K. Ramaswamy, J. High Court should exercise self - discipline and decline to entertain matters covered by the Act, including Section 19 - Constitution of India, Articles 226, 227.
132. Constitution of India - Article 226 Scope of High Court's jurisdiction under Jurisdiction cannot be taken away by legislation - Exclusion of jurisdiction by doctrine of concomitance - Jurisdiction of superior Courts discussed - Decision of superior Courts are conclusive as to all relevant matters thereby decided including its own jurisdiction - Cannot be impeached collaterally - 'Conclusive' - Meaning of - Words and phrases.

Per majority

133. The legislative history and the object of TADA Act indicate that the special Act has been enacted to meet challenges arising out of terrorism and disruption. Special provisions are enacted in the Act with regard to the grant of bail and appeals arising from any judgement, sentence or order (not being an interlocutory order) of a Designated Court etc. The overriding effect of the provisions of the Act (i.e. Section 25 of T ADA Act) and the Rules made thereunder and the non-obstante Clause in Section 20(7) reading, 'Notwithstanding anything contained in the Code ' clearly postulate that in granting of bail, the special provision alone should be made applicable. If any party is aggrieved by the order, the only remedy under the Act is to approach the Supreme Court by way of 'an appeal. If the High Courts entertain bail applications

invoking their extraordinary jurisdiction under Article 226 and pass orders, then the very scheme and object of the Act and the intendment of the Parliament would be completely defeated and frustrated. But at the same time it cannot be said that the High Courts have no jurisdiction. Though the High Courts have very wide powers under Article 226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well established principles. If the High Court is inclined to entertain any application under Article' 226, that power should be exercised most sparingly and only in rare and appropriate cases in extreme circumstances. What those rare cases are and what would be the circumstances that would justify the entertaining of applications under Article 226 cannot be put in strait-jacket. However, the judicial discipline and comity of Courts require that the High Courts should refrain from exercising their jurisdiction in entertaining bail applications in respect of an accused indicated under the special Act since the SUPREME Court has jurisdiction to interfere and correct the orders of the High Courts under Article 136 [Paras 359 and 368(17)]

134. *State of Maharashtra Vs. Abdul Hamid Haji Mahammed*, (1994) 2 SCC 664, affirmed.
135. *Rafiq Abid Patel Vs. Inspector of Police Thane*, 1992 Cri. LJ 394 (Bom); Writ Petition (Cri.) No. 458 of 1991, decided on April 25, 1991, *Waryam Singh Vs. Amarnath*, 1954 SCR 565 : AI R 1954 SC 215; *State of Gujarat Vs. Vakhtsinghji Sursinghji Vaghela*, (1968) 3 SCR 692: AI R 1968 SC 1481; *Ahmedabad Mfg. & Calico Ptg. Co. Ltd., Vs. Ram Tahel Ramnand*, (1972) 1 SCC 898; *Mohd. Yunus Vs. Mohd. Mustaqim*, (1983) 4 SCC 566; *Mani Nariman Daruwala Vs. Phiroz N. Bhatena*, (1991) SCC (Cri) 265, referred to.
136. *Usmanbhai Dawoodbhai Menon Vs. State of GUjarat*, (1988) 2 SCC 271 : 1988 SCC (Cri.) 318, Distinguished.

Per Sahai, J. (Concurring)

137. The power given to High Court under Article 226 is an extraordinary power not only to correct the manifest error but also to exercise is the highest court for purposes of exercising civil, appellate, criminal or even constitutional jurisdiction so far that State is concerned. The jurisdiction possessed by it before coming into force of the Constitution was preserved by Article 225 and by Articles 226 and 227 an extraordinary jurisdiction was conferred on it to ensure that the subordinate authorities act not only in accordance with law but they also function within the framework of law. That jurisdiction of the High Court has not been taken away and in fact could not be taken away by legislation. Since the High Court under the Constitution is a forum for enforcement of fundamental right of a citizen it cannot be denied the power

to entertain a petition by citizen claiming that the State machinery was abusing its power and was acting in violation of the constitutional guarantee. Rather it has a constitutional duty and responsibility to ensure that the State machinery was acting fairly and not on extraneous considerations. The High Court has jurisdiction to entertain a petition under Article 226 in extreme cases. What are such extreme cases cannot be put in a strait-Jacket. But the few of which there can be hardly any dispute are if the High Court is of opinion that the proceedings under TADA Act were an abuse of process of Court or taken for extraneous considerations or there was no material on record that a case under TADA Act was made out. If it be so then there is no reason why should the High Court not exercise its jurisdiction and grant bail to the accused in those cases where one or the other exceptional ground is made out. Therefore as regards jurisdiction of the High Court to entertain an application for bail under Article 226 the conclusion is that the High Courts being constitutionally obliged to ensure that any authority which exercise judicial and quasi-judicial powers in its jurisdiction functions within the frame work of law, are entitled to entertain the petition to determine if the proceedings were not an abuse of process Court. But while exercising discretion the Court must not be oblivious of the sensitivity of the legislation and the social objective inherent in it and, therefore, should exercise it for the sake of justice in rare and exceptional cases the details of which cannot be fixed by any rigid formula. [Paras 459 and 460(6)]

138. *State of Maharashtra Vs. Abdul Hamid Haji Mohammed*, (1994) 2 SCC 664; *Kharak Singh Vs. State of U.P.*, (1964) 1 SCR 332; AIR 1963 SC 1295; (1963) 2 Cri. LJ 329; *Paras Ram Vs. State of Haryana*, (1992) 4 SCC 662 : 1993 SC (Cri) 426; *Usmanbhai Dawoodbhhai Menon Vs. State of GUjarat*, (1988) 2 SCC 271 : 1988 SCC (Cri) 318, relied on.

139. *Narcotics Control Bureau Vs. Kishan Lal*, (1991) 1 SCC 705: 1991 SCC (Cri) 265; *Waryam Singh Vs. Amarnath*, 1954 SCR 565 : AI R 1954 SC 215; *State of Gujarat Vs. Vakhtsinghji Sursinghji Vaghela*, (1968) 3 SCR 692 : AIR 1968 SC 1481; *Mohd. Yunus Vs. Mohd. Mustaqim*, (1983) 4 SCC 566, referred to.

Per K. Ramaswamy, J. (dissenting)

140. The jurisdiction and power of the High Court under Article 226 of the Constitution is undoubtedly constituent power and the High Court has untrammelled powers and jurisdiction powers and jurisdiction to issue any writ or order or direction to any person or authority within its territorial jurisdiction for enforcement of any of the fundamental rights or for any other purpose. The legislature has no power to divest

the Court of the constituent power engrafted under Article 226. A superior Court is deemed to have general jurisdiction and the law presumes that the Court has acted within its jurisdiction. The judgement of a superior Court unreservedly is conclusive as to all relevant matters thereby decided, while the judgement of the inferior Court involving a question of jurisdiction is not final. The superior Court, therefore, has jurisdiction to determine its own jurisdiction, may be rightly or wrongly. Therefore, the Court in an appropriate proceeding may erroneously exercise jurisdiction. It does not constitute want of jurisdiction, but it impinges upon its propriety in the exercise of the jurisdiction. Want of jurisdiction can be impeached collaterally by an inferior Court. However, acts done by a superior Court are always deemed valid wherever they are relied upon. The exclusion thereof from the rule of validity is indispensable in its finality. The superior Courts, therefore, are the final arbiters of the validity of the acts done not only by other inferior Courts or authorities, but also their own decisions. Though they are immune from collateral attack, but to avoid confusion the superior Court's decisions lay down the rules of validity; are not governed by those rules. The valid decision is not only conclusive, it may affect, but it is also conclusive in proceedings where it is sought to be collaterally impeached. However, the term conclusiveness may acquire other specific meanings. It may mean that the finding upon which the decision is founded - as distinct or it is the operative part - or has to be conclusive or these findings bind only parties on litigated disputes or that the organ which has made the decision is itself precluded from revoking, rescinding or otherwise altering it. (Para 427)

141. The decision or order or a writ issued by the High Court under Article 226 is subject to judicial review by an appeal to the Supreme Court under Article 136 whose sweep is wide and untrammeled. The question, therefore, is whether the High Court would be proper to exercise its power under Article 226 over the proceedings or the offences, or the other offences committed in the course of the same transaction, covered under the TADA' Act. (Para 428)
142. The jurisdiction of the High Court though was not expressly excluded under the Act, by necessary implication it gets eclipsed not so much that it lacked constituent power but by doctrine of concomitance. Hence, though the High Court has jurisdiction and power under Article 226 to issue appropriate writ or direction or order in exceptional cases at the behest of a person accused of an offence under the Act, the High Court being amenable to appellate jurisdiction and judicial review under Article 136 to the Supreme Court, and the Supreme Court having been statutorily invested with the

power and jurisdiction under Section 19 of the Act, judicial pragmatism concomitance between the Supreme Court and the High Court, the latter must observe comity and self-imposed limitation, on the exercise of the power under Article 226 and refuse to pass an order or to give direction which would inevitably result in exercising the jurisdiction and power conferred on the Supreme Court under Section 19 of the Act or sitting over the appellate orders passed by the Supreme Court. Exercise of the power - even in exceptional cases or circumstances is, therefore, incompatible with or inconsistent with comity. Therefore, the only check up on a Court's exercise of power is one's own sense of self-restraint and due respect to comity. Judicial " pragmatism, therefore, poignantly point, per force to observe constitutional propriety and comity imposing self-discipline to decline to entertain proceedings under Article 226 over the matters covered under Section 19 or the matters in respect of which remedy under Section 19 is available or taken cognizance; issue of process or *prima facie* case in the complaint or charge sheet etc., in other words all matters covered under the Act. Thus the High Court's jurisdiction got eclipsed and denuded of the powers over the matters covered under the Act. (Para 428 and 435)

143. Connolly Brothers Ltd., Re; Wood Vs. *Connolly Brothers Ltd.*, (1911) 1 Ch 731 : 80 LJ CH 409; *Imperial Tobacco Ltd.*, Vs. Attorney General (1979) 2 All ER 592 : (1979) 2 WLR 805; *Santoshi Tel Utpaka Kendra Vs. Dy. C.S. T.*, (1981) 3 SCC 466: 1981 SCC (Tax) 253; *Tilokchand & Motichand Vs. H.B. Munshi, C.S. T.* (1969) 1 SCC 110 :AIR 1970 SC 898; *Lokshmi Charan Sen Vs. A.K.M. Hassan Uzzaman*, (1985) 4 SCC 689; 1985 Supp 1 SCR 493; *Pete Darr Vs. C.P. Burford*, 339 US 200 : 94 L Ed 761 (1949); *Evelle J. Younger Vs. John Harris*, 401 US 37 : 27 L Ed 2d 669 (1971); *Lawrence S. Gillock*, 445 US 360 : 63 LEd 2d 454 (1980), relied on.
144. Terrorist and Disruptive Activities (Prevention) Act, 1987 - Section 22 - Identification of accused on the basis of photograph - Held, Section 22 invalid and hence struck down.
145. There is much force in the submission that Section 22 is unintelligible and that it is quite impossible to identify any person on the basis of his photograph especially in the present day when trick photographs are being taken. If the evidence regarding the identification on the basis of a photograph is to be held to have the same value as the evidence of a test identification parade, gross injustice to the detriment of the persons suspected -may result. Therefore, Section 22 has to be struck down. [Paras 360, 361 and 368(18); Para 372J .

146. Terrorist and Disruptive Activities (Prevention) Act 1987 - Section 2(1)(f) - Terrorist Affected Areas (Special Courts) Act, 1984 - Section 2(1 Hi) - Notified area - Periodical review of, by State Govt. to decide whether to denotify any area suggested - Review/ Screening Committee may also be empowered to scrutinise the prevailing situation and make recommendations to the Govt.

Per majority

147. The State Governments should review periodically and take decision either to denotify any area or continue the same as 'notified area' and act accordingly. The Screening or Review Committee as suggested while dealing with Section 15 of the 1987 Act, may also be empowered by the respective Governments to scrutinise the prevailing situations and to make recommendations to the State Governments, recommending either to continue or to discontinue the notification. The Supreme Court's opinion in this regard may also be followed in the case of declaring any area as 'terrorist affected area'. (Para 362)

148. Terrorist and Disruptive Activities (Prevention) Act, 1987 - Deprivation of right to fair trial alleged - Challenge based on ground that in absence of proclamation of emergency when fundamental rights are available right to fair trial cannot be whittled down and even during emergency, rights under Articles 20 and 21 are saved under Article 359(1) by virtue of the 44th Amendment - Held, not sustainable - It is for Parliament to enact any law without infringing any of the provisions of the Constitution and within its legislative competence depending upon the need for such enactment - Constitution of India, Articles 395(1), 20 and 21. (Per majority) (Paras 92 to 96)

149. Terrorist and Disruptive Activities (Prevention) Act, 1987 - Expedited disposal of cases by Designated Courts commended.

Per majority

150. Keeping in view the doctrine of 'speedy trial' which is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution and which concept is manifested in the Special Courts Act, 1984 and TADA Act, 1987, the Designated Courts should dispose of the cases pending before them without giving room for any complaint of unreasonable delay. The Government concerned should ensure that no vacancy of Presiding Officer of the Designated Court remains vacant and should take necessary steps to fill up the vacancy as soon as any vacancy arises and also if necessitated, should constitute more Designated Courts so

that the undertrials charged with the provisions of T ADA Act do not languish' in jail indefinitely and the cases are disposed of expeditiously. (Para 369)

151. Constitution of India - Article 14 Classification - Test of valid classification Legislative classification for different treatment permissible so long as there is reasonable basis for such classification.

Per majority

152. The Principle of legislative classification is an accepted principle whereunder' persons may be classified into groups and such groups may differently be treated if there is a reasonable basis for such difference or distinction. The rule of differentiation is that is enacting laws differentiating between different persons or things in different circumstances which govern one set of persons or objects such laws may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different set' of circumstances. (Para 218)

153. The limit of valid classification must not be arbitrary but scientific and rational. It must always rest upon some real and substantial distinction bearing reasonable and just relation to the needs in respect of which the classification is made. (Para 219)

154. In order to consider the question as to the reasonableness of the distinction and classification, it is necessary to take into account the objective for such distinction and classification which of course need not be made with mathematical precision. Suffice, if there is little or no difference between the persons and the things which have been grouped together and those left out of the groups, the classification cannot be said to be a reasonable one. In making the classification, various factors have to be taken into consideration and examined as to whether such a distinction or classification justifies the different treatment and whether they subserve the object sought to be achieved. (Para 220)

155. *Chiranjit Lal Chowdhari Vs. Union of India*, 1950 SCR 869 : AIR 1951 SC 41; *Ram Krishna Dalmia Vs. Justice S.R. Tendolkar*, 1959 SCR 279 : AIR 1958 SC 538; Special Courts Bill, 1978, In re, (1979) 1 SCC 380 : (1979) 2 SCR 476, relied on.

156. Constitution of India - Articles 20(3) and 21 - Protection against self-incrimination under Article 20(3) forms part of right to life and liberty under Article 21.

157. Constitution of India - Articles 21 and 14 - Procedure established by law - Procedural law as well as substantive law must pass the test of Article 14 and must be just and fair.

Per majority

158. In our Constitution as well as procedural law as Law of Evidence, there are certain guarantees protection the right and liberty of a person in a criminal proceeding and safeguards in making use of any statement made by him. Article 20(3) of our Constitution embodies the principle of protection against compulsion of self-incrimination. This principle is also enunciated by the Fifth Amendment to the U.S. Constitution. The above principle is recognised to a substantial extent in the criminal administration of justice in our country by incorporating various statutory provisions. One of the components of the guarantee contained in Article 20(3) of the Constitution is that it is a protection against compulsion resulting in the accused of any offence is protected by the constitutional provisions as well as the statutory provisions to the extent that no self-incriminating statement made by an accused to the police officer while he is in custody, could be used against such maker. The above constitutional and statutory procedural guarantees and safeguards are in consonance with the expression, 'according to procedure established by law' enshrined in Article 21 of the Constitution within which fold the principle of just and fair trial is read into. (Para 205, 206, 207 214 and 215)

159. *M. P. Sharma Vs. Satish Chandra, District Magistrate, Delhi*, 1954 SCR 1077: AIR 1954 SC 300 : 1954 Cri. LJ 865; *Raja Narayan/a/ Bans/a/ Vs. Maneck Phiroz Ministry*, (1961)1 SCR 417: AIR 1961 SC 29 : (1960) 30 Comp Cas 644; *State of Bombay Vs. Kathi Ka/u Oghad*, (1962) 3 SCR 10; AIR 1961 SC 180; (1961) 2 Cri. LJ 856; *Nandini Satpathy Vs. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cri.) 236, Relied on.

Per K. Ramaswamy, J.

160. Though every person has social or statutory duty to assist the police, exceptions have been engrafted and it is a constitutional mandate under Articles 20(3) and 21 as a fundamental right against self-incrimination. Article 3 of Declaration of Human Rights assures that everyone has right to life, liberty and security of person. The Constitutional and human rights commitment, therefore, is that no one shall be constrained to commit himself out of his own mouth. In other words, the procedural checks are the valued means to prevent excess and civilises the actions of the executive: Articles 20(3) and 21 accord, therefore,

to every person privilege against self-incrimination as part of right to life which reflects many of fundamental values, the notable ones being unwillingness to subject those suspected of crime to the cruel or inhuman treatment of self-accusation, and abuse of person. It is a protection to the innocent or may be a shelter or shield to the guilty but so far as the constitutional protection is available, its deprivation is permissible only in accordance with law consistent with the mandate of Articles 20 to 22 of the Constitution. (Para 376)

161. Article 20 is not confined to individual or common law offences. It extends to statutory offences. Offences under the Act are statutory offences. As soon as a formal accusation constituting an offence under the Act has been made before SHO or in a private complaint the person is entitled to the protection under Articles 20(3) and 21. Their Violation, except in accordance with valid procedure established by law, is in violation of human right to life assured by Article 21 of the Constitution. Liberty of every citizen is an invaluable and precious right. Burden is on the State to establish that its deprivation is constitutionally valid. Procedural law as well as substantive law must pass the tests prescribed by Article 14. Article 21 is not intended to be a limitation upon the powers of the legislature which it otherwise has under the Constitution. Yet the substantive as well as the procedural law made, modified or amended must be just, fair and reasonable. The purity of the procedure to discover truth shall always remain fair, sensitive to the needs of the society and fairly and justly protect the accused. The procedural safeguards are indispensable essence of liberty. The history of personal liberty is largely the history of procedural safeguards. The procedure contemplated by Article 21 of the Constitution means just and fair procedure and reasonable law but not formal or fanciful. No person shall be deprived of his life or personal liberty except in accordance with the procedure established by law mandated by Article 21, which would mean that a person shall not be subjected to coercion which does not admit of legal justification. Procedure envisaged in Article 20(3) is the manner, means and the form in which the right is enforced, or the person is subjected to. Though the Constitution does not guarantee any particular procedure and the legislature is left free to lay down the procedure, Articles 14 and 21 prescribe a built limitation in prescribing the procedure, i.e., there must be fundamental fairness in the procedure prescribed by law and should not be unconscionable or oppressive. (Para 394)

162. *State of WB. Vs. Anwar A/i Sarkar*, 1952 SCR 284 : AIR 1952 SC 75 : 1952 Cri. LJ 510, relied on.

Per Sahai, J.

163. Making a provision which has the effect of forcing a person to admit his guilt amounts to denial of the liberty. A law which entitles a police officer to record confession and makes it admissible is violative of both Articles 20(3) and 21. (Para 456)

164. Procedure established by law, extends both to the substantive and procedural law. (Para 448) Procedure established by law - Must be right, just and fair and must be in conformity with principles of natural justice.

Per majority

166. The Procedure contemplated by Article 21 is the procedure must be 'right, just and fair' and not arbitrary, fanciful or oppressive. In order that the procedure is right, just and fair, it should conform to the principle of natural justice, that is, 'fair play in action'.

167. Constitution of India - Article 21 Nature, scope and importance of right guaranteed under - It is in the nature of basic human right - Words ' life', 'liberty', 'deprive' - Meaning of Article 21 to be strictly construed against the State and in favour of the person whose right is affected - Words and phrases.

Per Sahai, J.

168. Any law of punitive or preventive detention has to be tested on the touchstone of the constitutional assurance to every person that he shall not be deprived of his liberty except in accordance with procedure established by law. It is declaration of deep faith and belief in human rights. In the pattern of guarantee woven in Chapter III of the Constitution, personal liberty of a man is at the root of Article 21'. Each expression used in this Article enhances human dignity and value. It lays foundation for a society where rule of law has primacy and not arbitrary or capricious exercise of power. 'Life' dictionary means, 'State of functional activity and continual change peculiar to organised matter, and especially to the portion of it constituting an animal or plant before death; animate existence; being alive'. But used in the Constitution it may not be mere existence. Liberty is the most cherished possession of a man. 'Truncate liberty in Article 21 and several other freedoms fade out automatically', Liberty is the right of doing an act which the law permits. This Article instead of conferring the right. Purposely uses negative expression. Obviously because the Constitution has recognised the existence of the right in every man. It was not to be guaranteed or

created. One inherits it by birth. This absolutism has not been curtailed or eroded. Restriction has been placed on exercise of power by the State by using the negative. It is State which is restrained from interfering with freedom of life and liberty except in accordance with the procedure established by law. Use of the word 'deprive' is of great significance. According to the dictionary it means, 'debar from enjoyment; prevent (Child etc.) from having normal home life'. Since deprivation of right of any person by the State is prohibited except in accordance with procedure established by law, it is to be construed strictly against the State and in favour of the person whose rights are affected. Article 21 is a constitutional command to State to preserve the basic human rights of every person. Existence of right and its preservation has, thus, to be construed liberally and expansively. As a corollary to it the exercise of power by the State has to be construed narrowly and restrictively. It should be so understood and interpreted as not to nullify the basic purpose of the guarantee. No legislative or executive action can be permitted to get through unless it passes through the judicial scanning of it being not violative of the cherished right preserved constitutionally. The procedure adopted by State either legislatively or executively must therefore satisfy the basic and fundamental requirement of being fair and just. The word 'except' restricts the right of the State by directing it not to fiddle with this guarantee, unless it enacts a law which must withstand the test of Article 13. Procedure established by law, extends both to the substantive and procedural law. Further mere law is not sufficient. It must be fair and just law. Even in absence of any provision as in American Constitution fair trial has been rendered the basic and primary test through which a legislative and executive action must pass. (Paras 447 and 448)

169. *Munn Vs. Illinois*, 94 US 113 (1877); *Kharak Singh Vs. State of u.P.*, (1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri. LJ 329; *Sunil Batra Vs. Delhi Administration (I)*, (1978) 4 sec 494 : 1979 SCC (Cri) 155; (1779) 1 SCR 392; *Francis Coralie Mullin Vs. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608 : 1981 SCC (Cri) 212; (1881) 2 SCR 516; *Additional District Magistrate, Jabalpur Vs. Shivakani Shukla*, (1976) 2 SCC 521 : AIR 1976 SC 1207, relied on.
170. Constitution of India - Article 21 - 'Life and personal liberty' - Liberty - Concept, object and scope of - Liberty combined with equality and fraternity constitute the trinity and essential element of democracy - Control or restriction on liberty in social interest essential but it should not be overbearing - Individual liberty must be subordinated to common happiness (happiness of greatest number) - Yet so long as ubi jus ebi remedium is available, the procedure prescribed and action taken thereon by law

enforcement authority must *meet* the test of constitutional requirements - Courts as sentinel qui vive must strike a balance. (Per K. Ramaswamy, J.) (!?aras 373 to 375 and 381)

171. Constitution of India - Article 21 Right to speedy trial - Forms part of Article 21 and ensures a reasonable, just and fair procedure Right operates with the commencement of arrest and incarceration and continues at all stages of investigation, enquiry, trial, appeal and revision Whether trial delayed - To be determined in facts and circumstances of the case - Factors to be considered - Criminal Procedure Code, 1973, Section 309.

Per majority

172. Speedy trial is one of the facets of the fundamental right to life and liberty enshrined in Article 21 and the law must ensure 'reasonable, just and fair' procedure which has a creative connotation. The constitutional guarantee of speed trial is properly reflected in Section 309 of the Code of Criminal Procedure. (Paras 88 and 86)

173. *Maneka Gandhi Vs. Union of India*, (1978) 1 SCC 248 : (1978) 2 SCR 621, followed.

174. *Hussainara Khatoon (I) Vs. Home Secretary, State of Bihar*, (1980) 1 SCC (Cri.) 23: (1979) 3 SCR 169(1)(1); *Sunil Batra Vs. Delhi Administration (I)*, (1978) SCC 494 : 1979 SCC (Cri. 155 : (1979) 1 SCR 392; *Hussainara Khatoon (IV) Vs. Home Secretary, State of Bihar, Patna*, (1980) 1 SCR 98 : 1980 SCC (Cri.) 40 : (1979) 3 SCR 532 (IV); *Hussainara Khatoon (VI) Vs. Home Secretary, State of Bihar, Govt. of Bihar, Patna*, (1980) 1 SCC 115: 1980 SCC (Cri.) 57; (1979) 3 SCR 1276 (VI); *Kadra Pahadia Vs. State of Bihar (II)*, (1983) 2 SCC 104; 1983 SCC (Cru) 361; *T.V. Vetheswaran Vs. State of T.N.*, (1983) 2 SCC 68; 1983 SCC (Cri.) 342; (1983) 2 SCR 348; *Abdul Rehman Antulay Vs. R.S. Nayak*, (1992) 1 SCC 225: 1992 SCC (Cri.) 93; *Beavers Vs. Haubert*, 198 US 77; 49 LEd 950 (1905); *Strunk Vs. United States*, 412 US 434; 37 LEd 2d 57 (2973); *United States Vs. MacDonald*, 435 US 850; 56 LEd 2d 18 (1977), relied on.

175. The right to a speedy trial is not only an important safeguard to prevent undue and oppressive incarceration, to minimise anxiety and concern accompanying the accusation and to limit the possibility of impairing the ability on an accused to defend himself but also there is a societal interest in providing a speedy trial. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration

and continues at all stages,. namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averted. (Paras 85 and 86) .

176. Black's I *Law Dictionary'*, 6th Edn., p. 1400, relied on.

177. The Court has to adopt a balancing approach by taking note of the possible prejJdices and "disadvantages to be suffered by the accused by avoidable delay and to determine whether the accused in a criminal proceeding has been deprived of his right of having speedy trial with unreasonable delay which could be identified by the factors - (1) length of delay, (2) the justification for the delay, (3) the accused's assertion of his right to speedy trial, and (4) prejudice caused to the accused by such delay. However, the fact of delay is dependent on the circumstances of each case because reasons for delay will vary, such as delay in investigation on account of the Widespread ramification of crimes and its designed network either nationally or internationally, the deliberate absence of witness or Witnesses, crowded dockets on the file of the Court etc. (Para 92)

178. Constitution of India - Articles 21 and 14 - Fair trial - Procedure established by law Procedure must be in consonance with fundamental principles of fair justice - If procedure offends the. fundamental fairness or established ethos or traditions or shocks the conscience of the Court, it is unconstitutional - Administrative Law - Natural justice - Fairness.

Per K. Ramaswamy, J.

179. The procedure enVisaged in Article 21 means the manner and method of discovering the truth. Fair criminal trial is the fundamental right under Article 21. Though the State is free to regulate the procedure for investigation of a crime, to collect evidence and place the offender for trial in accordance with its own perception of policy, yet .in its so doing if it offends some fundamental principles of fair justice rooted in the traditions and conscience of our people, it would be classified or characterised or ranked as unjust and unfair procedure. Appearance of injustice is denial of justice. Built in procedural safeguards assure a feeling of fairness. When the procedure prescribed by the statute offends the principle of fair justice or established judicial ethos or traditions or shocks the conscience, it could be said that it is fundamentally unfair and violative of the fundamental fairness which are essential to the very concept of justice and civilised procedwe. Whether such fundamental fairness has been denied is to

be determined by an appraisal of the totality of facts, gathered from the setting, the contents and the procedure which feed the end result. The procedure which smacks of the denial of fundamental fairness and shocks the conscience or universal sense of justice is an anathema to just, fair or reasonable procedure. Article 14 and 21 frown against arbitrary and oppressive procedure. (Paras 399 and 398)

180. Constitution of India - Article 21 , 20(3) and 32 - Human rights - Police Atrocities - Third degree method" adopted by police to extort confession - Violates human rights - Exemplary compensation can be awarded to the victim in appropriate cases - Evidence Act, 1872, Section 24 - Penal Code, 1860, Sections 330, 331.

Per majority

181. In cases of police brutality and atrocities, committed, in utter disregard and in all breaches of humanitarian law and universal human rights as well as in total negation of the constitutional guarantees and human decency, the Supreme Court is committed to uphold human rights even as a part of long standing heritage and as enshrined in our constitutional law. This perspective needs to be kept in view by every law enforcing authority because the recognition of the inherent dignity and of the equal and inalienable rights of the citizens is the foundation of freedom, justice and peace in the world. If the human rights are outraged, then the Court should set its face against such violation of human rights by exercising its majestic judicial authority. (Para 365)

182. The Constitution as well as the statutory procedural law and law of Evidence condemn the conduct of any official in extorting a confession or information under compulsion by using any third degree methods. If it is shown to the Court that a confession has been extorted by illegal means such as inducement, threat or promise as contemplated under Section 24 of the Evidence Act the confession thus obtained from an accused person would become irrelevant and cannot be used in a criminal proceeding as against the maker. Section 330 and 331 of the Indian Penal Code provide punishment to one who voluntarily causes hurt or grievous hurt as the case may be to extort the confession or any information which may lead to the detection of an offence or misconduct. (Para 249 and 248)

183. The oppressive behaviour and the most degrading and despicable practice adopted by some of the police officers is much depressing, though no general and sweeping condemnation can be made. Courts have frequently dealt with cases of atrocity and brutality practised by some overzealous police officers resorting to inhuman, barbaric, archaic and drastic method of treating the suspects in their anxiety to collect evidence

by hook or by crook and wrenching a decision in their favour. We remorsefully like to state that on few occasions even custodial deaths caused during interrogation are brought to our notice. The Supreme Court on several occasions has awarded exemplary compensation to the victims at the hands of the police officials which can be testified by a series of pronouncements of the Supreme Court. (Paras 251 and 247)

Per K. Ramaswamy, J.

184. The expression 'life' or 'personal liberty' in Article 21 of the Constitution includes right to live with human dignity which would include guarantee against torture and assault by the State. Article 21 guarantees protection against torture and assault by the State while a person is in custody. It is a legitimate right of the police to arrest a suspect on receiving some credible information or material, but the arrest must be in accordance with law and the interrogation should not be accompanied with torture or use of third degree methods. The interrogation and investigation should be in true sense purposeful to make the investigation effective. Torture or beating of arrested person in the lockup is generally carried on behind the closed doors and no member of the public is permitted to be there and instances are not wanting that even the family members of the arrested persons are not allowed to meet the suspect. (Para 397)

185. *Sunil Batra Vs Delhi Administration (I)*, (1978) 4 SCC 494 : 1979 (Cri.) 155 : (1979) 1 SCR 392; *Sunil Batra (I) Vs. Delhi Administration*, (1980) 3 SCC 488 : 1980 SCC (Cri.) 777; (1980) 2 SCR 557; *Sheela Barse Vs. State of Maharashtra*, (1983) 2 SCC 96; 1983 SCC (Cri.) 353: AIR 1983 SC 378, relied on.

186. Custodial interrogation exposes the suspect to the risk of abuse of his person or dignity as well as distortion or manipulation of his self-incrimination in the crime. No one should be subjected to physical violence of the person as well as to torture. Infringement thereof undermines the peoples faith in the efficacy of criminal justice system .. Interrogation in police lockup are often done under conditions of pressure and tension and the suspect could be exposed to great strain even if he is innocent, while the culprit in custody to hide or suppress may be doubly susceptible to confusion and manipulation. A delicate balance has, therefore, to be maintained to protect the innocent from conviction and the need of the society to see the offender punished. Equally everyone has right against self-incrimination and a right to be silent under Article 20(3) which implies his freedom from police or anybody else. But when the police interrogates a suspect, they abuse their authority having unbridled opportunity

to exploit his moral position and authority inducing the captive to confess against his better judgement. Silence on the part of the frightened captive seems to his ears to call for vengeance and induces a belief that confession holds out a chance to avoid torture or to get bail or a promise of lesser punishment. The resourceful investigator adopts all successful tactics to elicit confession. (Para 377)

187. Constitution of India - Article 20(3) Testimonial compulsion - Guarantee against, extends not only to oral testimony in Court or outside Court but also to written statement incriminating the maker of the statement.

Per K. Ramaswamy, J.

188. Every positive act which furnishes evidence is testimony and testimonial compulsion connotes coercion which procures positive oral evidence. The act of the person, of course, is neither negative attitude of silence or submission on his part, nor is there any reason to think that the protection in respect of the evidence procured is confined to what transpires at the trial in the Court room. The phrase used in Article 20(3Hs to be a witness and not to appear as a witness. It follows that the protection accorded to an accused insofar as it is related to the phrase 'to be a witness' is not merely in respect of the testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. The guarantee, therefore, included not only oral testimony given in a Court or out of Court but also statements in writing which incriminated the maker when figuring as accused person. Compelled testimony must be read as evidence procured not merely by physical threat or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like - not legal penalty for violation.

189. *Nandini Satpathy Vs. P. L. Dani, (1978) 2 sec 424 : 1978 SCC (Cri.) 236; State of Bombay Vs. Kathi Kalu Oghad, (1962) 3 SCR 10 : AIR 1961 SC 180 : (1961) 2 Cri. LJ 856*, relied on.

190. Evidence Act, 1872 - Sections 24 to 30 - Confession - Meaning of - Confessional statement obtained by police inadmissible in evidence - Custodial interrogation involves risk of abuse of person or dignity of the suspect as well as distortion or manipulation of his self incrimination.

Per K. Ramaswamy, J.

191. Confession means an admission of certain facts which constitute an offence of substantially all the facts that constitute the offence, made by a person charged with the offence which is the subject - matter of the statement. (Para 383)

192. *Palvinder Kaur Vs. State of Punjab*, 1953 SCR 94 : AIR 1952 SC 354; 1953 Cri. LJ 154; *Pakala Narayana Swami Vs. King - Emperor*, 6~ IA 66 : AIR 1939 PC 47 : 40 Cri. LJ 364; *Tahsildar Singh Vs. State of V.P.*, AIR 1959 SC 1012; 1959 Supp 2 SCR 875 : 1959 Cri. LJ 1231, relied on':
193. The fascicule of Section 24 to 30 aim to zealously protect the accused against becoming the victim of his own delusion or the mechanisation of others to self-incriminate in crime. The confession, therefore, is not received with an assurance, if its source be not omni suspicious mojes, above and free from the remotest taint of suspicion. The mind of the accused before the makes a confession must be in a state of perfect equanimity and must not have been operated upon by fear or hope or inducement. Hence threat or promise or inducement held out to an accused makes the confession irrelevant and excludes it from consideration. A confession made to a police officer while the accused is in the custody or made before he became an accused is not provable against him on any proceeding in which he is charged to the commission of the said offence. Equally a confession made by him, while in the custody of the police officer, to any person is also not provable in a proceeding in which he is charged with the commission of the offence unless it is made in the immediate presence of the Magistrate. Police officer is inherently suspected of employing coercion to obtain confession. Therefore, the confession made to a police officer under Section 25 should totally be excluded from evidence. The reasons seem to be that the custody of police officer prOVides easy opportunities of coercion for extorting confession. Section 25 rests upon the principle that it is dangerous to depend upon a confession made to a police officer'which cannot extricate itself from the suspicion that it might have been produced by the exercise of coercion or by enticement. The legislative policy and practical reality emphasis that a statement obtained, while the accused is in police custody, truly be not the product of his free choice. (Para 383)
194. Evidence Act, 1872 - Section 24 Conviction can be founded on voluntary confession or even on retracted confession if it receives general corroboration. (Per K. Ramaswamy, J.) (Para 392)
195. *State of Maharashtra Vs. Sukhdev Singh*, (1992) 3 SCC 700 : 1992 SCC (Cri) 705; JT (1992) 4 SC 73, relied on.
196. Criminal Procedure Code, 1973 Section 164 - Recording of confession by Magistrate - Nature and object of the provision - Provision mandatory - Procedure - Precautions to be taken (Per K. Ramaswamy, J.) (Paras 386, 388, 389)

197. *Nazi Ahmad Vs. King - Emperor*, AIR 1936 PC 253 : 37 Cri. LJ 897; *Ram Chandra Vs. State of V.P.*, AIR 1957 SC 381 : 1957 SC 381 : 1957 Cri. LJ 559; *Sarwan Singh Vs. State of Punjab*, AIR 1957 SC 637 : 1957 SCR 953 : 1957 Cri. LJ 1014, relied on.
198. *Tahsildar Singh Vs. State of VP*, AIR 1959 SC 1012; 1959 Supp 2 SCR 875 : 1959 Cri. LJ 1231, referred to
199. Constitution of India - Articles 50, 32, 136, 226, 223 to 237 - Separation of powers Independent judiciary - it is the basic postulate of the Constitution - Subordinate judiciary is complement to the constitutional Courts as part of the constitutional Courts as part of the constitutional scheme.

Per K. Ramaswamy

200. It is the basic postulate under the Indian Constitution that the legal sovereign power has been distributed between the legislatures to make the law, the executive to implement the law and the judiciary to interpret the law within the limits to down by the Constitution. The Courts are intermediary between the people and the other organs of the State in order to keep the latter within the parameters delineated by the Constitution. There can be no liberty if the power of judging be not separated from the legislative and executive powers. Article 50 of the Constitution, therefore, enjoins the State and in fact separated the judiciary from the executive in the public service of the State. (Para 411)
201. Independent judiciary is the most essential attribute of rule of law and is indispensable to sustain democracy. Independence and integrity of the judiciary in a democratic system of Government is of the highest importance and interest not only to the Judges but the people at large who seek judicial redress against perceived legal injury or executive excesses. Dispensation of justice by an impartial presiding judge, without fear or favour, affection or ill-Will, is cardinal creed and is zealously protected by the Constitution. Judicial review is the basic structure and independent judiciary is the cardinal feature and an assurance of faith enshrined in the Constitution. Confidence of the people in impartial dispensation of justice is the binding force for acceptance of justice delivery system. Independence is not limited to insulating the judges from executive pressures alone.' Its sphere extends to many other impeccable zones of pressures or prejudices.Judges should be made of stern stuff unbending before the power, economic or political 'which alone would ensure fair and effective administration of justice. The officer exercising judicial power vested in him must

be of necessity, free to act upon his own conscience and without apprehension of personal consequences to himself or lure of retrial rehabilitation. The judges should be made independent of most of their restraints, checks and punishments which are usually called into play against other public officers and he should be devoted to the conscientious performance of his duties. Therefore, he must be free from external as well as internal pressures. The need for independent and impartial judiciary manned by persons of sterling character, impeccable integrity, undaunting courage and determination, impartiality and independence is the command of the constitutional and call of the people. (Para412)

202. The subordinate judiciary is complement to constitutional Courts as part of the constitutional scheme and plays vital part in dispensation of justice. Subordinate Courts are integral part of the judiciary under the Constitution. (Para 413)

**Supreme Court of India
1994 (4) SCC 602**

**Hitendra Vishnu Thakur
vs
State of Maharashtra**

DR. A.S. Anand, Faizan Uddin, JJ.

1. In this batch of criminal appeals and special leave petitions (criminal) the three meaningful questions which require our consideration are:
 - (1) When can the provisions of Section 3(1) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as the TADA) be attracted?
 - (2) Is the 1993 Amendment, amending Section 167(2) of the Code of Criminal Procedure by modifying Section 20(4)(b) and adding a new provision as 20(4)(bb), applicable to the pending cases i.e. is it retrospective in operation? and
 - (3) What is the true ambit and scope of Section 20(4) and Section 20(8) of TADA in the matter of grant of bail to an accused brought before the Designated Court and the factors which the Designated Court has to keep in view while dealing with an application for grant of bail under Section 20(4) and for grant of extension of time to the prosecution for further investigation under clause (bb) of Section 20(4) and incidentally whether the conditions contained in Section 20(8) TADA control the grant of bail under Section 20(4) of the Act also?

We shall take up for consideration these questions in seriatim.

2. When can the provisions of Section 3(1) of TADA be attracted?
...
4. The expression 'terrorist act' has been defined in Section 2(1)(h) of TADA. It provides that the expression terrorist act 'has the meaning assigned to it in sub- section (1) of Section 3'. Section 3(1) provides as under:

"3. Punishment for terrorist acts.- (1) Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons

or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act."

5. Section 3 when analysed would show that whoever with intent
 - (i) to overawe the Government as by law established; or
 - (ii) to strike terror in the people or any section of the people; or
 - (iii) to alienate any section of the people; or
 - (iv) to adversely affect the harmony amongst different sections of the people, does any act or things by using
 - (a) bombs or dynamite, or
 - (b) other explosive substances, or
 - (c) inflammable substances, or
 - (d) firearms, or
 - (e) other lethal weapons, or
 - (f) poisons or noxious gases or other chemicals, or
 - (g) any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause or as is likely to cause
 - (i) death, or
 - (ii) injuries to any person or persons,
 - (iii) loss of or damage to or destruction of property, or
 - (iv) disruption of any supplies or services essential to the life of the community, or
 - (v) detains any person and threatens to kill or injure

such person in order to compel the Government or any other person to do or abstain from doing any act, commits a 'terrorist act' punishable under Section 3 of TADA.

6. It is, thus, seen that most of the criminal activities constituting a terrorist act and offences under the penal law, do overlap. However, where an act complained of is punishable under Section 3 of TADA, it invites more stringent punishment than the

punishment prescribed for the offence under the ordinary penal law. Section 6 of TADA even provides for imposition of enhanced penalties for a person who with the intent to aid any terrorist or disruptionist activity, contravenes any of the provisions of or any rule made under the Arms Act, 1959, the Explosives Act, 1884, the Explosive Substances Act, 1908 or the Inflammable Substances Act, 1952 and renders him liable to punishment for not less than 5 years. The punishment may, in certain cases, extend to imprisonment for life with fine, notwithstanding anything contained in the provisions of acts or the rules made under the respective acts.

7. ‘Terrorism’ is one of the manifestations of increased lawlessness and cult of violence. Violence and crime constitute a threat to an established order and are a revolt against a civilised society. ‘Terrorism’ has not been defined under TADA nor is it possible to give a precise definition of ‘terrorism’ or lay down what constitutes ‘terrorism’. It may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or “terrorise” people and the society and not only those directly assaulted, with a view to disturb even tempo, peace and tranquillity of the society and create a sense of fear and insecurity. A ‘terrorist’ activity does not merely arise by causing disturbance of law and order or of public order. The fall out of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law. Experience has shown us that ‘terrorism’ is generally an attempt to acquire or maintain power or control by intimidation and causing fear and helplessness in the minds of the people at large or any section thereof and is a totally abnormal phenomenon. What distinguishes ‘terrorism’ from other forms of violence, therefore, appears to be the deliberate and systematic use of coercive intimidation. More often than not, a hardened criminal today takes advantage of the situation and by wearing the cloak of ‘terrorism’, aims to achieve for himself acceptability and respectability in the society because unfortunately in the States affected by militancy, a ‘terrorist’ is projected as a hero by his group and often even by the misguided youth. It is therefore, essential to treat such a criminal and deal with him differently than an ordinary criminal capable of being tried by the ordinary courts under the penal law of the land. Even though the

crime committed by a 'terrorist' and an ordinary criminal would be overlapping to an extent but then it is not the intention of the Legislature that every criminal should be tried under TADA, where the fall out of his activity does not extend beyond the normal frontiers of the ordinary criminal activity. Every 'terrorist' may be a criminal but every criminal cannot be given the label of a 'terrorist' only to set in motion the more stringent provisions of TADA. The criminal activity in order to invoke TADA must be committed with the requisite intention as contemplated by Section 3(1) of the Act by use of such weapons as have been enumerated in Section 3(1) and which cause or are likely to result in the offences as mentioned in the said section.

....

11. Thus, keeping in view the settled position that the provisions of Section 3 of TADA have been held to be constitutionally valid in *Kartar Singh v. State of Punjab* case, (1994) 3 SCC 569 and from the law laid down by this Court in *Usmanbhai Dawoodbhai Memon v. State of Gujarat*, (1988) 2 SCC 271 and *Niranjan Singh Karam Singh Punjabi, Advocate v. Jitendra Bhimraj Bijaya* (1990) 4 SCC 76 cases, it follows that an activity which is sought to be punished under Section 3(1) of TADA has to be such which cannot be classified as a mere law and order problem or disturbance of public order or even disturbance of the even tempo of the life of the community of any specified locality but is of the nature which cannot be tackled as an ordinary criminal activity under the ordinary penal law by the normal law-enforcement agencies because the intended extent and reach of the criminal activity of the 'terrorist' is such which travels beyond the gravity of the mere disturbance of public order even of a 'virulent nature' and may at times transcend the frontiers of the locality and may include such anti-national activities which throw a challenge to the very integrity and sovereignty of the country in its democratic polity. The Constitution Bench in *Kartar Singh* case repelled the submission of Mr Jethmalani that the preamble of the Act gives a clue "that the terrorist and disruptive activities only mean a virulent form of the disruption of public order" and found the argument to be "inconceivable and unacceptable". Thus, unless the Act complained of falls strictly within the letter and spirit of Section 3(1) of TADA and is committed with the intention as envisaged by that section by means of the weapons etc. as are enumerated therein with the motive as postulated thereby, an accused cannot be tried or convicted for an offence under Section 3(1) of TADA. When the extent and reach of the crime committed with the intention as envisaged by Section 3(1), transcends the local barriers and the effect of the criminal act can be felt in other States or areas or has the potential of that result being felt there, the provisions of Section 3(1) would certainly be attracted. Likewise, if it is

only as a consequence of the criminal act that fear, terror or/and panic is caused but the intention of committing the particular crime cannot be said to be the one strictly envisaged by Section 3(1), it would be impermissible to try or convict and punish an accused under TADA. The commission of the crime with the intention to achieve the result as envisaged by the section and not merely where the consequence of the crime committed by the accused create that result, would attract the provisions of Section 3(1) of TADA. Thus, if for example a person goes on a shooting spree and kills a number of persons, it is bound to create terror and panic in the locality but if it was not committed with the requisite intention as contemplated by the section, the offence would not attract Section 3(1) of TADA. On the other hand, if a crime was committed with the intention to cause terror or panic or to alienate a section of the people or to disturb the harmony etc. it would be punishable under TADA, even if no one is killed and there has been only some person who has been injured or some damage etc. has been caused to the property, the provisions of Section 3(1) of TADA would be squarely attracted. Where the crime is committed with a view to overawe the Government as by law established or is intended to alienate any section of the people or adversely affect the harmony amongst different sections of the people and is committed in the manner specified in Section 3(1) of TADA, no difficulty would arise to hold that such an offence falls within the ambit and scope of the said provision. Some difficulty, however, arises where the intended activity of the offender results in striking terror or creating fear and panic amongst the people in general or a section thereof. It is in this situation that the courts have to be cautious to draw a line between the crime punishable under the ordinary criminal law and the ones which are punishable under Section 3(1) of TADA. It is of course neither desirable nor possible to catalogue the activities which would strictly bring the case of an accused under Section 3(1) of TADA. Each case will have to be decided on its own facts and no rule of thumb can be applied.

12. Of late, we have come across some cases where the Designated Courts have charged-sheeted and/or convicted an accused person under TADA even though there is not even an iota of evidence from which it could be inferred, even *prima facie*, let alone conclusively, that the crime was committed with the intention as contemplated by the provisions of TADA, merely on the statement of the investigating agency to the effect that the consequence of the criminal act resulted in causing panic or terror ill the society or in a section thereof. Such orders result in the misuse of TADA. Parliament, through Section 20-A of TADA has clearly manifested its intention to treat the offences under TADA seriously inasmuch as under Section 20-A(1), notwithstanding anything

contained in the Code of Criminal Procedure, no information about the commission of an offence under TADA shall even be recorded without the prior approval of the District Superintendent of Police and under Section 20-A(2), no court shall take cognisance of any offence under TADA without the previous sanction of the authorities prescribed therein. Section 20-A was thus introduced in the Act with a view to prevent the abuse of the provisions of TADA.

13. We would, therefore, at this stage like to administer a word of caution to the Designated Courts regarding invoking the provisions of TADA merely because the investigating officer at some stage of the investigation chooses to add an offence under same (sic some) provisions of TADA against an accused person, more often than not while opposing grant of bail, anticipatory or otherwise. The Designated Courts should always consider carefully the material available on the record and apply their mind to see whether the provisions of TADA are even *prima facie* attracted.
14. The Act provides for the constitution of one or more Designated Courts either by the Central Government or the State Government by notification in the Official Gazette to try specified cases or class or group of cases under the Act. The Act makes every offence punishable under the Act or any rule made thereunder to be a cognizable offence within the meaning of Section 2(c) of the CrPC. The Act vests jurisdiction in the Designated Court to try all such offences under the Act by giving precedence over the trial of any other case against an accused in any other court (not being a Designated Court) notwithstanding anything contained in the Code or any other law for the time being in force. The conferment of power on the Designated Courts to try the offences triable by them, punishable with imprisonment for a term not exceeding three years or with fine or with both, in a summary manner in accordance with the procedure prescribed in the CrPC notwithstanding anything contained in Section 260(1) or 262 CrPC by applying the provisions of Sections 263-265 of the Act is a marked departure. The right of appeal straight to the Supreme Court against any judgment, sentence or order not being an interlocutory order vide Section 19(1) of the Act demonstrates the seriousness with which Parliament has treated the offences under TADA. An onerous duty is therefore cast on the Designated Courts to take extra care to scrutinise the material on the record and apply their mind to the evidence and documents available with the investigating agency before charge-sheeting an accused for an offence under TADA. The stringent provisions of the Act coupled with the enhanced punishment prescribed for the offences under the Act make the task of the Designated Court even more onerous, because the graver the offence, greater should be the care taken

to see that the offence must strictly fall within the four corners of the Act before a charge is framed against an accused person. Where the Designated Court without as much as even finding a *prima facie* case on the basis of the material on the record, proceeds to charge-sheet an accused under any of the provisions of TADA, merely on the statement of the investigating agency, it acts merely as a post office of the investigating agency and does more harm to meet the challenge arising out of the ‘terrorist’ activities rather than deterring terrorist activities. The remedy in such cases would be worse than the disease itself and the charge against the State of misusing the provisions of TADA would gain acceptability, which would be bad both for the criminal and the society. Therefore, it is the obligation of the investigating agency to satisfy the Designated court from the material collected by it during the investigation, and not merely by the opinion formed by the investigating agency, that the activity of the ‘terrorist’ falls strictly within the parameters of the provisions of TADA before seeking to charge-sheet an accused under TADA. The Designated Court must record its satisfaction about the existence of a *prima facie* case on the basis of the material on the record before it proceeds to frame a charge-sheet against an accused for offences covered by TADA. Even after an accused has been charge-sheeted for an offence under TADA and the prosecution leads evidence in the case it is an obligation of the Designated Court to take extra care to examine the evidence with a view to find out whether the provisions of the Act apply or not. The Designated Court is, therefore, expected to carefully examine the evidence and after analysing the same come to a firm conclusion that the evidence led by the prosecution has established that the case of the accused falls strictly within the four corners of the Act before recording a conviction against an accused under TADA.

15. Thus, the true ambit and scope of Section 3(1) is that no conviction under Section 3(1) of TADA can be recorded unless the evidence led by the prosecution establishes that the offence was committed with the intention as envisaged by Section 3(1) by means of the weapons etc. as enumerated in the section and was committed with the motive as postulated by the said section. Even at the cost of repetition, we may say that where it is only the consequence of the criminal act of an accused that terror, fear or panic is caused, but the crime was not committed with the intention as envisaged by Section 3(1) to achieve the objective as envisaged by the section, an accused should not be convicted for an offence under Section 3(1) of TADA. To bring home a charge under Section 3(1) of the Act, the terror or panic etc. must be actually intended with a view to achieve the result as envisaged by the said section and not be merely an incidental fall out or a consequence of the criminal activity. Every crime, being a revolt

against the society, involves some violent activity which results in some degree of panic or creates some fear or terror in the people or a section thereof, but unless the panic, fear or terror was intended and was sought to achieve either of the objectives as envisaged in Section 3(1), the offence would not fall *stricto sensu* under TADA. Therefore, as was observed in *Kartar Singh case*' by the Constitution Bench: (SCC p. 759, para 451)

"Section 3 operates when a person not only intends to overawe the Government or create terror in people etc. but he uses the arms and ammunition which results in death or is likely to cause death and damage to property etc. In other words, a person becomes a terrorist or is guilty of terrorist activity when intention, action and consequence all the three ingredients are found to exist."

16. Where the Designated Court finds, after taking cognisance of the offence, that the offence does not even *prima facie* fall under TADA, it must proceed to act under Section 18 of TADA. That section reads as follows :

18. Power to transfer cases to regular courts.-Where, after taking cognisance of any offence, a Designated Court is of opinion that the offence is not triable by it, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for the trial of such offence to any court having jurisdiction under the Code and the court to which the case is transferred may proceed with the trial of the offence as if it had taken cognisance of the offence."
17. Section 18 vests jurisdiction in a Designated Court to transfer the case for trial by any court having jurisdiction under the CrPC where after taking cognisance of an offence, the Designated Court is of the opinion, for reasons to be recorded, that the offence is not such as is triable by the Designated Court inasmuch as the offence does not fall within the true ambit and parameters of the provisions of TADA, it is obliged to transfer the case to the court of competent jurisdiction for its trial and on such transfer, the court to which the case is so transferred acquires the jurisdiction to proceed with the trial of the offence, as if the transferee court had itself taken cognisance of the offence.
18. Thus, having dealt with the ambit and scope of Section 3(1) of TADA and considered the situations where its provisions may be attracted in the established facts and circumstances of the case, we shall now take up for consideration questions 2 and 3 mentioned in the earlier part of this judgment. Both these questions essentially revolve around the grant of bail to an accused under TADA.
19. Section 20(4) of TADA makes Section 167 of CrPC applicable in relation to case involving an offence punishable under TADA, subject to the modifications specified

therein. Clause (a) thereof, provides that reference in sub-section (1) of Section 167 to "Judicial Magistrates" shall be construed as reference to "Judicial Magistrate" or "Executive Magistrate" or "Special Executive Magistrates" while clause (b) provided that reference in subsection (2) of Section 167 to '15 days', '90 days' and '60 days' wherever they occur shall be construed as reference to '60 days', 'one year' and 'one year' respectively. This section was amended in 1993 by the Amendment Act 43 of 1993 with effect from 22-5-1993 and the period of 'one year' and ,one year' in clause (b) was reduced to '180 days' and '180 days' respectively, by modification of sub-section (2) of Section 167. After clause (b) of sub-section (4) of Section 20 of TADA, another clause (bb) was inserted which reads:

"(bb) in subsection (2), after the proviso, the following proviso shall be inserted, namely:-

'Provided further that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Designated Court shall extend the said period up to one year, on the report of the Public Prosecutor indicating the progress of tile investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days; '

20. Section 57 of tile Code of Criminal Procedure provides that a person arrested shall not be detained in custody by the police for a period longer than that which is reasonable but that such period shall not exceed 24 hours exclusive of the time necessary for journey from the place of arrest to the court of the Magistrate in the absence of a special order under Section 167 of the Code. The Constitution of India through Article 22(2) mandates that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to that court and that no person shall be detained in custody beyond that period without the authority of the Magistrate. Thus, the Constitution of India as well as the Code of Criminal Procedure expect that an arrested person, who has been detained in custody, shall not be kept in detention for any unreasonable time and that the investigation must be completed as far as possible within 24 hours. Where the investigation of the offence for which accused has been arrested cannot be completed within 24 hours and there are grounds for believing that the accusation or information against the accused is well- founded, the police is obliged to forward the accused along with the case diary to the nearest Magistrate for further remand of the accused person. The Magistrate, on the production of the accused and the case diary, must scrutinise the same carefully and consider whether the arrest was legal and proper and whether the formalities required by law have been complied with and then to grant further

remand, if the Magistrate is so satisfied. The law enjoins upon the investigating agency to carry out the investigation, in a case where a person has been arrested and detained, with utmost urgency and complete the investigation with great promptitude in the prescribed period. Sub-section (2) of Section 167 of the Code lays down that the Magistrate to whom the accused is forwarded may authorise his detention in such custody, as he may think fit, for a term specified in that section. The proviso to subsection (2) fixes the outer limit within which the investigation must be completed and in case the same is not completed within the said prescribed period, the accused would acquire a right to seek to be released on bail and if he is prepared to and does furnish bail, the Magistrate shall release him on bail and such release shall be deemed to be grant of bail under Chapter XXXIII of the Code of Criminal Procedure. The said chapter comprises of Sections 436 to 450 but for our purposes it is only Sections 437 and 439 of the Code which are relevant. Both these sections empower the court to release an accused on bail. The object behind the enactment of Section 167 of the Code was that the detention of an accused person should not be permitted in custody pending investigation for any unreasonably longer period. However, realising that it may not be possible to complete the investigation in every case within 24 hours or even 15 days, as the case may be, even if the investigating agency proceeds with utmost promptitude, Parliament introduced the proviso to Section 167(2) of the Code prescribing the outer limit within which the investigation must be completed. Section 167 read with Section 20(4) of TADA, thus, strictly speaking is not a provision for "grant of bail" but deals with the maximum period during which a person accused of an offence may be kept in custody and detention to enable the investigating agency to complete the investigation and file the charge-sheet, if necessary, in the court. The proviso to Section 167(2) of the Code read with Section 20(4)(b) of TADA, therefore, creates an indefeasible right in an accused person on account of the 'default' by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail. It is for this reason that an order for release on bail under proviso (a) of Section 167(2) of the Code read with Section 20(4) of TADA is generally termed as an "order-on-default" as it is granted on account of the default of the prosecution to complete the investigation and file the challan within the prescribed period. As a consequence of the amendment, an accused after the expiry of 180 days from the date of his arrest becomes entitled to bail irrespective of the nature of the offence with which he is charged where the prosecution fails to put up challan against him on completion of the investigation. With the amendment of clause (b) of sub-section (4) of Section 20

read with the proviso to sub-section (2) of Section 167 of CrPC an indefeasible right to be enlarged on bail accrues in favour of the accused if the police fails to complete the investigation and put up a challan against him in accordance with law under Section 173 CrPC. An obligation, in such a case, is cast upon the court, when after the expiry of the maximum period during which an accused could be kept in custody, to decline the police request for further remand except in cases governed by clause (bb) of Section 20(4). There is yet another obligation also which is cast on the court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf (*Hussinara Khatoon v. Home Secy., State of Bihar*, (1980) 1 SCC 98 case). This legal position has been very ably stated in *Aslam Babalal Desai v. State of Maharashtra* (1992) 4 SCC 272, where speaking for the majority, Ahmadi, J. referred with approval to the law laid down in *Rajnikant Jivanlal Patel v. Intelligence officer, Narcotic Control Bureau, New Delhi*, (1989) 3 SCC 532 wherein it was held that (SCC p. 288, para 9)

"The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds."

21. Thus, we find that once the period for filing the charge-sheet has expired and either no extension under clause (bb) has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted to bail under sub-section (4) of Section 20 TADA read with Section 167 of the Code and the Designated Court shall release him on bail, if the accused seeks to be so released and furnishes the requisite bail. We are not impressed with the argument of the learned counsel for the appellant that on the expiry of the period during which investigation is required to be completed under Section 20(4) TADA read with Section 167 of the Code, the court must release the accused on bail on its own motion even without any application from an accused person on his offering to furnish bail. In our opinion an accused is required to make an application if he wishes to be released on bail on account of the 'default' of the investigating prosecuting agency and once such an application is made, the court should issue a notice to the public prosecutor who may either show that the prosecution has obtained the order for extension for completion of investigation from the court under clause (bb) or that the challan has been filed in the Designated Court before the expiry of the prescribed

period or even that the prescribed period has actually not expired and thus resist the grant of bail on the alleged ground of 'default'. The issuance of notice would avoid the possibility of an accused obtaining an order of bail under the 'default' clause by either deliberately or inadvertently concealing certain facts and would avoid multiplicity of proceedings. It would, therefore, serve the ends of justice if both sides are heard on a petition for grant of bail on account of the prosecution's 'default'. Similarly, when a report is submitted by the public prosecutor to the Designated Court for grant of extension under clause (bb), its notice should be issued to the accused before granting such an extension so that an accused may have an opportunity to oppose the extension on all legitimate and legal grounds available to him. It is true that neither clause (b) nor clause (bb) of sub-section (4) of Section 20 TADA specifically provide for the issuance of such a notice but in our opinion the issuance of such a notice must be read into these provisions both in the interest of the accused and the prosecution as well as for doing complete justice between the parties. This is a requirement of the principles of natural justice and the issuance of notice to the accused or the public prosecutor, as the case may be, would accord with fair play in action, which the courts have always encouraged and even insisted upon. It would also strike a just balance between the interest of the liberty of an accused on the one hand and the society at large through the prosecuting agency on the other hand. There is no prohibition to the issuance of such a notice to the accused or the public prosecutor in the scheme of the Act and no prejudice whatsoever can be caused by the issuance of such a notice to any party. We must as already noticed reiterate that the objection to the grant of bail to an accused on account of the 'default' of the prosecution to complete the investigation and file the challan within the maximum period prescribed under clause (b) of sub-section (4) of Section 20 TADA or within the extended period as envisaged by clause (bb) has to be limited to cases where either the factual basis for invoking the 'default' clause is not available or the period for completion of investigation has been extended under clause (bb) and the like. No other condition like the gravity of the case, seriousness of the offence or character of the offender etc. can weigh with the court at that stage to refuse the grant of bail to an accused under sub-section (4) of Section 20 TADA on account of the 'default' of the prosecution.

22. An application for grant of bail under Section 20(4) has to be decided on its own merits for the default of the prosecuting agency to file the charge-sheet within the prescribed or the extended period for completion of the investigation uninfluenced by the merits or the gravity of the case. The court has no power to remand an accused to custody beyond the period prescribed by clause (b) of Section 20(4) or extended

under clause (bb) of the said section, as the case may be, if the challan is not filed, only on the ground that the accusation against the accused is of a serious nature or the offence is very grave. These grounds are irrelevant for considering the grant of bail under Section 20(4) TADA. The learned Additional Solicitor General rightly did not subscribe to the argument of Mr Madhava Reddy (both appearing for the State of Maharashtra) that while considering an application for release on bail under Section 20(4), the court has also to be guided by the general conditions for grant of bail as provided by Section 20(8) TADA. Considering the ambit and scope of the two provisions, we are of the opinion that it is totally inconceivable and unacceptable that the considerations for grant of bail under Section 20(8) would be applicable to and control the grant of bail under Section 20(4) of the Act. The two provisions operate in different and independent fields. The basis for grant of bail under Section 20(4), as already noticed, is entirely different from the grounds on which bail may be granted under Section 20(8) of the Act. It would be advantageous at this stage to notice the provisions of Section 20(8) and (9) of the Act.

"(8) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless-

- (a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and*
 - (b) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.*
- (9) The limitations on granting of bail specified in sub-section (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail."*

As would be seen from the plain phraseology of sub-section (8) of Section 20, it commences with a non obstante clause and in its operation imposes a ban on release of a person accused of an offence punishable under TADA or any rule made thereunder on bail unless the twin conditions contained in clauses (a) and (b) thereof are satisfied. No bail can be granted under Section 20(8) unless the Designated Court is satisfied after notice to the public prosecutor that there are reasonable grounds for believing that the accused is not guilty of such an offence and that he is not likely to commit any offence while on bail. Sub-section (9) qualifies sub-section (8) to the extent that the two conditions contained in clauses (a) and (b) are in addition to the limitations prescribed under the Code of Criminal Procedure or any other law for the time being in force relating to the grant of bail. Strictly speaking Section 20(8) is not the source

of power of the Designated Court to grant bail but it places further limitations on the exercise of its power to grant bail in cases under TADA, as is amply clear from the plain language of Section 20(9). The Constitution Bench in *Kartar Singh case*' while dealing with the ambit and scope of sub-sections (8) and (9) of Section 20 of the Act quoted with approval the following observations from *Usmanbhai* case: (SCC p. 704, para 344)

"Though there is no express provision excluding the applicability of Section 439 of the Code similar to the one contained in Section 20(7) of the Act in relation to a case involving the arrest of any person on an accusation of having committed an offence punishable under the Act or any rule made thereunder, but that result must, by necessary implication, follow. It is true that the source of power of a Designated Court to grant bail is not Section 20(8) of the Act as it only places limitations on such power. This is made explicit by Section 20(9) which enacts that the limitations on granting of bail specified in Section 20(8) are 'in addition to the limitations under the Code or any other law for the time being in force'. But it does not necessarily follow that the power of a Designated Court to grant bail 'is relatable to Section 439 of the Code. It cannot be doubted that a Designated Court is 'a court other than the High Court or the Court of Session' within the meaning of Section 437 of the Code. The exercise of the power to grant bail by a Designated Court is not only subject to the limitations contained therein, but is also subject to the limitations placed by Section 20(8) of the Act."

and went on to add: (SCC p. 704, para 345)

"Reverting to Section 20(8), if either of the two conditions mentioned therein is not satisfied, the ban operates and the accused person cannot be released on bail but of course it is subject to Section 167(2) as modified by Section 20(4) of the TADA Act in relation to a case under the provisions of TADA."

Thus, the ambit and scope of Section 20(8) of TADA is no longer res integra and from the above discussion it follows that both the provisions i.e. Section 20(4) and 20(8) of TADA operate in different situations and are controlled and guided by different considerations.

23. We may at this stage, also on a plain reading of clause (bb) of sub-section (4) of Section 20, point out that the Legislature has provided for seeking extension of time for completion of investigation on a report of the public prosecutor. The Legislature did not purposely leave it to an investigating officer to make an application for seeking extension of time from the court. This provision is in tune with the legislative intent to have the investigations completed expeditiously and not to allow an accused to be kept in continued detention during unnecessary prolonged investigation at the whims of the police. The Legislature expects that the investigation must be completed

with utmost promptitude but where it becomes necessary to seek some more time for completion of the investigation, the investigating agency must submit itself to the scrutiny of the public prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons for seeking further custody of an accused. A public prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before Submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation. In that event, he may not submit any report to the court under clause (bb) to seek extension of time. Thus, for seeking extension of time under clause (bb), the public prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The public prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause (bb), must disclose on the face of it that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The use of the expression "on the report of the public prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period" as occurring in clause (bb) in sub-section (2) of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an accused in custody unreasonably and to grant extension only on the report of the public prosecutor. The report of the public prosecutor, therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements as contained in clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the public prosecutor. Where either no report as is envisaged by clause (bb) is filed or the report filed by the public prosecutor is not accepted by the Designated Court, since the

grant of extension of time under clause (bb) is neither a formality nor automatic, the necessary corollary would be that an accused would be entitled to seek bail and the court 'shall' release him on bail if he furnishes bail as required by the Designated Court. It is not merely the question of form in which the request for extension under clause (bb) is made but one of substance. The contents of the report to be submitted by the public prosecutor, after proper application of his mind, are designed to assist the Designated Court to independently decide whether or not extension should be granted in a given case. Keeping in view the consequences of the grant of extension i.e. keeping an accused in further custody, the Designated Court must be satisfied for the Justification, from the report of the public prosecutor, to grant extension of time to complete the investigation. Where the Designated Court declines to grant such an extension, the right to be released on bail on account of the 'default' of the prosecution becomes indefeasible and cannot be defeated by reasons other than those contemplated by sub-section (4) of Section 20 as discussed in the earlier part of this judgment. We are unable to agree with Mr. Madhava Reddy or the Additional Solicitor General Mr. Tulsi that even if the public prosecutor 'presents' the request of the investigating officer to the court or 'forwards' the request of the investigating officer to the court, it should be construed to be the report of the public prosecutor. There is no scope for such a construction when we are dealing with the liberty of a citizen. The courts are expected to zealously safeguard his liberty. Clause (bb) has to be read and interpreted on its plain language without addition or substitution of any expression in it. We have already dealt with the importance of the report of the public prosecutor and emphasised that he is neither a 'post office' of the investigating agency nor its 'forwarding agency' but is charged with a statutory duty. He must apply his mind to the facts and circumstances of the case and his report must disclose on the face of it that he had applied his mind to the twin conditions contained in clause (bb) of sub-section (4) of Section 20. Since the law requires him to submit the report as envisaged by the section, he must act in the manner as provided by the section and in no other manner. A Designated Court which overlooks and ignores the requirements of a valid report falls in the performance of one of its essential duties and renders its order under clause (bb) vulnerable. Whether the public prosecutor labels his report as a report or as an application for extension, would not be of much consequence so long as it demonstrates on the face of it that he has applied his mind and is satisfied with the progress of the investigation and the genuineness of the reasons for grant of extension to keep an accused in further custody as envisaged by clause (bb) (*supra*). Even the mere reproduction of the application or request of the investigating officer

by the public prosecutor in his report, without demonstration of the application of his mind and recording his own satisfaction, would not render his report as the one envisaged by clause (bb) and it would not be a proper report to seek extension of time. In the absence of an appropriate report the Designated Court would have no jurisdiction to deny to an accused his Indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bonds as directed by the court. Moreover, no extension can be granted to keep an accused in custody beyond the prescribed period except to enable the investigation to be completed and as already stated before any extension is granted under clause (bb), the accused must be put on notice and permitted to have his say so as to be able to object to the grant of extension. 43 of 1993 would apply to the pending cases i.e. the cases which were pending investigation on the date when the amendment came into force and in which the charge-sheet or challan had not been filed till 22-5-1993.

25. We have already noticed that clause (b) of sub-section (4) of Section 20 was amended by the Amendment Act No. 43 of 1993 with effect from 22-5-1993. Besides reducing the maximum period during which an accused under TADA Could be kept in custody pending investigation from one year to 180 days, the Amendment Act also introduced clause (bb) to sub- section (4) of Section 20 enabling the prosecution to seek extension of time for completion of the investigation. Does the Amendment Act No. 43 of 1993 have retrospective operation and does the amendment apply to the cases which were pending investigation on the date when the Amendment Act came into force? There may be cases where on 22-5-1993 the period of 180 days had already expired but the period of one year was not yet over. In such a case, the argument of learned counsel for the appellant is that the Act operates retrospectively and applies to pending cases and therefore the accused should be forthwith released on bail if he is willing to be so released and is prepared to furnish the bail bonds as directed by the court, an argument which is seriously contested by the respondents.
26. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the court. From the law settled by this Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:

- (i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.
 - (ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.
 - (iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.
 - (iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.
 - (v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."
27. In fairness to the learned Additional Solicitor General Mr Tulsi, it may be stated that he did not controvert the legal position (both in his oral submissions and written arguments) that Amendment Act 43 of 1993 regulating the period of compulsory detention and the procedure for grant of bail, being procedural in nature, would operate retrospectively. We need not, therefore, detain ourselves to further examine the question of retrospective operation of the Amendment Act. On the basis of the submissions made by learned counsel for the parties, we uphold the finding of the Designated Court, for the reasons recorded by it and those noticed by us above that the Amendment of 1993 would apply to the cases which were pending investigation on 22-5-1993 and in which the challan had not till then been filed in court.
28. The learned Additional Solicitor General, however, submitted that since the Amendment Act had introduced clauses (b) and (bb) to sub-section (4) of Section 20 also, it would be appropriate and desirable that both the clauses (b) and (bb) must be considered together and treated on a par insofar as the retrospective operation is concerned meaning thereby that clause (bb) would also be available to be invoked where the challan had not been filed till the amendment came into force. Mr Tulsi argued that since the modification brought about by the Amending Act curtailed the period granted to the investigating agency to complete the investigation, the

Legislature had designedly introduced clause (bb) to enable the public prosecutor to make a report to the court when the investigation was still in progress indicating progress of the investigation and seek extension of the time beyond 180 days by assigning specific reasons for seeking extension and as such it would not be proper to treat clause (b) only as applicable to the pending cases and not clause (bb). We find substance in the submission of the learned Additional Solicitor General. Both the clauses have to be harmonised and the legislative intent given a full play. Since both the clauses (b) and (bb) as introduced by the Amendment Act fall within the realm of procedural law, these would be applicable to pending cases since there is no vested right in an accused in the procedural law. The object which influenced Parliament to introduce clause (bb) after curtailing the period of compulsory detention in custody to 180 days from one year by amendment of clause (b) clearly appears to be that if the investigating agency, which originally, had one year's time allowed to it to complete the investigation, could not complete the investigation when the period was suddenly curtailed to 180 days, it should not be put to a disadvantage for no fault of its and should be in a position to seek extension of time for completing the investigation beyond the period of 180 days. However, to prevent an abuse of clause (bb) and to avoid seeking of extension of time in a routine manner, the Legislature provided a safeguard in clause (bb) itself, namely, that extension in such cases could be granted by the court provided it is satisfied from the report of the public prosecutor that there are sufficient grounds for grant of such extension. In case clause (b) only and not clause (bb) is held to be applicable to pending cases as was suggested by Mr Khanwilkar, it would render clause (bb) almost otiose insofar as pending cases are concerned and defeat the legislative intent and further put the prosecution to an unfair disadvantage. The Amendment Act was not enacted with the object of giving benefit to an accused and subjecting the prosecuting agency to an unfair disadvantage and leaving it almost with no remedy for seeking further custody of an accused. We are, thus, of the opinion that Amendment Act 43 insofar as it modifies the period prescribed in clause (b) and introduces clause (bb) to sub-section (4) of Section 20 would apply retrospectively and apply to pending cases as well. We are unable to persuade ourselves to agree with Mr Khanwilkar that clause (b) only and not clause (bb) of sub-section (4) of Section 20 should be held to have retrospective operation. The acceptance of such an argument would result in the creating of an anomalous situation and defeat the very object with which clause (bb) was introduced after the period of compulsory detention was curtailed under clause (b) of Section 20(4) of the Act.

29. As a result of our above discussion it follows that Amendment Act 43 of 1993 is retrospective in operation and both clauses (b) and (bb) of subsection (4) of Section 20 of TADA apply to the cases which were pending investigation on the date when the amendment came into force with effect from 22-5-1993 and in which the challan had not been filed till then.
30. In conclusion, we may (even at the cost of repetition) say that an accused person seeking bail under Section 20(4) has to make an application to the court for grant of bail on grounds of 'default' of the prosecution and the court shall release the accused on bail after notice to the public prosecutor uninfluenced by the gravity of the offence or the merits of the prosecution case since Section 20(8) does not control the grant of bail under Section 20(4) of TADA and both the provisions operate in separate and independent fields. It is, however, permissible for the public prosecutor to resist the grant of bail by seeking an extension under clause (bb) by filing a report for the purpose before the court. However, no extension shall be granted by the court without notice to an accused to have his say regarding the prayer for grant of extension under clause (bb). In this view of the matter, it is immaterial whether the application for bail on ground of 'default' under Section 20(4) is filed first or the report as envisaged by clause (bb) is filed by the public prosecutor first so long as both are considered while granting or refusing bail. If the period prescribed by clause (b) of Section 20(4) has expired and the court does not grant an extension on the report of the public prosecutor made under clause (bb), the court shall release the accused on bail as it would be an indefeasible right of the accused to be so released. Even where the court grants an extension under clause (bb) but the charge-sheet is not filed within the extended period, the court shall have no option but to release the accused on bail if he seeks it and is prepared to furnish the bail as directed by the court. Moreover, no extension under clause (bb) can be granted by the Designated Court except on a report of the public prosecutor nor can extension be granted for reasons other than those specifically contained in clause (bb) which must be strictly construed.

Supreme Court of India

1995 Cri LJ 477

Sanjay Dutt

vs

State Through C.B.I., Bombay

A.M. Ahmadi, J.S. Verma, P.B. Sawant, B.P. Jeevan Reddy, N.P. Singh, JJ.

1. By an order dated 18.8.1994 made in these special leave petitions by the Division Bench (B.P. Jeevan Reddy and N.P. Singh, JJ.), these matters relating to grant of bail to the petitioner, an accused in the Bombay blasts' case being tried by the Designated Court for Greater Bombay, have been referred for decision by a Constitution Bench since certain questions involved in these special leave petitions arise in respect of a large number of persons accused of offences punishable under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as 'the TADA Act'). This is how these matters have come up for decision by this Bench. At the commencement of hearing before us, we had indicated that this Bench would decide only the questions of law involved in the case as indicated in the order of reference and then send back these matters to the appropriate Division Bench for decision on merits in accordance with the answers we give to the questions of law. Accordingly, only those facts which are material for appreciating the questions of law which are being decided by us require mention in this order.
2. The questions of law indicated in the said order of reference, to be decided by us, are three, namely -
 - (1) The proper construction of Section 5 of the TADA Act indicating the ingredients of the offence punishable thereunder and the ambit of the defence available to a person accused of that offence;
 - (2) The proper construction of Clause (bb) of Sub-section (4) of Section 20 of the TADA Act indicating the nature of right of an accused to be released on bail thereunder, on the default to complete investigation within the time allowed therein; and
 - (3) The proper construction and ambit of Sub-section (8) of Section 20 of the TADA Act indicating the scope for bail thereunder.
3. The only material facts for answering the above questions are these: The petitioner is one of the several accused persons in Case No. 1 of 1993 being tried in the Designated

Court for Greater Bombay in connection with the bomb blasts which took place in Bombay on 12.3.1993 killing a large number of persons and causing huge destruction of property. The case of the prosecution against the petitioner, set out in the charge-sheet, is that on 16.1.1993 he "knowingly and intentionally procured from accused Anees Ibrahim Kaskar through Sameer Ahmad Hingora, Hanif Kadawala, Baba @ Ibrahim Musa Chouhan, Abu Salem Abdul Qayoom Ansari and Manzoor Ahmed Sayed Ahmed 3 AK-56 rifles, 25 hand grenades and one 9 mm. pistol and cartridges for the purpose of committing terrorist acts. By keeping the AK-56 rifles, hand grenades, pistol and cartridges in his possession willingly, accused Sanjay Dutt facilitated these objectives. Some parts of the rifle, the 9 mm. pistol and 53 rounds of live cartridges were recovered during the course of investigation. Accused Yusuf Mohsin Nullwala, Kersi Bapuji Adenia, Rusi Framrose Mulla, Ajay Yashprakash Marwah, caused wilful destruction of evidence namely 1 AK-56 rifle, one 9 m.m. pistol, and cartridges by deliberately removing them from the house of accused Sanjay Dutt, at his instance, with the intention to protect the offender i.e. Sanjay Dutt from legal consequences and therefore, they are also guilty of the offence Under Section 201 IPC".

4. The charge against the petitioner is of several offences including those under the TADA Act, of which Section 5 thereof is one. Reliance is placed by the prosecution on the testimony of certain witnesses, some incriminating circumstances and an unrestricted confession by the petitioner himself. In the said confession, which has remained unrestricted, the petitioner admitted receiving three AK-56 rifles on 16.1.1993 along with ammunition from the aforesaid persons adding that two days later he returned two of them but retained only one for the purpose of self-defence. The petitioner further stated that in view of the tense communal situation as a result of the incident at Ayodhya on 6.12.1992 and the serious threats given to petitioner's father Sunil Dutt, then a Member of Parliament, for his active role in steps taken to restore communal harmony and serious threats to petitioner's sisters also, all of whom were residing together, the petitioner agreed to obtain and keep one AK-56 rifle with ammunition for protection of his family without the knowledge of his father. In short, the petitioner's statement is that his possession of one AK-56 rifle with ammunition was in these circumstances for self-defence on account of the serious threats to the members of his family, unrelated to any terrorist activity and, therefore, mere unauthorised possession of the weapons and ammunition by him in these circumstances cannot constitute an offence under Section 5 of the TADA Act, and has to be dealt with only under the Arms Act, 1959. The petitioner claims to be released on bail on this basis and places reliance on certain other facts pertaining to his conduct to support his assertion that his action is unconnected with any terrorist

or disruptive activity. It is unnecessary here to refer to any other facts which may be material only for the purpose of considering the case of petitioner on the merits for grant of bail. The Designated Court has refused bail to the petitioner. These special leave petitions are against the order of the Designated Court, in substance, for grant of bail to the petitioner.

5. On these facts, the aforesaid questions of law arise for determination by us. These questions arise in a large number of cases of persons accused of offences punishable under the TADA Act and detained for that reason. It is the general importance of these questions, numerous cases in which they arise and the frequency of their occurrence during the life of the TADA Act which has occasioned this reference.
6. The decision of the Constitution Bench in *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569, it is urged does not fully answer these questions. It is also urged that the principle enunciated by a Division Bench in *Hitendra Vishnu Thakur and Others vs. State of Maharashtra and Others*, (1994) 4 SCC 602, read in the context of the final order made therein, raises some ambiguity about the true meaning and effect of Section 20(4)(bb) of the TADA Act which requires that controversy also to be settled. We shall now deal with these questions.
7. The Terrorist and Disruptive Activities (Prevention) Act, 1987 is 'an Act to make special provisions for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto'. The Statement of Objects and Reasons indicates the historical background and the situation which led to its enactment. It is useful to refer to the material portion of the Statement of Objects and Reasons which is, as under :-

"The Terrorist and Disruptive Activities (Prevention) Act, 1985, was enacted in May, 1985, in the background of escalation of terrorist activities in many parts of the country at that time. It was expected then that it would be possible to control the menace within a period of two years and, therefore, the life of the said Act was restricted to a period of two years from the date of its commencement. However, it was subsequently realised that on account of various factors, what were stray incidents in the beginning have now become a continuing menace specially in States like Punjab. On the basis of experience, it was felt that in order to combat and cope with terrorist and disruptive activities effectively, it is not only necessary to continue the said law but also to strengthen it further. The aforesaid Act of 1985 was due to expire on the 23rd May, 1987. Since both Houses of Parliament were not in session and it was necessary to take immediate action, the President promulgated the Terrorist and Disruptive Activities (Prevention) Ordinance, 1987 (2 of 1987) on the 23rd May, 1987, which came into force with effect from the 24th May, 1987."

XXX XXX XXX

Subsequent to the promulgation of the Ordinance, it was felt that the provisions need further strengthening in order to cope with the menace of terrorism. It is, therefore, proposed that persons who are in possession of certain arms and ammunition specified in the Arms Rules, 1962 or other explosive substances unauthorisedly in an area to be notified by the State Government, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and with fine. It is further proposed to provide that confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device shall be admissible in the trial of such person for an offence under the proposed legislation or any rules made thereunder. It is also proposed to provide that the Designated Court shall presume, unless the contrary is proved, that the accused had committed an offence where arms or explosives or any other substances specified in Section 3 were recovered from his possession, or where by the evidence of an expert the finger prints of the accused were found at the site of offence or where a confession has been made by a co-accused that the accused had committed the offence or where the accused had made a confession of the offence to any other person except a police officer...." (emphasis supplied)

8. We have heard Shri Kapil Sibal on behalf of the petitioner and Shri K.T.S. Tulsi, Additional Solicitor General on behalf of respondent C.B.I. In view of the general importance of the questions for decision affecting a large number of persons accused of offences under the TADA Act, we requested Shri Soli J. Sorabjee, a senior advocate of this Court to appear as amicus curiae to assist us in deciding these questions. We have also taken into account the written submissions filed by the National Human Rights Commission with our leave. We are grateful to the learned Counsel for the able assistance rendered by them at the hearing.
9. Certain provisions of the TADA Act may now be referred. Section 1 provides for the extent, application, commencement and duration of the Act, which says that it extends to the whole of India and was to remain in force initially for a period of two years from May 1987 but has been extended from time to time. The last extension by Act No. 43 of 1993 is for eight years from its commencement. Several clauses in Sub-section (1) of Section 2 contain the definitions. The definition of 'abet' in Clause (a) is much wider than that in the Indian Penal Code. Clause (d) defines 'disruptive activity' to give it the meaning assigned to it in Section 4; and 'terrorist act' in Clause (h) is defined to give the meaning assigned to it in Sub-section (1) of Section 3. Clause (f) defines 'notified area' to mean such area as the State Government may by notification in the Official Gazette specify. Apart from the and given by the general scheme of the TADA Act and the object of its enactment to guide the State Government in specifying a 'notified area' for the purpose of the TADA Act, there is no other specific provision dealing

with the manner of performance of that exercise. A notified area is significant for the purpose of Section 5 of the TADA Act which makes mere unauthorised possession of certain arms and ammunition etc. specified therein, a punishable offence. Part II of the TADA Act relates to 'Punishments for, and measures for coping with, terrorist and disruptive activities' containing Sections 3 to 8. Section 3 gives the meaning assigned to the expression 'terrorist act' and also prescribes the punishment for the same. Similarly, Section 4 gives the meaning assigned to the expression 'disruptive activity' and prescribes the punishment for the same. Then comes Section 5 which says that a person in mere unauthorised possession of certain arms and ammunition etc. specified therein, in a 'notified area' is punishable 'with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine'. This offence is more grave and the punishment more severe than the offence of mere unauthorised possession of the same arm and ammunition etc. provided in the Arms Act. Section 6 provides for enhanced penalties in certain cases. Section 8 provides for forfeiture of property of persons convicted of any offence punishable under this Act in addition to the punishment awarded for the offence. This Section also provides for forfeiture of property of certain other persons accused of any offence under this Act. Part III containing Sections 9 to 19 relates to Constitution of 'Designated Courts', their place of sitting, jurisdiction and power with respect to other offences, apart from the procedure to be followed by the Designated Courts and certain other matters relating to trial. Section 15 deals with certain confessions made to police officers and the admissibility thereof. Part IV contains miscellaneous provisions which are in Sections 20 to 30. Section 20 provides for the modified application of certain provisions of the CrPC and Section 21 deals with presumption as to offences under Section 3 of this Act.

10. We may now quote for the sake of convenience the provisions of the TADA Act which are particularly material for our purpose -

2. **Definitions.**- (1) *In this Act, unless the context otherwise requires, -*

XXX XXX XXX

(d) "disruptive activity" has the meaning assigned to it in Section 4, and the expression "disruptions" shall be construed accordingly; XXX XXX XXX

(f) "notified area" means such area as the State Government may, by notification in the Official Gazette, specify;

XXX XXX XXX

(h) "terrorist act" has the meaning assigned to it in Sub-section (1) of Section 3, and the expression "terrorist" shall be construed accordingly;"

PART II**Punishments for, and measures for coping with, terrorist and disruptive activities****3. Punishment for terrorist acts.-**

- (1) *Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act.*
- (2) *Whoever commits a terrorist act, shall -*
 - (i) *if such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine;*
 - (ii) *in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.*
- (3) *Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.*
- (4) *Whoever harbours or conceals, or attempts to harbour or conceal, any terrorist shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.*
- (5) *Any person who is a member of a terrorists gang or a terrorists organisation, which is involved in terrorist acts, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also liable to fine.*
- (6) *Whoever holds any property derived or obtained from commission of any terrorist act or has been acquired through the terrorist funds shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.*

4. Punishment for disruptive activities.- (1) Whoever commits or conspires or attempts to commit or abets, advocates, advises, or knowingly facilitates the commission of, any

disruptive activity or any act preparatory to a disruptive activity shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

xxx xxx xxx

5. Possession of certain unauthorised arms, etc., in specified areas.- Where any person is in possession of any arms and ammunition specified in Columns 2 and 3 of Category I or Category III(a) of Schedule I to the Arms Rules, 1962, or bombs, dynamite or other explosive substances unauthorisedly in a notified area, he shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

6. Enhanced penalties.- (1) If any person with intent to aid any terrorist or disruptions, contravenes any provision of, or any rule made under, the Arms Act, 1959 (54 of 1959), the Explosives Act, 1884 (4 of 1884), the Explosive Substances Act, 1908 (6 of 1908), or the Inflammable Substances Act, 1952 (20 of 1952), he shall, notwithstanding anything contained in any of the aforesaid Acts or the rules made thereunder, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(2) For the purposes of this section, any person who attempts to contravene or abets, or attempts to abet, or does any act preparatory to the contravention of any provision of any law, rule or order, shall be deemed to have contravened that provision, and the provisions of Sub-section (1) shall, in relation to such person, have effect subject to the modification that the reference to "imprisonment for life" shall be construed as a reference to "imprisonment for ten years".

xxx xxx xxx

PART III

Designated Courts

xxx xxx xxx

12. Power of Designated Courts with respect to other offences.- (1) When trying any offence, a Designated Court may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence.

(2) If, in the course of any trial under this Act of any offence, it is found that the accused person has committed any other offence under this Act or any rule made thereunder or under any other law, the Designated Court may convict such person of such other offence and pass any sentence authorised by this Act or such rule or, as the case may be, such other law, for the punishment thereof.

XXX XXX XXX

15. Certain confessions made to police officers to be taken into consideration.- (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872),

but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder.

Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

(2) The police officer shall, before recording any confession under Sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily, XXX XXX XXX

PART IV

Miscellaneous

20. Modified application of certain provisions of the Code:-

xxx xxx xxx

(4) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act or any rule made thereunder subject to the modifications that -

- (a) the reference in Sub-section (1) thereof to "Judicial Magistrate" shall be construed as a reference to. "Judicial Magistrate or Executive Magistrate or Special Executive Magistrate";*
- (b) the references in Sub-section (2) thereof to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "sixty days", and "one hundred and eighty days" respectively; and*

(bb) in Sub-section (2), after the proviso, the following proviso shall be inserted, namely:-

Provided further that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Designated Court shall extend the said period upto one year, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days; and

- (c) Sub-section (2-A) thereof shall be deemed to have been omitted.*

XXX XXX XXX

(7) Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under this Act or any rule made thereunder.

(8) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless

- (a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
- (b) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(9) The limitations on granting of bail specified in Sub-section (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail.

21. Presumption as to offences under Section 3.- (1) In a prosecution for an offence under Sub-section (1) of Section 3, if it is proved -

- (a) that the arms or explosives or any other substances specified in Section 3 were recovered from the possession of the accused and there is reason to believe that such arms or explosives or other substances of a similar nature, were used in the commission of such offence; or
 - (b) that by the evidence of an expert the finger prints of the accused were found at the site of the offence or on anything including arms and vehicles used in connection with the commission of such offence;
- the Designated Court shall presume, unless the contrary is proved, that the accused had committed such offence.

(2) In a prosecution for an offence under Sub-section (3) of Section 3, if it is proved that the accused rendered any financial assistance to a person accused of, or reasonably suspected of, an offence under that section, the Designated Court shall presume, unless the contrary is proved, that such person has committed the offence under that sub-section.

XXX XXX XXX

25. Overriding effect.- The provisions of this Act or any rule made thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

11. We would now consider the questions referred for decision.

Section 5 of the TADA Act

12. The true meaning and sweep of the offence made punishable under Section 5 of the TADA Act is the main controversy for decision by us. The Constitution Bench in *Kartar Singh* has upheld its constitutional validity and, therefore, the question is one

of proper construction of the provision keeping in view the object for which it was enacted, notwithstanding the existence of similar provision in the Arms Act, 1959. For the sake of convenience. Section 5 of the TADA Act may be quoted:

5. Possession of certain unauthorised arms, etc. in specified areas.-Where any person is in possession of any arms and ammunition specified in Columns 2 and 3 of Category I or Category III(a) of Schedule I to the Arms Rules, 1962, or bombs, dynamite or other explosive substances unauthorisedlyin a notified area, he shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine. (emphasis supplied)

...

14. In the Arms Act, 1959, Section 24A inserted by Act No. 25 of 1983 w.e.f. 22.6.1983 contains provision relating to the 'Prohibition as to possession of notified arms in disturbed areas, etc.; and Section 25 prescribes the 'punishment for certain offences' which includes punishment to a person who acquires, has in his possession or carries any prohibited arms or prohibited ammunition in contravention of Section 7, in Sub-sections (1) and (1A) inserted by Act No. 25 of 1983 w.e.f. 22.6.1983 and Act No. 42 of 1988 w.e.f. 27.5.1988 respectively. Section 7 prohibits acquisition or possession etc. of prohibited arms or prohibited ammunition unless specially authorised by the Central Government in this behalf. Clauses (h) and (i) of Sub-section (1) of Section 2 of the Arms Act define 'prohibited ammunition' and 'prohibited arms' respectively. Section 11 of the Arms Act empowers the Central Government by notification in the Official Gazette to prohibit import or export of arms etc. while Section 12 contains a similar power to restrict or prohibit transport of arms. There is no dispute that the prohibition against unauthorised possession of the categories of arms and ammunition etc. specified in Section 5 of the TADA Act could as well be covered by the Arms Act and the rules framed thereunder, if necessary, by a further amendment thereof which would be governed by the general law relating to investigation and trial of such offences without attracting the more stringent and drastic provisions of the TADA Act. However, the Parliament has chosen to adopt the course of enacting Section 5 in the TADA Act which has the result of governing the investigation, trial and punishment of the offence by the more stringent provisions in this behalf in the TADA Act. In short, the offence prescribed by and made punishable under Section 5 of the TADA Act is a graver offence governed by more stringent provisions for its investigation and trial while providing a more severe maximum, with a minimum punishment of five years' imprisonment for it. It is this difference which is the reason for the controversy raised

about the true meaning and scope of the offence prescribed by Section 5 of the TADA Act and the rights of the accused in this context.

15. The ingredients of the offence punishable under Section 5 of the TADA Act are:

- (i) Possession of any of the specified arms and ammunition etc.,
- (ii) unauthorisedly,
- (iii) in a notified area.

If these ingredients of the offence are proved, then the accused shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine. Admittedly, this punishment prescribing a minimum sentence of five years imprisonment for unauthorised possession of any of the specified arms etc. with the maximum extending to life imprisonment, is more severe as compared to the punishment for the corresponding offence under the Arms Act. In addition to it, the other provisions of the TADA Act which include admissibility of some evidence against the accused which is inadmissible under the general law coupled with a longer period available for completing the investigation enabling longer custody of the accused and the overall more stringent provisions of the TADA Act loads the prosecution more heavily against the accused under the TADA Act.

16. The TADA Act was enacted to make special provisions for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto in the background of escalation of the terrorist and disruptive activities in the country. There is also material available for a reasonable belief that such activities are encouraged even by hostile foreign agencies which are assisting influx of lethal and hazardous weapons and substances into the country to promote escalation of these activities. The felt need of the times is, therefore, proper balancing of the interest of the nation vis-a-vis the rights of a person accused of an offence under this Act. The rights of a person found in unauthorised possession of such a weapon or substance in this context, to prove his innocence of involvement in a terrorist or disruptive activity, is to be determined.

17. The construction made of any provision of this Act must, therefore, be to promote the object of its enactment to enable the machinery to deal effectively with persons involved in, and associated with, terrorist and disruptive activities while ensuring that

any person not in that category should not be subjected to the rigours of the stringent provisions of the TADA Act. It must, therefore, be borne in mind that any person who is being dealt with and prosecuted in accordance with the provisions of the TADA Act must ordinarily have the opportunity to show that he does not belong to the category of persons governed by the TADA Act. Such a course would permit exclusion from its ambit of the persons not intended to be covered by it while ensuring that any person meant to be governed by its provisions, will not escape the provisions of the TADA Act, which is the true object of the enactment. Such a course while promoting the object of the enactment would also prevent its misuse or abuse. Such a danger is not hypothetical but real in view of serious allegations supported by statistics of the misuse of provisions of the TADA Act and the concern to this effect voiced even by the National Human Rights Commission.

18. It is the duty of courts to accept a construction which promotes the object of the legislation and also prevents its possible abuse even though the mere possibility of abuse of a provision does not affect its constitutionality or construction. Abuse has to be checked by constant vigilance and monitoring of individual cases and this can be done by screening of the cases by a suitable machinery at a high level. It is reported that in some States, after the decision of this Court in *Kartar Singh*, high powered committees have been constituted for screening all such cases. It is hoped that this action will be taken in all the States throughout the country. Persons aware of instances of abuse, including the National Human Rights Commission, can assist by reporting such instances with particulars to that machinery for prompt and effective cure. However, that is no reason, in law, to doubt its constitutionality or to alter the proper construction when there is a felt need by the Parliament for enacting such a law to cope with, and prevent terrorist and disruptive activities threatening the unity and integrity of the country.
19. The settled rule of construction of penal provisions is, that 'if there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction and if there are two reasonable constructions, we must give the more lenient one'; and if 'two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty'. (See *London & North Eastern Railway v. Berriman* (1946) 1 All ER 255 (HL), p. 270; *Tolaram Relumal and Anr. v. the State of Bombay*, 1955 (1) SCR 158; and *State of Madhya Pradesh v. M/s Azad Bharat Finance Co. and Anr.*, 1996 (Suppl.) SCR 473).

20. Applying the settled rule of construction of penal statutes in *Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijaya and Ors.*, 1990 (4) SCC 76, a Division Bench of this Court speaking through one of us (Ahmadi, J.) construing certain provisions of the TADA Act reiterated the principle thus :-

"The Act is a penal statute. Its provisions are drastic in that they provide minimum punishments and in certain cases enhanced punishments also; make confessional statements made to a police officer not below the rank of a Superintendent of Police admissible in evidence and mandates raising of a rebuttable presumption on proof of facts stated in Clauses (a) to (d) of Sub-section (1) of Section 21. Provision is also made in regard to the identification of an accused who is not traced through photographs. There are some of the special provisions introduced in the Act with a view to controlling the menace of terrorism. These provisions are a departure from the ordinary law since the said law was found to be inadequate and not sufficiently effective to deal with the special class of offenders indulging in terrorist and disruptive activities. There can, therefore, be no doubt that the legislature considered such crimes to be of an aggravated nature which could not be checked or controlled under the ordinary law and enacted deterrent provisions to combat the same. The legislature, therefore, made special provisions which can in certain respects be said to be harsh, created a special forum for the speedy disposal of such cases, provided for raising a presumption of guilt, placed extra restrictions in regard to the release of the offender on bail, and made suitable changes in the procedure with a view to achieving its objects. It is well settled that statutes which impose a term of imprisonment for what is a criminal offence under the law must be strictly construed...."

...Therefore, when a law visits a person with serious penal consequences extra care must be taken to ensure that those whom the legislature did not intend to be covered by the express language of the statute are not roped in by stretching the language of the law...".

With respect, we fully concur with the above perception for construing the provisions of the TADA Act.

21. It is with this perspective we must proceed to spell out the ingredients of the offence created by Section 5 of the TADA Act and the extent of the right of the accused to defend himself of that charge. We have already indicated the ingredients of the offence punishable under Section 5 of the TADA Act.
22. The meaning of the first ingredient of 'possession' of any such arms etc. is not disputed. Even though the word 'possession' is not preceded by any adjective like 'knowingly', yet it is common ground that in the context the word 'possession' must mean possession with the requisite mental element, that is, conscious possession and not mere custody without the awareness of the nature of such possession.

There is a mental element in the concept of possession. Accordingly, the ingredient of 'possession' in Section 5 of the TADA Act means conscious possession. This is how the ingredient of possession in similar context of a statutory offence importing strict liability on account of mere possession of an unauthorised substance has been understood. (See *Warner v. Metropolitan Police Commissioner* [1969] 2 A.C. 256 and *Sambasivam v. Public Prosecutor, Federation of Malaya*, 1950 AC 458).

23. The next ingredient is that the possession of such an arm etc. should be 'unauthorised'. That also presents no difficulty. The unauthorised possession in the context means without the authority of law. There is no dispute even in this area. The difficulty arises only hereafter. The unauthorised possession so understood of such an arm etc. 'in a notified area' constitutes the offence. The true import of this last ingredient is the area of real controversy.
24. Section 2(1)(f) defines 'notified area' to mean such area as the State Government may, by notification in the Official Gazette, specify. There is no express indication in the Act of the manner in which the State Government is to exercise this power of issuing the notification. It is rightly urged by the learned Additional Solicitor General that the manner in which this power is to be exercised by the State Government has to be inferred by reading the enactment as a whole keeping in view its object, from which it follows by necessary implication. He submits that the indication is, that the State Government is to notify a specified area for this purpose with reference to the extent of terrorist and disruptive activities therein with a view to check the influx into, and availability within the notified area of the specified arms and ammunition etc. which by their inherent nature are lethal and hazardous and, therefore, facilitate commission of terrorist and disruptive activities. He submits that the unauthorised possession of arms and ammunition etc. of the specified category facilitates the commission of terrorist and disruptive activities and, therefore, an area which is more prone to such activities is notified with a view to prevent the availability of unauthorized weapons and substances of this kind in that area. Learned Additional Solicitor General submitted that it is because of this fact of greater proneness of a notified area to the commission of terrorist and disruptive activities that mere unauthorised possession of the specified arms etc. therein is made a statutory offence of strict liability. This is the basis of his contention that a conviction under Section 5 of the TADA Act must follow on proof by the prosecution of conscious 'possession', 'unauthorisedly', of any of the specified arms and ammunition etc. in a 'notified area'. We think the submission of the learned Additional Solicitor General that the State Government's power to notify

an area under Section 2(1)(f) must have relation to curbing terrorist and disruptive activities in the notified area is well founded for otherwise the State Government's power would be unfettered and unguided which would render Section 5 vulnerable.

25. Shri Kapil Sibal, learned Counsel for the petitioner submitted that the unauthorised conscious possession of any such specified arms and ammunition etc. in a 'notified area' may not necessarily be related to, or associated with, a terrorist or disruptive activity and it may be possible for the accused to show that the object even of the unauthorised possession was different, for example, self-defence. He submits that the accused must have the opportunity in law of raising such a defence and proving it. The construction of Section 5 suggested by Shri Soli J. Sorabjee as amicus curiae as well as by the National Human Rights Commission in its written submissions is the same. Shri Sibal further submitted that unless such an opportunity to the accused to prove his innocence for the graver offence punishable under Section 5 of the TADA Act is read into it, even though he may be punished for mere unauthorised possession of such arms and ammunition etc. under the Arms Act, the provision would suffer from the vice of arbitrariness being unrelated to the object of its enactment.
26. Several facets of the arguments of both sides aim at supporting the rival contentions. Learned Additional Solicitor General contends that there is no such right available to the accused being tried for an offence punishable under Section 5 of the TADA Act while the others canvass for accepting the other view. The clue for resolution of this controversy lies in the significance and true import of the third ingredient of the offence, namely, a 'notified area'.
27. We have already indicated the manner in, and the purpose for which, a specified area is declared to be a notified area by the State Government under Section 2(1)(f) of the TADA Act. This is done with reference to the fact that a notified area is treated to be more prone to the commission and escalation of terrorist and disruptive activities. This is the basis for classification of 'a notified area' differently from the non-notified areas and it has a reasonable nexus with the object of classification. Such activities must, therefore, have a bearing on the Constitution of any special offence confined to that area. Declaration of a specified area as a notified area by the State Government is based on its satisfaction, subjective in nature that the area is prone to terrorist and disruptive activities and its escalation. This opinion of the State Government has to be formed necessarily with reference to facts relating to incidents of terrorist and disruptive activities, for the prevention of which check on the influx of the specified arms and ammunition etc. in that area, is the object of enacting Section 5. The

existence of the factual basis for declaring a specified area as notified area has to be presumed for the purposes of Section 5 for otherwise it would be put to proof in every case. This is the true significance of the third ingredient of the offence under Section 5.

28. The significance of unauthorised possession of any such arms and ammunition etc. in a notified area is that a statutory presumption arises that the weapon was meant to be used for a terrorist or disruptive act. This is so, because of the proneness of the area to terrorist and disruptive activities, the lethal and hazardous nature of the weapon and its unauthorised possession with this awareness, within a notified area. This statutory presumption is the essence of the third ingredient of the offence created by Section 5 of the TADA Act. The question now is about the nature of this statutory presumption.
29. The position which emerges is this. For constituting the offence made punishable under Section 5 of the TADA Act, the prosecution has to prove the aforesaid three ingredients. Once the prosecution has proved 'unauthorised' 'conscious possession' of any of the specified arms and ammunition etc. in a 'notified area' by the accused, the conviction would follow on the strength of the presumption unless the accused proves the non-existence of a fact essential to constitute any of the ingredients of the offence. Undoubtedly, the accused can set up a defence of non-existence of a fact which is an ingredient of the offence to be proved by the prosecution.
30. There is no controversy about the facts necessary to constitute the first two ingredients. For proving the non-existence of facts constituting the third ingredient of the offence, the accused would be entitled to rebut the above statutory presumption and prove that his unauthorised possession of any such arms and ammunition etc. was wholly unrelated to any terrorist or disruptive activity and the same was neither used nor available in that area for any such use and its availability in a 'notified area' was innocuous. Whatever be the extent of burden on the accused to prove the non-existence of the third ingredient, as a matter of law he has such a right which flows from the basic right of the accused in every prosecution to prove the non-existence of a fact essential to constitute an ingredient of the offence for which he is being tried. If the accused succeeds in proving non-existence of the facts necessary to constitute the third ingredient alone after his unauthorised possession of any such arms and ammunition etc. in a notified area is proved by the prosecution, then he cannot be convicted under Section 5 of the TADA Act and would be dealt with and punished under the general law. It is obviously to meet situations of this kind that Section 12 was incorporated in the TADA Act.

31. The non-obstante clause in Section 5 of the TADA Act shows that within a notified area, the general law relating to unauthorised possession of any of the specified arms and ammunition etc. is superseded by the special enactment for that area, namely, the TADA Act. If however the third ingredient to constitute the offence under Section 5 of the TADA Act is negated by the accused while the first two ingredients are proved to make out an offence punishable under the general law, namely, the Arms Act, then the Designated Court is empowered to deal with the situation in accordance with Section 12 of the TADA Act. Section 12 itself shows that the Parliament envisaged a situation in which a person tried under the TADA Act of any offence may ultimately be found to have committed any other offence punishable under any other law and in that situation, the Designated Court is empowered to punish the accused for the offence under such other law. The offence under Section 5 of the TADA Act is graver and visited with more severe punishment as compared to the corresponding offence under the general law. This is because of the greater propensity of misuse of such arms and ammunition etc. for a terrorist or disruptive act within a notified area. If the assumed propensity of such use is negated by the accused, the offence gets reduced to one under the general law and is punishable only thereunder. In such a situation, the accused is punished in the same manner as any other person found to be in unauthorised possession of any such arms and ammunition etc. outside a notified area. The presumption in law is of the greater and natural danger arising from its unauthorised possession within a notified area more prone to terrorist or disruptive activities.
32. The Statement of Objects and Reasons for enacting the TADA Act clearly states as under:
- ...It is also proposed to provide that the Designated Court shall presume, unless the contrary is proved, that the accused had committed an offence where arms or explosives or any other substances specified in Section 3 were recovered from his possession, or where by the evidence of an expert the finger prints of the accused were found at the site of offence or where a confession has been made by a co-accused that the accused had committed the offence or where the accused had made a confession of the offence to any other person except a police officer.... (emphasis supplied)*
33. The above extract gives a clear indication of the purpose for enacting Section 21 in the TADA Act creating the statutory presumption as to offences under Section 3 of the TADA Act, if it is proved that the arms or explosives or any other substances specified in Section 3 were recovered from the possession of the accused anywhere, and there is reason to believe that such arms or explosives or other substances of a similar

nature were used in the commission of such offence. On proof of possession alone and not also its use, the statutory presumption which arises is of the lesser offence under Section 5 and that too when the possession is unauthorised within a notified area, which is more prone to terrorist or disruptive activities. The presumption arising of the commission of an offence under Section 3 by virtue of Section 21 is expressly made rebuttable and the accused can even then prove the non-existence of a fact essential to constitute an ingredient of the offence under Section 3. On the same principle, the statutory presumption arising of the lesser offence under Section 5 on proof of the fact of unauthorised possession in a notified area would be rebuttable presumption enabling the accused to prove that the weapon was not meant for use for any terrorist or disruptive act. Where its actual use in addition to the possession has been proved, the presumption is of an offence under Section 3 and burden on the accused is to prove the non-existence of any fact required for constituting an ingredient of the offence under Section 3. The distinction that an offence under Section 3 can be committed anywhere but that under Section 5 only within a notified area, is also significant. Enactment of Section 21 also supports the view that the statutory presumption arising of commission of an offence under Section 5, on proof of the requisite facts, is a rebuttable and not an irrebuttable presumption. If the presumption arising of an offence under Section 3 by virtue of Section 21 is expressly made rebuttable, there can be no reason why presumption of the offence under Section 5 would be irrebuttable and not rebuttable. After all the offence under Section 5 is less serious than that under Section 3 of the Act. This construction is also preferable because the statute is penal in nature. The nature and extent of burden on the accused to rebut the statutory presumption under Section 5 is the same as in case of the presumption arising by virtue of Section 21 of an offence under Section 3 of the Act.

34. It is clear that the statutory presumption so read into Section 5 is in consonance with the scheme of the statute and Section 5 read in the context makes the statutory presumption implicit in it. The clear words in Section 21 that the 'Designated Court shall presume, unless the contrary is proved' is an unambiguous expression that the presumption thereunder is a rebuttable presumption. The language in Section 21 of the TADA Act has to be contrasted with the language of Section 112 of the Indian Evidence Act, 1872 which shows that the presumption under Section 112 of the Indian Evidence Act is irrebuttable whereas the presumption under Section 21 of the TADA Act is rebuttable. It may here be noticed that Section 5 is attracted only in case of unauthorised possession in a notified area, of arms and ammunition

specified in columns 2 and 3 of Category I or Category III(a) of Schedule I to the Arms Rules, 1962 which are prohibited arms, semi-automatic fire-arms, smooth bore guns, bolt action or semi-automatic rifles of certain categories, revolvers and pistols, and their ammunition, or bombs, dynamite or other explosive substances, which are all inherently more dangerous weapons. None of these weapons is meant for, or kept, for ordinary use. The statutory presumption is also, therefore, reasonable.

.....

38. ... We have construed in Section 5 of the TADA Act, the ingredient of 'possession' to mean 'conscious possession'. This decision also supports the principle that mere conscious possession of a forbidden substance is sufficient to constitute, an offence and the offence created by Section 5 in a statute like the TADA Act is not extraordinary or conceptually impermissible. Moreover, that is also the position in the general law, with difference only in the prescribed punishment.

39. The construction we have made of Section 5 of the TADA Act shows that it creates a statutory offence with strict liability and no statutory exception therein. However, we have also taken the view that the accused has a right as a part of his defence to prove the non-existence of a fact essential to constitute an ingredient of the offence under Section 5 of the TADA Act and for that purpose he can rebut the presumption against him, as indicated above. The question whether the defence set up by an accused is really a defence of an exception or is a defence to assert the non-existence of a fact, which is an ingredient of an offence to be proved by the prosecution, depends upon the construction of the particular statute. If the language of the statute does not clearly reveal the Parliamentary intent, it has then to be inferred with reference to the mischief to be checked and the 'practical considerations affecting the burden of proof and the comparative ease or difficulty which the respective parties would encounter in discharging the burden.

.....

41. It is a settled rule of criminal juries-prudence that the burden on an accused of proving a fact for rebutting a statutory presumption in his defence is not as heavy as on the prosecution to prove its case beyond reasonable doubt but the lighter burden of proving the greater probability. Thus, the burden on the accused of rebutting the statutory presumption which arises against him under Section 5 of the TADA Act on proof by the prosecution that the accused was in unauthorised possession of any of the specified arms and ammunition etc. within a notified area, is of greater probability.

When the prosecution has proved these facts, it has to do nothing more and conviction under Section 5 of the TADA Act must follow unless the accused rebuts the statutory presumption by proving that any such arms and ammunition etc. was neither used nor was meant to be used for a terrorist or disruptive activity. No further nexus of his unauthorised possession of the same with any specific terrorist or disruptive activity is required to be proved by the prosecution for proving the offence under Section 5 of the TADA Act. The nexus is implicit, unless rebutted, from the fact of unauthorised conscious possession of any such weapon etc. within a notified area and the inherent lethal and hazardous nature and potential of the same. The observations of Sahai, J. alone in *Kartar Singh* cannot be read to enlarge the burden on the prosecution to prove the implicit nexus by evidence aliunde, or to require the prosecution to prove anything more than what we have indicated.

42. We may deal with one more aspect pertaining to the construction of Section 5 of the TADA Act to which reference was made placing reliance on the decision in *Paras Ram v. State of Haryana* (1992) 2 SCC 662, to which one of us (J.S. Verma, J.) was a party. Correctness of that decision has been doubted by the learned Additional Solicitor General. That decision holds that the words 'arms and ammunition' in Section 5 should be read conjunctively and so read, the conclusion is that a person in possession of only both, a fire-arm and the ammunition therefor, is punishable under Section 5 and not one who has either the fire-arm or the ammunition alone.
43. Section 5 applies where 'any person is in possession of any arms and ammunition specified in columns 2 and 3 of Category I or Category III(a) of Schedule I to the Arms Rules, 1962, or... unauthorisedly in a notified area'. After specifying the forbidden arms and ammunition, Section 5 proceeds to include in that category other substances by using the expression 'or bombs, dynamite or other explosive substances'. It is clear that unauthorised possession in a notified area is forbidden of 'any arms and ammunition' which is specified 'or bombs or dynamite or other explosive substances'. The other forbidden substances being read disjunctively, the only question is : Whether in this context the words 'arms and ammunition' in Section 5 should be read conjunctively ? We do not think so.
44. Schedule I to the Arms Rules specifies the categories of both arms and ammunition mentioned therein. This is what has led to use of the words 'arms and ammunition' in Section 5 while referring to them as those specified in columns 2 and 3 of Category I or Category III(a) of Schedule I. The word 'and' has been used because Schedule I specifies both arms and ammunition in columns 2 and 3 thereof. The words 'any arms

and ammunition' in Section 5 mean any of the arms and ammunition so specified or in other words any arm or any ammunition specified in columns 2 and 3 of Category I or Category III(a) of the Schedule. The word 'and' instead of 'or' is used in the expression 'any arms and ammunition specified ... because reference to both is made as specified in the Schedule. For this reason, the words 'arms and ammunition' are not to be read conjunctively. This is further evident from the fact that the disjunctive 'or' is used while describing other forbidden substances like bombs etc. It means the forbidden substances, the unauthorised possession of any of which in a notified area is an offence under Section 5, are any of the specified arms or its ammunition or bombs or dynamite or other explosive substances. Unless these words are read disjunctively instead of conjunctively in this manner, the object of prohibiting unauthorised possession of the forbidden arms and ammunition would be easily frustrated by the simple device of one person carrying the forbidden arm and his accomplice carrying its ammunition so that neither is covered by Section 5 when any one of them carrying both would be so liable. We must, therefore, correct the view taken in Paras Ram. This part of Section 5 has to be read in the manner indicated herein by us. With respect, the decision in Paras Ram does not lay down the correct law.

45. The Parliament envisages that enactment of the TADA Act is necessary to deal with terrorists, disruptions and their associates or even those reasonably suspected of such association. A purposive construction promoting the object of the enactment but not extending its sweep beyond the frontiers within which it was intended to operate must be adopted keeping in view that a construction which exempts a person from its operation must be preferred to the one which includes him in it, in view of the penal nature of the statute. The construction we have made of Section 5 of the TADA Act which gives an opportunity to the accused to rebut the presumption arising against him of the commission of an offence by mere unauthorised possession of any such arms etc. within a notified area is manifest from the Statement of Objects and Reasons. This is in consonance with the basic principles of criminal jurisprudence and the basic rights of an accused generally recognised. We must attribute to the Parliament the legislative intent of not excluding the right of an accused to prove that he is not guilty of the graver offence under Section 5 of the TADA Act and, therefore, he is entitled to be dealt with under the general law which provides a lesser punishment. The provision of a minimum sentence of five years' imprisonment for unauthorised possession of any of the specified arms etc. with the maximum punishment of life imprisonment under Section 5 of the TADA Act is by itself sufficient to infer such a legislative intent, more so, when such intent is also more reasonable. The practical

considerations in prosecution for an offence punishable under Section 5 of the TADA Act affecting the burden of proof indicate that the intended use by the accused of such a weapon etc. of which he is in unauthorised possession within a notified area is known only to him and the prosecution would be unable most often to prove the same while the accused can easily prove his intention in this behalf. The practical considerations also support the view we have taken.

46. In the view we have taken, it is unnecessary to consider the several arguments advanced at the hearing relating to the requirement of mensrea as an ingredient of this offence, the nature of the statutory offence, whether it is one of strict liability, whether any exception can be read into the provision and if so, how. These aspects do not require any further consideration on the construction we have made of Section 5 and the manner, in which we have read into it the right and extent of defence available to the accused tried of an offence punishable under Section 5 of the TADA Act. This purpose is achieved by a route which is free of most of the debated area in the controversy. For this reason we need not refer to the details of the other arguments and the decisions cited at the Bar to support the rival contentions.

Section 20(4)(bb) of the TADA Act

47. Section 20 of the TADA Act prescribes the modified application of the CrPC indicated therein. The effect of Sub-section (4) of Section 20 is to apply Section 167 of the CrPC in relation to a case involving an offence punishable under the TADA Act subject to the modifications indicated therein. One of the modifications made in Section 167 of the Code by Section 20(4) of the TADA Act is to require the investigation in any offence under the TADA Act to be completed within a period of 180 days with the further proviso that the Designated Court is empowered to extend that period upto one year if it is satisfied that it is not possible to complete the investigation within the said period of 180 days, on the report of the public prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of 180 days. This gives rise to the right of the accused to be released on bail on expiry of the said period of 180 days or the extended period on do-fault to complete the investigation within the time allowed.

48. In *Hitendra Vishnu Thakur and Others vs. State of Maharashtra and Others*, the conclusion was summarised, as under :-

In conclusion, we may (even at the cost of repetition) say that an accused person seeking bail under Section 20(4) has to make an application to the court for grant

of bail on grounds of the ‘default’ of the prosecution and the court shall release the accused on bail after notice to the public prosecutor uninfluenced by the gravity of the offence or the merits of the prosecution case since Section 20(8) does not control the grant of bail under Section 20(4) of TADA and both the provisions operate in separate and independent fields. It is, however, permissible for the public prosecutor to resist the grant of bail by seeking an extension under Clause (bb) by filing a report for the purpose before the court. However, no extension shall be granted by the court without notice to an accused to have his say regarding the prayer for grant of extension under Clause (bb). In this view of the matter, it is immaterial whether the application for bail on ground of ‘default’ under Section 20(4) is filed first or the report as envisaged by Clause (bb) is filed by the public prosecutor first so long as both are considered while granting or refusing bail. If the period prescribed by Clause (b) of Section 20(4) has expired and the court does not grant an extension on the report of the public prosecutor made under Clause (bb), the court shall release the accused on bail as it would be an indefeasible right of the accused to be so released. Even where the court grants an extension under Clause (bb) but the charge sheet is not filed within the extended period, the court shall have no option but to release the accused on bail, if he seeks it and is prepared to furnish the bail as directed by the court. Moreover, no extension under Clause (bb) can be granted by the Designated Court except on a report of the public prosecutor nor can extension be granted for reasons other than those specifically contained in Clause (bb), which must be strictly construed.

49. In *Hitendra Vishnu Thakur*, it was held that the Designated Court would have ‘no jurisdiction to deny to an accused his indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bond as directed by the court’; and that a ‘notice’ to the accused is required to be given by the Designated Court before it grants any extension under the further proviso beyond the prescribed period of 180 days for completing the investigation.

....

52. We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section

167 but different provisions of the CrPC. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 Cr.P.C. ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the CrPC. It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. (See: *Niranjan Singh Nathawan v. The State of Punjab*, 1952 1952 SCR 395; *Ram Narayan Singh v. The State of Delhi and Others*, 1953 SCR 652; and *A.K. Gopalan v. The Government of India*, (1966) 2 SCR 427.

53. This is the nature and extent of the right of the accused to be released on bail under Section 20(4)(bb) of the TADA Act read with Section 167 Cr.P.C. in such a situation. We clarify the decision of the Division Bench in *Hitendra Vishnu Thakur*, accordingly, and if it gives a different indication because of the final order made therein, we regret our inability to subscribe to that view.

Sub-Section (8) of Section 20 of the TADA Act

54. Shri Kapil Sibal, learned Counsel for the petitioner submitted that the meaning and scope of Sub-section (8) of Section 20 of the TADA Act is indicated by the Constitution Bench in *Kartar Singh* (supra) as under:

"The conditions imposed under Section 20(8)(b), as rightly pointed out by the Additional Solicitor General, are in consonance with the conditions prescribed under Clauses (i) and (ii) of Sub-section (1) of Section 437 and Clause (b) of subsection (3) of that section.... Therefore, the condition that "there are grounds for believing that he is not guilty of an offence," which condition in different form is incorporated in other Acts such as Clause (i) of Section 437(1) of the Code ..., cannot be said to be an unreasonable condition infringing the principle of Article 21 of the Constitution."

55. In reply, the learned Additional Solicitor General submitted that the pronouncement of the Constitution Bench in *Kartar Singh* is clear and unambiguous and, therefore, there is no occasion for a fresh consideration of that matter.
56. The pronouncement of the Constitution Bench as extracted above is clear and does not require any further elucidation by us, besides it being binding on us.

Conclusions

57. As a result of the above discussion, our answers to the three questions of law referred for our decision are as under :-

- (1) In the prosecution for an offence punishable under Section 5 of the TADA Act, the prosecution is required to prove that the accused was in conscious 'possession', 'unauthorisedly', in 'a notified area' of any arms and ammunition specified in columns 2 and 3 of Category I or Category III(a) of Schedule I to the Arms Rules, 1962 or bombs, dynamite or other explosive substances. No further nexus with any terrorist or disruptive activity is required to be proved by the prosecution in view of the statutory presumption indicated earlier. The accused in his defence is entitled to prove the non-existence of a fact constituting any of these ingredients. As a part of his defence, he can prove by adducing evidence, the non-existence of facts constituting the third ingredient as indicated earlier to rebut the statutory presumption. The accused is entitled to prove by adducing evidence, that the purpose of his unauthorised possession of any such arms and ammunition etc. was wholly unrelated to any terrorist or disruptive activity. If the accused succeeds in proving the absence of the said third ingredient, then his mere unauthorised possession of any such arms and ammunition etc. is punishable only under the general law by virtue of Section 12 of the TADA Act and not under Section 5 of the TADA Act.
- (2) (a) Section 20(4)(bb) of the TADA Act only requires production of the accused before the court in accordance with Section 167(1) of the CrPC and this is how the requirement of notice to the accused before granting extension beyond the prescribed period of 180 days in accordance with the further proviso to Clause (bb) of Sub-section (4) of Section 20 of the TADA Act has to be understood in the judgment of the Division Bench of this Court in *Hitendra Vishnu Thakur*. The requirement of such notice to the accused before granting the extension for completing the investigation is not a written notice to the accused giving reasons therein. Production of the accused at that time in the court informing him that

the question of extension of the period for completing the investigation is being considered, is alone sufficient for the purpose.

- (2) (b) The 'indefeasible right' of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the CrPC in default of completion of the investigation and filing of the challan within the time allowed, as held in *Hitendra Vishnu Thakur* is a right which enures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the CrPC. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage.
- (3) In view of the decision of the Constitution Bench in *Kartar Singh* on the meaning and scope of Sub-section (8) of Section 20 of the TADA Act as extracted earlier, this question does not require any further elucidation by us.
58. The questions referred are answered in the above manner. This case, for decision of the petitioner's claim for grant of bail on merits, like any other bail matter, has now to be considered and decided by the appropriate Division Bench. We direct accordingly.

**Supreme Court of India
1998 (4) SCC 492**

**Khudeswar Dutta
vs
State of Assam**

G.T.Nanavati, V.N.Khare, JJ

1. The appellant has been convicted by the Designated Court, Assam in TADA Sessions Case No. 126 of 1993 on his pleading guilty to the charge that on 22-10-1991 in the notified area, he was found in possession of two guns and two cartridges which were intended to be used for carrying on terrorist and disruptive activities.
2. Learned counsel for the appellant has challenged the conviction on the ground that the Designated Court wrongly construed the statement of the appellant as an admission of guilt.
3. The charge framed against the appellant was :

"That you on or about 22-10-1991 kept concealed DBBL Guns Nos. 7083 and 42250 with .12 bore two cartridges (red in colour) without licence or authority for using the same in terrorist and disruptive activities and thereby committed an offence under Section 5 of TADA (P) Act."

After framing the charge, the question that was put to the appellant was that
"on 22-10-1991 police military recovered from your Engar Khowa house SBBL Gun No. 7083 and SBBL Gun No. 42250 and .12 bore 2 cartridges led by you".

4. To this question, the appellant replied as under :
"It was recovered from the house of another person which is situated at a distance of one and half/two kms distance from my house. One Shri Atul Nath, President, Anchalik Parishad of ULFA, directed to keep that in that house. I lead the police but I am not an extremist and I am not connected with the occurrence."
5. Treating this answer as an admission of guilt, the Designated Court convicted him. Immediately after the order of conviction and sentence was passed, the appellant gave an application to the Court complaining that he had no lawyer to assist him, that the Court had also not appointed any lawyer to assist him and that he was fully ignorant about the case and had no idea about law. He also stated that he had not understood anything about what the learned Judge had asked him. Thereafter, he stated that he

wanted legal aid to be provided to him. The Designated Judge, thereafter, passed an order upholding the submission of the learned Special Public Prosecutor that the Court having passed the final order of conviction and sentence had no jurisdiction to deal further with the case. The second order is also challenged by the appellant.

6. We are of the opinion that the Designated Court committed a grave error of law in convicting the appellant on the basis of the answer given by him. It was alleged against the appellant that the said firearms were recovered from his Engar Khowa house. While replying to that allegation he clearly stated that they were recovered from the house of another person situated at a distance of 1 1/2 to 2 kms from his house. Though he stated that "one Shri Atul Nath, President, Anchalik Parishad of ULFA, directed to keep that in that house" he did not say that Atul Nath had directed him to keep those firearms in that house. While admitting that he led the police to that house he denied that he was an extremist and that he was connected with the "occurrence". If these statements made by the appellant were considered carefully by the Designated Court it would have realised that they did not constitute an admission of guilt. The only inference that can be drawn from the answer given by the appellant is that he knew that the said two guns and the cartridges were kept at that place but mere knowledge that they were kept at that place cannot amount to conscious possession of those things. It is, therefore, obvious that on the basis of the said answer it was not proper to a convict the appellant under Section 5 of the TADA Act.
7. We, therefore, allow these appeals, set aside the conviction under Section 5 of the TADA Act and direct the trial court to proceed further with the trial after providing legal assistance to him.

**Supreme Court of India
2001 Cri. LJ 3294**

**Vijay Pal Singh
vs
State, N.C.T. of Delhi**

K.T. Thomas, R.P. Sethi, JJ

1. These appeals have been filed by two persons, namely, Ashok Kumar and Vijay Pal Singh, who were convicted of two different offences in one trial held by a Designated Judge under the provisions of Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA). As appeals lie directly to this Court under Section 19 of the TADA we heard learned counsel for the appellants as well as learned counsel for the State in extenso. There were five accused arraigned before the Designated Court to face a charge for the offences under Section 302 read with Sections 34 and 212 of the Indian Penal Code besides Section 5 of TADA and some other Sections of the Arms Act. The Designated Judge convicted first accused Ashok Kumar who is appellant in one of the appeals for the offence under Section 302 IPC as well as Section 5 of TADA. On the first count he was awarded imprisonment for life while on the second count rigorous imprisonment for five years was awarded as sentence. The fourth accused who is appellant in the other appeal was convicted of Section 5 of TADA alone. He too was sentenced to undergo rigorous imprisonment for five years.
2. The case relates to the murder of one Shyam Sunder @ Billa. It happened at around 9.00 p.m. on 9-9-1990 on the busy street at Jhangir Puri in Delhi, deceased was shot dead by an armed assailant. Thus far we did not find any dispute between the prosecution and the defence.
3. The prosecution case runs thus :

Appellant-Ashok Kumar and deceased-Shyam Sunder were friends initially, but at the instance of deceased's mother (PW 7 - Sulochana) their friendship became separated. Ashok Kumar again tried to enlist the friendship of deceased but that was again dissuaded by PW 7 and it resulted in burgeoning of enmity in the mind of Ashok Kumar towards the deceased. Added to this another incident happened. A lady was put in possession of a plot at the instance of Ashok Kumar but she was evacuated therefrom at the instance of deceased-Shyam Sunder. One or two days prior to the

murder, appellant-Ashok Kumar visited the house of the deceased and there was a brawl between the deceased and himself. It was at the behest of the mother of deceased that they were separated and Ashok Kumar left the place in huff after giving a threat that deceased would be dealt with properly which would leave its impact for seven generations.

4. At the time of occurrence deceased Shyam Sunder was either on his way to his friend or was returning from the friend's house as he already informed his mother that he was proceeding to meet that friend. The assailants surrounded the deceased at a place which is said to be in front of house No. 1502, block B of Jhangir Puri, Delhi.
5. Ashok Kumar whipped out a revolver and shot at the deceased which injured fatally the deceased on the chest and the abdomen and the shots became fatal. He was immediately taken to a nearby Nursing Home but the people at the Nursing Home were not inclined to admit him for their own reasons and hence he was taken to a government hospital. But the doctors who examined him pronounced him dead.
6. A First Information Report was recorded from the mother of the deceased who claimed to have witnessed the occurrence. The statement was recorded at 11.35 p.m. at the government hospital. After completing the investigation the charge-sheet was laid before the Designated Court.
7. While dealing with the appeal of appellant Ashok Kumar we have to focus only on two items of evidence. They are, the testimony of PW 2 (Rajinder Kumar) and the testimony of PW 7 (Sulochana). One more eye witness was examined by the prosecution (PW 10 - Anil Kumar) but he did not support the prosecution version and hence was treated as hostile. Yet one more person was cited by the prosecution as an eye witness (Murli), but he was not examined and we have noticed from the trial court's judgement that the Public Prosecutor reported that Murli was untraceable during trial.
8. Evidence of PW 2 and his mother PW 7 can be considered together as they lived together in the same house and they set out together and returned together, if their version is believable. Both of them said that Shyam Sundar wanted to visit his friend and hence he proceeded to that place and since he was not found even after some time the mother and the brother became panicky and therefore both of them went out in search of Shyam Sunder. As they reached the place of occurrence they found that Shyam Sunder was encircled by a number of persons including the four persons arraigned in the case. It was then that appellant Ashok Kumar opened the revolver at the deceased.

-
15. After evaluating the evidence of PW 2 and PW 7 from different angles projected by Mr. B. S. Jain, learned counsel for the appellant (Ashok Kumar) we are unable to dissent from the finding on fact made by the learned Designated Judge in regard to the complicity of that appellant.
 16. Now, we have to consider whether appellant-Vijay Pal Singh is liable to be convicted either under Section 5 of TADA or for any other offence. The only allegation against him is that he is found in possession of the revolver which Ashok Kumar used in murdering the deceased. There are two items of evidence adduced by the prosecution as against Vijay Pal Singh. First is, appellant-Ashok Kumar when arrested and interrogated by PW 20, told him that the revolver was given in the house of A4-Vijay Pal Singh. Second is, when PW 20, Inspector accompanied by some other police officers including PW 9 went to the house of appellant Vijay Pal Singh he handed over a Polythene bag and when the Polythene bag was opened it contained two pieces of blood stained clothes and one revolver. If the above two items of evidence alone were available for the prosecution, the appellant Vijay Pal Singh can justifiably contend that he did not know the contents of the Polythene bag which was handed over to him by his boss-Ashok Kumar. To obviate the said difficulty Shri Ashok Bhan, learned counsel for the respondent-State invited our attention to the evidence of PW 9 who said that Polythene bag contained only two pieces of clothes and the revolver was a separate article. PW 9 cannot be permitted to make any improvement upon the evidence of PW 20 who is the author of the recovery. In other words if there is discrepancy between the versions of PW 20 and PW 9 the benefit of that discrepancy cannot be extended to the prosecution. We are inclined to accept the evidence of PW 20 on that score. At any rate there is an area of reasonable doubt as to whether Vijay Pal Singh had only the polythene bag with him without knowing the entire contents therein. The benefit of said doubt is available to him.
 17. In the result we confirm the conviction and sentence passed on appellant Ashok Kumar and dismiss his appeal. But we set aside the conviction and sentence passed on Vijay Pal Singh and allow his appeal. We order appellant Vijay Pal Singh to be set at liberty forthwith unless he is required in any other case. The fine imposed on him, if realised, shall be refunded to him.

**Supreme Court of India
1995 (6) SCC 447**

**Bonkya Alias Bharat Shivaji Mane and Others
vs
State of Maharashtra**

Dr. A.S. Anand, K.S. Paripoornan, JJ

2. According to the prosecution case on 11-8-1990 at about 3.00 p.m. Anna Shety Band Patte, Mukesh, Ramesh and Prakash Band Patte had gone to the Vrindavan Video Parlour for watching a movie. The accused A-6, A-10 and A-11 along with one other person were also present at the video parlour. There was an altercation between the accused and the complainant party when the leg of Kaka Dombe (A-11) dashed against the leg of Anna Shety Band Patte PW. Both the prosecution witnesses as well as the accused party left the video parlour threatening each other. The complainant party went towards Jagdamba Hotel owned by Waman Band Patte PW. At that time Baban Karpe, Bajrang Band Patte, Sanjay Mane, Ramesh Pawar were also present near the hotel. At about 4.00 p.m., the appellants and other accused persons allegedly armed with swords, satturs and sticks arrived there in two auto-rickshaws and one jeep. Out of the accused A-5, A-6, A-8, A-10 and A-11 were carrying swords while A-7 and A-9 had satturs and the remaining accused were armed with sticks. On the arrival of accused party Anna Shety ran away. Appellants A-5, A -10 and A-11 thereafter assaulted Bajrang Band Patte (PW 14) on his head in front of the hotel. They also assaulted Baban Karpe (PW 9) and Popat deceased, who had run away to the Math, after chasing them in the auto-rickshaws and the jeep. It is alleged that A-5, A-10 and A-11 assaulted Popat deceased with the swords on his head and thighs and when Baban tried to intervene he was also assaulted and he received a blow with the sattur near his knee. He ran away to conceal himself. Bajrang (PW 14) was taken to the hospital by Waman PW 15, Ramesh PW 11 and Prakash PW 2, whereas Popat deceased who was seriously injured and had fallen down unconscious after receipt of the injuries was removed to the hospital by the police when it arrived at the spot a little later. All the injured persons were admitted to the hospital. While receiving treatment, Popat succumbed to his injuries. On receipt of information, Asstt. Police Inspector Joshi arrived at the hospital and Baban Karpe PW 9 narrated the occurrence to him which was reduced into writing. On the basis of the said report, an FIR for

offences under Sections 302/307/149/147/148 IPC was registered vide CR No. 101 of 1990 at about 6.00 p.m. The inquest on the dead body of Popat was conducted and the body was sent for post-mortem examination.

..... At the trial, the prosecution alleged that the accused party with an intent to commit terror in the Wadar Community had committed the murder of Popat and injured PW 9 and PW 14, by using lethal weapons and had thereby committed terror in the Wadar Community and, thus, committed an offence under Section 3 of TADA, besides the other offences as already noticed. Baloba (A-1) died during the pendency of the trial and therefore, the proceedings against him abated. The plea of the remaining accused in their statements under Section 313 CrPC was one of total denial and false implication. According to A-2, A-3, A-5, A-6 and A-7 they had been identified by PW 9, during the identification parade, at the instance of the police. A-4 alleged false implication at the instance of PW 15 Waman while A-8 alleged false implication at the hands of the police with a view to pressurise him to withdraw a complaint concerning the murder of his brother and 5 others allegedly committed by the police. A-9 also put forward a similar defence, while A-10 alleged that the police had instituted a false case against him at the instance of Narayan Dhotare, according to A-1, also the witnesses had deposed falsely against him at the instance of Narayan Dhotare. The learned Judge of the Designated Court acquitted A-2, A-3, A-4, A-6, A-7 and A-12 of the offences charged against them, apparently influenced by the lack of identification of these accused persons by the prosecution witnesses at the identification parade conducted by the Executive Magistrate. The appellants, however, were convicted and sentenced in the manner as already noticed.

4. We have heard learned counsel for the parties and perused the record.
5. That the incident arose out of a petty altercation between A-11 and his three companions with PW 10 and his three companions at the video parlour and later on led to the homicidal death of Popat Band Patte on 11-8-1990 and injuries to PW 9 and PW 14 was neither disputed before the learned Designated Court nor before us. From the post-mortem report prepared by Dr A. P. Khiste (PW 22), we find that the deceased had four incised injuries which had caused extensive damage to his internal organs also.
.....
15. The victims, it appears from the record, belong to the Wadar Community. The Designated Court after considering the evidence of the first incident and the manner

of assault on the deceased and PW 9 and PW 14, came to the conclusion that the appellants, along with some others had intended to create terror in a section of the people (Wadar Community) and with that intention had assaulted PW 14, the deceased and PW 9 by lethal weapons and were therefore guilty of committing an offence under Section 3 TADA.

16. In our opinion the Designated Court fell in error in holding that an offence under Section 3 of TADA had been committed by the accused-appellants in the established facts and circumstances of this case. Merely because the deceased and the two injured witnesses belong to Wadar Community, no inference could be drawn that the attack by the appellants on them was intended to strike terror in a section of the society, namely, the Wadar Community. There is no basis for such an assumption. Prosecution has led no evidence in that behalf either. It appears to be a mere coincidence that PW 9, PW 14 and the deceased all belong to the "Wadar Community". There is nothing on the record to disclose as to which community do the appellants belong to or what grievance they had against the "Wadar Community". By no stretch of imagination can it be said that the accused had the intention to strike terror, much less in a particular section of the society, when they entered into an altercation at the video parlour or even when they went after the complainant party and opened an assault on them opposite Jagdamba Hotel or at the Math. None out of those who were present at the video parlour received any injury and there is no material on the record to show as to which community did they belong to either. Prosecution has led no evidence nor brought any circumstances on the record from which any inference may be drawn that the appellants intended to strike terror amongst the "Wadar Community". It was not proper for the Designated Court to draw an inference of intention from the mere consequence, i.e., the victims belonging to the particular community. The learned trial court appears to have ignored to take into consideration the essential requirements for establishing an offence under Section 3 of TADA. In *Hitendra Vishnu Thakur v. State of Maharashtra* this Court opined that the criminal activity in order to invoke TADA must be committed with the requisite intention as contemplated by Section 3(1) of the Act by use of such weapons as have been enumerated therein and which cause or are likely to result in the commission of offences as mentioned in that section. It was observed : (SCC pp. 620-21, para 11)

"Thus, keeping in view the settled position that the provisions of Section 3 of TADA have been held to be constitutionally valid in Kartar Singh case and from the law laid down by this Court in Usmanbhai and Niranjan cases, it follows that an activity which is sought to be punished under Section 3(1) of TADA has to be such which cannot be

classified as a mere law and order problem or disturbance of public order or even disturbance of the even tempo of the life of the community of any specified locality but is of the nature which cannot be tackled as an ordinary criminal activity under the ordinary penal law by the normal law-enforcement agencies because the intended extent and reach of the criminal activity of the 'terrorist' is such which travels beyond the gravity of the mere disturbance of public order even of a 'virulent nature' and may at times transcend the frontiers of the locality and may include such anti-national activities which throw a challenge to the very integrity and sovereignty of the country in its democratic polity Thus, unless the Act complained of falls strictly within the letter and spirit of Section 3(1) of TADA and is committed with the intention as envisaged by that section by means of the weapons etc. as are enumerated therein with the motive as postulated thereby, an accused cannot be tried or convicted for an offence under Section 3(1) of TADA Likewise, if it is only as a consequence of the criminal act that fear, terror or/and panic is caused but the intention of committing the particular crime cannot be said to be the one strictly envisaged by Section 3(1), it would be impermissible to try or convict and punish an accused under TADA. The commission of the crime with the intention to achieve the result as envisaged by the section and not merely where the consequence of the crime committed by the accused create that result, would attract the provisions of Section 3(1) of TADA."

17. Thus, keeping in view the background in which the occurrence took place, namely, the altercation at the video parlour, which has a great relevance to determine the applicability of Section 3 TADA, we are of the opinion that the finding of the Designated Court that the appellants have committed an offence punishable under Section 3 TADA is clearly erroneous. In fairness to the learned counsel for the State, Mr Madhava Reddy, Senior Advocate, we must also record that he conceded that in the facts and circumstances of the case and keeping in view the law laid down by the Constitution Bench in Kartar Singh case and Hitendra Vishnu Thakur case no offence under Section 3 of TADA could be said to have been committed by the appellants. The conviction and sentence of the appellants for the offence under Section 3 TADA cannot therefore, be sustained and is hereby set aside.

**Supreme Court of India
1999 (5) SCC 682**

**Balbir Singh and Another
vs
State of Uttar Pradesh**

G.B. Pattanaik, M.B. Shah, JJ

1. These two appellants have been convicted by the learned Designated Judge, Lakhimpur Kheri under Sections 124-A, 153-A IPC and Section 4 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 on the allegation that on 14-11-1985 at 10.30 a.m. they were found to be hearing some cassettes containing the speech of Sant Jarnail Singh Bhinderwala. The so-called speech of Bhinderwala has been quoted in the impugned judgement. To attract Section 4 of TADA, it is obligatory for the prosecution to establish that the accused committed or conspired or attempted to commit or abetted, advocated, or advised or knowingly facilitated the commission of any disruptive activity or any act preparatory to a disruptive activity. The expression "disruptive activity" has been defined in sub-section (2) of Section 4 of TADA. From the entire prosecution evidence established in this case, we really fail to appreciate how it can be said that the prosecution has been able to establish the charge under sub-section (1) of Section 4 of TADA. There is not an iota of evidence to indicate that the accused appellants either committed or conspired or attempted to commit or abetted or advocated or advised or knowingly facilitated the commission of any disruptive activity.
2. In the aforesaid circumstances, the offence under Section 4(1) of TADA cannot be said to have been established beyond reasonable doubt to convict the appellants under Section 4(1) of TADA. Similarly, we are also satisfied that no offence can be said to have been committed either under Section 124-A or Section 153-A of IPC. We, therefore, set aside the conviction and sentence passed against the appellants and acquit them of the charges levelled against them. The appeal is, accordingly, allowed.

**Supreme Court of India
1999 (2) SCC 45**

**Kishore Prabhakar Sawant and Others
vs
State of Maharashtra**

G.T. Nanavati, S. Rajendra Babu, JJ

1. This appeal was filed by three appellants. Kishore, Appellant 1 died on 21-11-1998 and therefore his appeal has abated. The appeal by appellants Dinesh and Hemant only now survives.
2. The appellants along with Kishore (now dead) and one Subhash Gawade were tried by the Designated Court for Greater Bombay for offences punishable under Sections 120-B, 307 read with Section 34 and Section 307 read with Section 114 of IPC, Section 3 read with Section 25(1-B)(a) and Section 5 read with Section 27 of the Arms Act, 1959 and Sections 3(2)(ii), 3(3), 3(5), 5 and 6 of the TADA Act, 1987. Subhash Gawade died during the pendency of the trial before the Designated Court. All those accused were alleged to be members of the gang of dreaded gangster Arun Gawli. It was also alleged that the said gang is involved in collecting "khandani" from innocent persons under the garb of protection money. It was the prosecution case that on 28-2-1993, Subhash Gawade had telephoned PW 3 Himmatal Dholakia and demanded Rs. 5 lakhs from him as "khandani". The said demand was repeated three to four times thereafter. Again on 2-3-1993 in the afternoon, while Himmatal Dholakia, was in his office, Subhash Gawade telephoned him and told him to keep ready Rs. 5 lakhs by 4.00 p.m. and that he would reach his office by that time. Himmatal instead of succumbing to the threat approached the police and lodged a complaint. A trap was arranged by the police. Himmatal was asked to stand near the gate of his office building known as "Gheewala Building". The police remained near about that place. At about 4.00 p.m., Subhash Gawade went there on a scooter. After parking it, he started walking towards Himmatal. Soon thereafter, the two appellants and Kishore came there in an autorickshaw. Immediately after alighting from it, Subhash Gawade fired a shot in the air and shouted in Marathi and Hindi (translated into English by the Court) that: "None should dare to come forward and if anyone does so, he will be done away with. Did you not recognise me ?" The police immediately swung into action and was

able to overpower and arrest them even though an attempt was made by Subhash Gawade to run away and had also fired one more shot while doing so.

3. At the trial, prosecution relied mainly upon the evidence of three eyewitnesses, PW 6 Tapasi who had arranged the raid, PW 3 Himmatal who had been threatened and PW 1, the Constable who had accompanied Tapasi, to prove its case. Tapasi deposed about the incident and also about the recovery of weapons and other articles from the spot. The Designated Court after appreciating the evidence held that their evidence was believable and that their evidence established that Kishore had committed the offence punishable under Section 5 of the TADA Act and also under Section 25(1-B)(a) of the Arms Act. The appellants Dinesh and Hemant were found to have committed the offence punishable under Section 3(2)(ii) of the TADA Act. They were convicted accordingly and sentenced to suffer imprisonment for five years and to pay a fine of Rs. 500 each.
4. Learned counsel for the appellants has challenged the conviction of these appellants on the ground that the version of the eyewitnesses is not believable at all and even if their evidence is believed, it does not constitute the offence punishable under Section 3 of the TADA Act.
5. We have carefully gone through the evidence of the three eyewitnesses and we find that their evidence has remained unshaken. It does not suffer from such infirmity as would create any doubt regarding its acceptability. Himmatal had no reason to falsely involve the accused. It is highly improbable that he would have done so at the instance of the police or anyone else, knowing fully well whom he was accusing. The material on record does not show that he was in any way connected with the police. No good reason could be advanced by the learned counsel for the appellants for not accepting the evidence regarding their having been caught at the spot. As the appellants were caught on the spot, the question of their identity does not arise. Even after lengthy cross-examination of the three eyewitnesses, the defence was not able to establish anything that can create a doubt regarding involvement of the appellants and the other co-accused. If the evidence is believed, it can be said with reasonable certainty that what they did amounted to commission of a terrorist act. As a result of what they did, the nearby shopowners closed their shops and went away. Passers-by on the road had run away from that place, though some remained at that place. Public tranquillity was thus disturbed. The way the appellants behaved clearly indicates that they wanted to create fear in the mind of Himmatal and the persons present at the place of the incident. It was a busy public road. In view of the facts and circumstances

established by the prosecution, it can be said without any doubt that the intention of the accused was to create terror so that they could carry on their terrorist activity in future also without being opposed by members of the public. We are, therefore, of the view that the conviction under Section 3 is quite legal and proper. The appeal is, therefore, dismissed.

**Supreme Court of India
1997 (4) SCC 156**

**Paramjit Singh and Others
vs
State of Punjab and Others**

M.K. Mukherjee, S.P. Kurdukar, JJ

.....

4. At the outset, it may be stated that the entire prosecution case rested on circumstantial evidence. The prosecution, principally, relied upon two vital circumstances, (1) Sukhdev Singh was last seen together alive going along with both the accused (2) statement of Sukhdev Singh Ex. PD-1. In addition to the above, it also relied upon the evidence of formal witnesses and the medical evidence to prove the cause of death.
5. The Additional Judge, Designated Court, on appraisal of oral and documentary evidence on record held that the prosecution proved both the vital circumstances mentioned hereinabove as also other circumstances which complete the chain of circumstantial evidence. Consistent with these findings, the trial court convicted A-2 under Section 302 of the Indian Penal Code whereas A-1 under Sections 302/34 of the Indian Penal Code and sentenced each one of them to suffer imprisonment for life and to pay a fine of Rs. 1000 and in default RI for one year. Both the appellants were also convicted under Section 397 of the Indian Penal Code and were sentenced to suffer RI for seven years and to pay a fine of Rs. 2500 and in default six months' RI. Both the accused were also convicted under Section 3 of TADA and each of them was awarded imprisonment for five years and a fine of Rs. 2500 or in default six months' RI. All the substantive sentences were ordered to run concurrently. Out of the amount of fine as and when realised, half of it shall be paid to the widow of Sukhdev Singh. Aggrieved by this order of conviction and sentence, the appellants have preferred the appeal under Section 19 of TADA to this Court.
6. Before we deal with these two important circumstances, it may be stated that the learned counsel for the appellants did not and could not seriously challenge the fact that Sukhdev Singh met with a homicidal death. We, therefore, do not think it necessary to set out in detail the evidence of Dr. Jagjir Kumar (PW 9) who held the autopsy on the dead body of Sukhdev Singh and prepared the post-mortem examination report Ex.

PB-1. Suffice it to mention that according to Dr. Jagbir Kumar, Sukhdev Singh sustained as many as five injuries, of which, spinal injury was caused by firearm and the cause of death was shock due to the said spinal injury. All these injuries were ante-mortem. The spinal injury was possible with shotgun since there were pellets. During the cross-examination, he stated that bullet comes out of revolver, stengun and pistol whereas pellets are from shotguns. In view of this medical evidence, we have no hesitation in upholding the finding of the trial court that Sukhdev Singh died a homicidal death. We, accordingly do so.

7. Coming to the first vital circumstance, namely, Sukhdev Singh was last seen alive in the company of the appellants and in order to prove this fact, prosecution strongly relied upon the evidence of Mohinder Singh (PW 4) and Madan Lal, PC (PW 5). Both the witnesses undoubtedly stated on oath that on 23-3-1991, when they were on patrolling duty along with Sukhdev Singh, the appellants came and asked Sukhdev Singh to come along with them to find out a room on rent and also share a drink. Saying so, Sukhdev Singh left the patrolling duty and went along with the appellants. We have gone through the evidence of both these witnesses very carefully and we do not feel it safe to accept the same as a credible one. The main reason for discarding their evidence is that their statements under Section 161 of CrPC came to be recorded on 8-8-1991 after about four and a half months. No explanation whatsoever was given by the Investigating Officer Gurmeet Singh (PW 11) as to why their statement should not be recorded earlier. Both these witnesses were members of the patrolling duty and even after knowing that on 22-3-1991, Sukhdev Singh left along with the appellants and was admitted in the hospital in an injured condition, they did not come forward to tell about this fact. It is in these circumstances, we do not feel it safe to accept their evidence on this vital circumstance, namely, Sukhdev Singh was last seen alive in the company of the appellants.
8. The next circumstance strongly relied upon by the prosecution to prove the complicity of both the appellants was the alleged dying declaration Ex. PD-1 of Sukhdev Singh recorded by SHO Jagjit Singh (PW 6) on 22-3-1991 between 8.30 and 9.00 p.m. Jagjit Singh (PW 6) testified that on 22-3-1991, he was posted as an Inspector/SHO, Police Station Sadar, Patiala and on that day, he along with SI Kuldip Singh and other police officials were going in the area of Bahadurgarh, Seel Road, in connection with patrolling duty and investigation of a case bearing FIR No. 76/91, PS Sadar, Patiala. He saw Sukhdev Singh, HC in an injured condition lying on the roadside. He lifted him by giving support and made inquiries. Sukhdev Singh made the statement Ex. PD-1 which

he recorded and forwarded the same to the Sadar Police Station for recording formal FIR. Accordingly, an FIR was registered Ex. PD-2. Sukhdev Singh in his statement Ex. PD-1 stated that when he was posted at PAP, Bahadurgarh as Hawaldar and was on patrolling duty on 22-3-1991, along with Constable Mohinder Singh (PW 4) and Madan Lal, PC (PW-5) at about 8.00 p.m., Paramjit Singh (A-1) and Satnam Singh (A-2) came near the gate of Escort and Goetze Factory, Bahadurgarh, whom, he was knowing earlier. They told him that if he needed a room on hire, they would provide the same and they would sit somewhere to have the snacks. Accordingly, he went along with them to Seel Road and when they reached near Mandirwali Pulli, A-2 took out the revolver from his dub and fired at him. He sustained a firearm injury and fell down. Thereafter, A-2 and A-1 took away his stengun No. 20261, Batt No. 86, two magazines and cartridges and ran away. He lay there for a long time. No one came to him due to firearm injury sustained by him. The market was already closed but the outer lights of the shops were on. A-1 and A-2 in connivance with each other with the intention to kill him and snatch the arms and ammunition brought him to the place of occurrence and fired at him. He was unable to sign as his hands were shrinking. This complaint be recorded and action be taken.

9. Jagjit Singh (PW 6) in his evidence stated that he recorded the statement of Sukhdev Singh in his own words and since his injuries were bleeding, he was shifted to Rajendra Hospital, Patiala. On the way, he became semi-unconscious and did not regain consciousness till he died on 2-5-1991. Dr. R. P. Jindal (PW 3) who was then Registrar at Rajendra Hospital, Patiala, examined Sukhdev Singh and gave the necessary medical treatment. As regards the entries in the medical papers at Rajendra Hospital, separate reference would be made in a short while. This witness was cross-examined at great length and after going through his evidence and the contents of the dying declaration Ex. PD-1, neither the said evidence nor the contents of the dying declaration inspire confidence in us to accept the same as credible and truthful. Jagjit Singh (PW 6) admitted in his evidence that after recording the dying declaration of Sukhdev Singh, he became semi-unconscious and was unable to speak. He further admitted that he did not record his remarks on the dying declaration that the maker was in a fit condition to make such a statement. Dr. Jagjir Kumar (PW 9) had stated that Sukhdev Singh had sustained pellet injury on his spinal cord. Having regard to the medical evidence and the admission of Jagjit Singh (PW 6) that after recording the dying declaration Ex. PD-1, Sukhdev Singh became semi-unconscious, it would be totally unsafe to accept the testimony of this witness to hold that Sukhdev Singh

was in a fit condition to make the dying declaration. Moreover, the contents and the manner in which all minor details were alleged to have been given by the injured Sukhdev Singh in his dying declaration does not inspire confidence in us to accept it as truthful. For instance, the dying declaration apart from giving the names of his two colleagues, it mentioned their buckle numbers and how he was tempted to go along with both the appellants. The maker despite such a serious injury to the spinal cord mentioned the stengun No. 20261 including Batt No. 86. We have very carefully gone through the dying declaration Ex. PD-1 and we are satisfied that the said document cannot be accepted as a true dying declaration of Sukhdev Singh and we will not be unjustified if we call it a "concocted document". If this dying declaration Ex. PD-1 is left out of consideration, there is hardly any evidence to connect the appellants with the present crime.

10. Coming to the entries the medical papers and the bed head ticket at Rajendra Hospital, what surprises us was the entry made on these papers as "accidental". It is not at one place such an "accidental" entry was made but also at three other places. Dr. R. P. Jindal (PW 3), Registrar, Rajendra Hospital, Patiala, had stated that he did not make these entries but he was also unable to account for the same. Surprisingly, the learned trial Judge expected that the appellants were supposed to give explanation as to how the entry "accidental" was made in the medical papers. The entire approach of the learned trial Judge was totally erroneous on this aspect and no explanation whatsoever in this behalf could have been expected from the accused.
11. We have gone through the judgement of the learned trial Judge as well as other materials on record and we are satisfied that the prosecution has failed to prove both these vital circumstances and resultantly the conviction of the accused cannot be sustained.

**Supreme Court of India
2000 (4) SCC 454**

**Sagayam
vs
State of Karnataka**

S. Rajendra Babu, S. Saghir Ahmad, JJ

1. The appellant before us had been charged for offences under Sections 3 and 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 and under Section 307 read with Section 34 of the Indian Penal Code. The case is against the appellant and accused 2 (who was absconding and whose case was separated) who are rowdy elements and are so recorded in the police stations concerned. It is alleged that there are 17 cases registered against them the details of which are not forthcoming. On the charge-sheet being filed before the Jurisdictional Magistrate, he committed it to the Court of the Principal Sessions Judge at Kolar. Later, the case had been treated as one arising under TADA and filed by the Designated Court.
2. The appellant pleaded not guilty to the charges. The prosecution examined as many as 9 witnesses and the statement of the appellant under Section 313 CrPC is also recorded. The defence taken up by the appellant is that the case pleaded against him is totally concocted and the witnesses who are police personnel have given interested testimony. Witnesses other than police officers did not support the case of the prosecution. The witnesses PWs 2 to 5 and PWs 7 and 8 raided the premises of the appellant and conducted investigation at different stages. The Designated Court relying upon the evidence of 8 police officers and a confessional statement made under Exh. P-7 convicted the accused under Sections 3 and 5 of the TADA and Section 307 IPC and convicted him to undergo sentence of 5 years under TADA and 10 years under Section 307 IPC. Against the said conviction and sentence passed against the appellant, this appeal is filed.
.....
4. The evidence upon which the Designated Court relied is that the appellant in order to spread fear psychosis in the minds of the people stored lethal weapons in his house, besides committing acts of terror in the people or in the section of people by threatening many people like businessmen, autorickshaw drivers and others and forcibly snatching away money and valuables from them. In reaching this conclusion, the trial court relied upon Exh. P-7 made to a police officer. If the allegation made

against the appellant does not establish any of the acts under Section 3(1) of the Act to which we have adverted to above and all the acts attributed to him should have been done with the intent to cause any of the above four acts, that such requirement would be satisfied only if the dominant intention of the doer is to cause the aforesaid effect. It is not enough that the act resulted in any of the four consequences. In Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya ((1990) 4 SCC 76 : 1991 SCC (Cri) 47) it is stated that when the allegation was that the accused was alleged to have killed two persons for gaining supremacy in the underworld, a mere statement to the effect that the show of such violence would create terror or fear in the minds of the people and none would dare to oppose them, cannot constitute an offence under Section 3(1) of the Act. The consequence of such violence is bound to cause panic and fear but the intention of committing the crime cannot be said to be to strike terror in the people or any section of the people. In Hitendra Vishnu Thakur v. State of Maharashtra ((1994) 4 SCC 602 : 1994 SCC (Cri) 1087) this Court noticed the distinction between the act done with the requisite intent and another act which had only ensued such consequences. In that decision, it is further noticed that a terrorist activity is not confined to unlawful activity or crime committed against the individual or individuals, but it aims at bringing about terror in the minds of the people or a section of people disturbing public order, public peace and tranquillity, social and communal harmony, disturbing or destabilising public administration and threatening security and integrity of the country. Thus, the legal position is that whether the act was done to overawe the Government as by law established and to strike terror in people or any section of the people, etc. If we examine the statements made by the witnesses, who are police officers, in this light it is clear that it is only to the effect of recovering certain arms or materials which can be used as lethal weapons and are vague allegations of extortion or robbery. Though statements have been made that the appellant used to extract money from public by wielding a knife so as to threaten people and is involved in many cases of other illegal activities that by itself would not lead to the conclusion that he has committed acts arising under Section 3 of the Act. Mere storing of certain weapons such as cycle chain, chopper would not also lead to the conclusion that the accused has committed these offences.

5. The sheet anchor of the prosecution case is the confessional statement Exh. P-7. It is stated by PW 7, Sri M. V. Murthy, Superintendent of Police that he recorded confessional statement after observing due formalities and administering due warning as required in law that the statement made by him may be used against him. The statement has been recorded in the question and answer form and even before he affixed his signature to the said statement, due warning is stated to have been again

administered to him that his statement may be used against him in evidence and even so he signed the same voluntarily. The confessional statement which is marked as Exh. P-7 indicates that he used to go to the mines and used to commit theft of gold and iron articles and he used to terrorise people with the help of his group of friends and used to forcibly collect money, gold jewels etc. from the passers-by and also from the businessmen; that he used to give threat to life along with his friends Janson, Raja Harry Aseer and his brother Thangam; that he also admitted that he used to store lethal weapons in his house such as 'katti' (knife or sword), cycle chains which were used to get money and he used to get the weapons by threatening the workshop-owners and used to collect cycle chains; that whenever any complaint was made against him, he used to destroy the property of the complainant and he used to harm the witnesses who would give evidence against him; that there are many cases against him and others in Andersonpet, Robertsonpet, Marikuppam and Championreefs Police Stations. Taking this entire statement as a whole, the acts attributed to the appellant do not amount to any terrorist activity answering the test to which we have adverted to earlier. Therefore, the charge framed against him under the TADA Act falls to the ground much less could the Designated Court have relied upon the so-called confessional statement recorded in terms of Section 15 of the TADA Act to come to such a conclusion.

6. To justify conviction under Section 307 IPC, it is not essential that bodily injury capable of causing death should have been inflicted. An attempt in order to be criminal need not be the penultimate act foreboding death. It is sufficient in law if there is present an intent coupled with some overt act in execution thereof, such act being proximate to the crime intended and if the attempt has gone so far that it would have been complete but for the extraneous intervention which frustrated its consummation. There are different stages in a crime. First, the intention to commit it; second, the preparation to commit it; third, an attempt to commit it. If at the third stage, the attempt fails, the crime is not complete but the law punishes for attempting the same. An attempt to commit crime must be distinguished from an intent to commit it or preparation of its commission.

.....
9. The ingredients of none of the sections arising under the TADA or in the IPC have been established. We find the prosecution case does not hold water and cannot stand scrutiny much less a close one. Therefore, we set aside the conviction recorded against the appellant and acquit him of all the charges framed against him. If he is in jail serving sentence, he shall be set at liberty at once unless he is required in any other case.

Supreme Court of India
2003 (4) SCALE 428
Yusuf @ Babu Khan
vs
State of Rajasthan

N. Santosh Hegde and B.P. Singh, JJ.

-
2. The prosecution case, briefly stated, is that on 10.11.1990, when PW-4, Jagdish Narain, ASI, the incharge of the Highways police checking along with his colleagues received a wireless message that a maruti van which had met with an accident, had got away without stopping, therefore, these police were on the look out for the said van. It is stated that in the midnight at above 12.25 a.m., a maruti van bearing no. CIW-17 came from Jaipur-Sikandara side, the abovesaid police signalled to stop the said van and on checking the same, they found 4 cartons of gelatine and 31 packets of electronic detonators. The four appellants named above were the occupants of that van. They did not have any licence to carry the said explosives, hence, the van with the explosives was seized and the accused person were taken into custody. A case under sections 4 to 6 of the Explosive Substances Act, 1908 was registered in FIR no. 195/90. Subsequently it came to the knowledge of investigation agency that the place where the explosive material was seized, was a notified area declared under section 2(1)(f) of the TADA Act, hence, the provisions of the said Act were also invoked. After completing the investigation, a chargesheet was filed against the appellant and the TADA Court which tried the appellants after considering the material on record, accepted the prosecution case and convicted the appellants, as stated above. The appellants are therefore before us in these appeals. Even though many questions involving the facts are raised in these appeals, we are of the opinion that these appeals could be disposed of on a short point argued by the learned counsel for the appellants.
 3. It is considered on behalf of the appellants that the foundation of the prosecution case was that these appellants were found traveling in a maruti van bearing no. CIW-17 which came from Jaipur Sikandara side to the checkpost and on stopping the vehicle and checking the same, the explosives in question were found. But this very material circumstance was not put to the accused persons when their statements were recorded under section 313 Cr. P.C. which is an omission which goes to the root of the prosecution case. Learned counsel argued that the omission on the part of the

prosecution to comply with this mandatory requirement of law had vitiated the entire trial, therefore, they are entitled to an acquittal. The learned counsel in support of this contention of their relied upon the judgements of this court in Jaidev and Anr. v. State of Punjab, 1963(3) S.C.R. 489, Harijan Megha Jesha v. State of Gujarat A.I.R. 1979 S.C. 1566 and State of Maharashtra v. Sukhdeo Singh and Anr. 1992 Crl. L.J. 3454.

.....

6. We have already noticed the fact that the entire prosecution case is based on the circumstance that these appellants were found in a maruti van from which the explosives were seized. If they were not found in the van, there is no other material to connect them with the said explosives, therefore, without the said circumstances it will not be possible for the prosecution to establish the accusations against these appellants. Therefore, this circumstance become so material that the omission of which would go to the root of the prosecution case, and benefit of which omission would naturally go to the accused, therefore, any conviction in spite of such omission is per se contrary to the requirement of law, therefore, prejudice is inherent on the face of the record, hence, there is no need to establish the said prejudice by any other material on record. As stated above, without the said circumstance which is not put to the accused persons there can be no conviction.
7. Having considered the material on record we are of the opinion that the omission to put the circumstance that these appellants were found in a maruti van in which the explosives were found is such a material omission which has gone to the root of the prosecution case and which has prejudiced the defence of the appellants hence has vitiated the trial. The question then is whether we should accede to the request of learned counsel for the state by remanding the matter to the TADA court for fresh trial from the stage prior to stage at which the statements of the accused were recorded under section 313 of the Code. We have considered the material on record. The incident in question dated back to the year 1990 and the only circumstance connecting the accused with the crime is the fact that they were found in the van with the explosives and there being no other charges especially connecting the accused of involvement in any other terrorist activity, we think in the interest of justice, we should put an end to these proceedings, hence, we are not inclined to remand this case for fresh trial. In that view this prayer of the learned counsel is also rejected.
8. Consequently, these appeals are liable to be allowed and the judgement and conviction award by the designated court is set aside. The appellants are on bail, their bail bonds shall stand discharged.

**Supreme Court of India
2003 (6) SCC 641**

**State
vs
Navjot Sandhu**

S.N. Variava, Brijesh Kumar, JJ

.....

3. On 13.12.2001, five terrorists attacked the Parliament of India. After an encounter with the security forces, the five terrorists were shot dead.....

It is the case of the prosecution that the interception disclosed the involvement of the respondents in the conspiracy to attack the Parliament of India.....

4. On 8.7.2002 the respondents applied before the Special Judge seeking a direction that the intercepted conversation not be used as evidence in the trial for proving the charge(s) under POTA. The procedure which the Special Judge should have followed is as laid down by this Court in the case of *Bipin Shantilal Panchal v.State of Gujarat* as under:

"15. The above procedure, if followed, will have two advantages. First is that the time in the trial court, during evidence-taking stage, would not be wasted on account of raising such objections and the court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior court, when the same objection is recanvassed and reconsidered in appeal or revision against the final judgement of the trial court can determine the correctness of the view taken by the trial court regarding that objection, without bothering to remit the case to the trial court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.

16. We, therefore, make the above as a procedure to be followed by the trial courts whenever an objection is raised regarding the admissibility of any material or any item of oral evidence."

Had the Special Judge followed the above dictum no prejudice would have been caused to the respondents inasmuch as their arguments / objections would have been decided at the stage of final hearing. If the court was in their favour the evidence could have been eschewed and not considered. Any decision given at that stage could then

have been challenged in the appeal under section 34 POTA. Ignoring the above dictum the Special Judge chose to hear detailed arguments and by his order dated 11.7.2002, dismissed the applications. The Special Judge held that the evidence collected by various police officials when the case was registered under different provisions of law cannot be washed away merely because the provisions of POTA were added on 19.12.2001. The Special Judge held that the provisions of POTA had to be followed only if the investigation was done under the provisions of POTA. By dictating an order and passing the interlocutory order the Special Judge enabled the respondents to adopt the course that they have. This has resulted in a peculiar situation where two Judges of the High Court, hearing the statutory appeal under section 34 POTA, may be precluded from deciding an important point of law by an order passed by a Single Judge of the High Court.

5. Thereafter the trial proceeded. The evidence was recorded / taken.
6. The respondent Ms. Navjot Sandhu filed Criminal Writ Petition No. 774 of 2002. On 22.7.2002, the following order was passed therein:

"Learned counsel for the petitioner wishes to withdraw this petition in order to take appropriate action in accordance with law. Leave as prayed for is granted."

Crl. W.No. 774 of 2002 and Crl. M.No. 588 of 2002 are accordingly disposed of."

7. Respondent Ms. Navjot Sandhu then filed Criminal Misc. No. 2331 of 2002 under section 482 of the Criminal Procedure Code read with Articles 226 and 227 of the Constitution of India seeking quashing of the order dated 11.7.2002 of the Special Judge.

.....

11. By the impugned judgement the High Court has disposed of all the above petitions / applications. The High Court has not mentioned whether it was exercising its power of superintendence under Article 227 of the Constitution of India or its inherent power under section 482 of the Criminal Procedure Code. The question thus arises as to what power or jurisdiction the High Court has exercised. The only source of power, which might have been used / invoked was either under Article 227 of the Constitution of India or the inherent power under Section 482 of the Criminal Procedure Code. The further question, which then arises is whether, on the facts of this case, the High Court could or should have exercised power under Article 227 or jurisdiction under section 482.

12. For a consideration of these questions, it is first necessary to note the stage at which the trial was when the impugned judgement was delivered. This is best indicated by reproducing herein a relevant paragraph from the impugned judgement. The paragraph reads as follows:

"I am told that in the meantime the prosecution evidence has been completed and the trial of the case is at its fag end. Therefore, it will be appropriate that this Court restricts the decision on the legal points which are absolutely necessary to decide leaving all other objections raised in these petitions to be canvassed before the trial court for consideration at the time of the final decision."

13. As being set out hereafter there is no legal point, which was "absolutely necessary" to be decided at that stage.

.....

28. Thus the law is that Article 227 of the Constitution of India gives the High Court the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. This jurisdiction cannot be limited or fettered by any Act of the State Legislature. The supervisory jurisdiction extends to keeping the subordinate tribunals within the limits of their authority and to seeing that they obey the law. The powers under Article 227 are wide and can be used, to meet the ends of justice. They can be used to interfere even with an interlocutory order. However the power under Article 227 is a discretionary power and it is difficult to attribute to an order of the High Court, such a source of power, when the High Court itself does not in terms purport to exercise any such discretionary power. It is settled law that this power of judicial superintendence, under Article 227, must be exercised sparingly and only to keep subordinate courts and tribunals within the bounds of their authority and not to correct mere errors. Further, where the statute bans the exercise of revisional powers it would require very exceptional circumstances to warrant interference under Article 227 of the Constitution of India since the power of superintendence was not meant to circumvent statutory law. It is settled law that the jurisdiction under Article 227 could not be exercised "as the cloak of an appeal in disguise".

29. Section 482 of the Criminal Procedure Code starts with the words "Nothing in this Code". Thus the inherent jurisdiction of the High Court under section 482 of the Criminal Procedure code can be exercised even when there is a bar under section 397 or some other provisions of the Criminal Procedure Code. However, as is set out in *Satya Narayan Sharma* case this power cannot be exercised if there is a statutory bar in some other enactment. If the order assailed is purely of an interlocutory character,

which could be corrected in exercise of revisional powers or appellate powers the High Court must refuse to exercise its inherent power. The inherent power is to be used only in cases where there is an abuse of the process of the court or where interference is absolutely necessary for securing the ends of justice. The inherent power must be exercised very sparingly as cases, which require interference would be few and far between. The most common cases where inherent jurisdiction is generally exercised is where criminal proceedings are required to be quashed because they are initiated illegally, vexatiously or without jurisdiction. Most of the cases set out hereinabove fall in this category. It must be remembered that the inherent power is not to be resorted to if there is a specific provision in the Code or any other enactment for redress of the grievance of the aggrieved party. This power should not be exercised against an express bar of law engrafted in any other provision of the Criminal Procedure Code. This power cannot be exercised as against an express bar in some other enactment.

30. This being the law, let us now see whether the High Court was right in interfering at this stage. As has been set out hereinabove, by the time the High Court delivered the impugned judgement the evidence, objected to, had already been recorded. The order dated 11.7.2002 was clearly an interlocutory order. Section 34 POTA clearly provides that no appeal or revision would lie to any court from an order, which was an interlocutory order. As stated above, the impugned order is a common order in all applications / petitions. Respondent Geelani had filed an appeal under section 34 POTA. Merely because he chose to invoke section 482 of the Criminal Procedure Code did not mean that his application was not an appeal. Clearly the High Court could not have interfered at this stage. The High Court has not indicated that it was exercising power of superintendence under Article 227. Such a power being a discretionary power, it is difficult to attribute to the order of the High Court such a source of power. Even otherwise, in respect of respondent Geelani power under Article 227 could not have been invoked or exercised.
31. On facts of this case we find that the effect of the impugned order is that the statutory provision of Section 34 POTA has been circumvented. The impugned order has also led to the very peculiar situation set out hereinabove. To repeat, under section 34 POTA the appeal is to be heard by a Bench of two Judges of the High Court. An appeal under section 34 POTA is both on facts and on law. The correctness of the interlocutory order could, by virtue of section 34 POTA, have been challenged only in the appeal filed against the final judgement. The respondents by filing the applications petitions and the learned Judge having chosen to entertain them, has

resulted in a party being deprived of an opportunity of canvassing an important point of law in the statutory appeal before the Division Bench. The peculiar situation is that the Division Bench, hearing a statutory appeal (both on law and facts) is bound / constrained by an order of a Single Judge. The order of the Special Judge is based on an interpretation of the various provisions of POTA. The Special Judge undoubtedly had authority and jurisdiction to interpret the various provisions of POTA and other laws. The Special Judge had jurisdiction to decide whether the evidence collected by interception could be used for proving a charge under POTA. The Special Judge was acting within the limits of his authority in passing the impugned order. We are told that before the Single Judge of the High Court the arguments, by both sides, went on for approximately two weeks. Even before us considerable time was taken. This is being mentioned only to indicate that the question is no so clear. It requires interpretation of various provisions of POTA. Neither the power under Article 227 nor the power under section 482 enabled the High Court to correct an error in interpretation even if the High court felt that the order dated 11.7.2002 was erroneous. Even if the High Court did not agree with the correctness of that order, the High Court should have refused to interfere as the order could be corrected in the appeal under section 34 POTA. To be remembered that by the time the impugned order was passed the evidence had already been recorded. Thus there was no abuse of process of court, which could now be prevented. Even the ends of justice did not require interference at this stage. In fact the ends of justice required that the statutory intent of Section 34 POTA be given effect to. The High Court should have directed the respondents to raise all such points in the statutory appeal, if any, required to be filed under Section 34 POTA. If in the appeal the Division Bench felt that the order was not correct or that it was erroneous it would set aside the order, eschew the evidence and not take the same into consideration. Thus no prejudice was being caused or would be caused to the respondents. Their rights were fully protected as per the provisions of POTA and other laws. At this stage, there was no miscarriage of justice or palpable illegality, which required immediate interference. We are therefore of the opinion that even if powers under Article 227 or under Section 482 could have been exercised this was a case where the high Court should not have exercised those powers.

32. It was submitted that the prosecution had not raised the point of maintainability of the applications /petitions before the High Court. It was submitted that the prosecution chose to argue on merits before the High Court and therefore they should now not be permitted to raise these contentions before this Court. It does appear that the

question of maintainability was not argued before the High Court. However, we are informed that Section 34 POTA was brought to the notice of the High Court. The High Court was also aware that, by the time it heard the matter, the evidence had already been recorded and the trial had reached the final stage. On the abovementioned settled law the High Court should have on its own refused to interfere and should have left the parties to agitate their contentions in the appeal to be filed under section 34 POTA.

33. It must be mentioned that before us also arguments on merits were made. At one stage, this Court did consider giving a decision on merits. However on a proper consideration of the matter it appears to us that to give a decision on merits would be to perpetrate the mistake committed by the High Court. It would result in depriving one or the other party of a valuable right of agitating the point in the statutory appeals, which are at present going on before the Division Bench of the High Court. We therefore refrain from expressing any opinion on merits. We clarify that all parties will be free to urge all questions in the pending appeals before the Division Bench of the High Court.

Supreme Court of India
2003 (8) SCC 50
State of Gujarat
vs
Salimbhai Abdul Gaffar Shaikh and Others

S. Rajendra Babu, G.P. Mathur, JJ

1. These appeals arise on a certificate granted by the Gujarat High Court under Article 134-A read with Article 134(1)(c) of the Constitution in the matter of grant of bail to the respondents.
2. Raising a preliminary objection, Shri Amarendera Sharan, learned Senior Advocate submitted that an appeal will lie to this Court from any judgement, final order or sentence in a criminal proceeding of a High Court on a certificate being granted in terms of Articles 134(1)(c) and 134-A of the Constitution; that, an order made in a proceeding arising out of an application for grant of bail is not a judgement, final order or sentence; that a judgement would mean any decision which terminates a criminal proceeding pending before the court and excludes an interlocutory order; that, in a criminal proceeding an order on an application for bail is not a final order; that, the order in question is neither a final order nor imposes a sentence; that therefore, the certificate issued by the High Court should be cancelled and the appeal should be treated as incompetent.
3. There seems to be force in the contentions urged by the learned Senior Advocate on behalf of the respondents but the settled practice of this Court is that if on the face of it this court is satisfied that the High Court has not properly exercised the discretion under Article 134(1)(c), the matter may either be remitted or this Court may exercise that discretion itself or treat the appeal as one under Article 136 (*Nar Singh Vs. State of U.P. and Baladin Vs. State of U.P.2*). Therefore, we do not propose to examine this aspect of the matter any further but treat this appeal as a proceeding arising under Article 136 of the Constitution.
5. A ghastly incident took place at about 7.45 a.m. on 27.2.2002 when Sabarmati Express was stopped near Godhra Railway Station and a coach was set on fire resulting in the death of 59 persons and serious injuries to 48 others. An FIR was lodged on the basis

of which a case was registered as CR No. I-09 of 2002 under sections 143, 147, 148, 149, 337, 338, 435, 120-B, 34, 153-A, 302, 307 IPC, Sections 141, 151, 152 of the Indian Railways Act, Sections 3 and 4 of the Prevention of Damage to Public Property Act and Section 135(1) of the Bombay Police Act. After investigation, charge sheets were submitted against the accused involved in the case but it was specifically mentioned therein that investigation was still continuing. The respondents who are accused in the case moved separate bail applications, which were rejected by the Additional Sessions Judge, Panchmahals at Godhra on different dates between 18.1.2003 and 30.1.2003. Thereafter bail applications under section 439 CrPC were filed before the High Court. On the basis of the facts revealed as a result of further investigation, the prosecution came to the conclusion that offences under sections 3(2) and (3) and section 4 of the Prevention of Terrorism Act (for short "POTA") had also been committed and accordingly, took appropriate steps for including the aforesaid offence. A counter-affidavit was filed on behalf of the State on 5.3.2003 before the High Court wherein it was averred that after filing of the charge sheets, further evidence had been collected which revealed commission of offences under sections 3 and 4 of POTA and applications had already been moved on 19/2/2003 in the court of Additional Sessions Judge and JMFC (Railway Court), Godhra for adding Sections 3(2) and (3) and section 4 of POTA to the main charge-sheet dated 22.5.2002 as well as the supplementary charge sheets dated 20.9.2002 and 19.12.2002. The accused who were in judicial custody were also informed about the aforesaid development that POTA had been applied against them. It was pleaded in the counter-affidavit that the accused-respondents should first approach the Special Court for grant of bail under POTA and they could approach the High Court only after decision on the said matter. It was submitted that in view of the specific provisions of POTA, the learned Single Judge, who was in seisin of the matter had no jurisdiction to hear the bail application. The High Court, by a detailed order dated 4.7.2003, allowed all the bail applications and directed that the respondents be released on bail in connection with CR No. I-09 of 2002 registered with Godhra Railway Police Station. Certificate under Article 134-A read with Article 134(1)(c) of the Constitution of India was granted by the High Court on the prayed made by the State.

.....

7. In order to examine the contention raised by the learned counsel for the appellant, it is necessary to take note of Section 34 of POTA which reads as under:

"34.(1) Notwithstanding anything contained in the Code, a appeal shall lie from any

judgement, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.

* * *

- (2) *Every appeal under sub-section (1) shall be heard by a Bench of two Judges of the High Court.*
- (3) *Except as aforesaid, no appeal or revision shall lie to any court from any judgement, sentence or order including an interlocutory order of a Special Court.*
- (4) *Notwithstanding anything contained in sub-section (3) of Section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.*
- (5) *Every appeal under this section shall be preferred within a period of thirty days from the date of the judgement, sentence or order appealed from:*

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days."

.....

10. Sub-section (4) of Section 34 of POTA provides for an appeal to the High Court against an order of the Special Court granting or refusing bail. Though the word "appeal" is used both in the Code of Criminal Procedure and the Code of Civil Procedure and in many other statutes but it has not been defined anywhere. Over a period of time, it has acquired a definite connotation and meaning which is as under:

"A proceeding undertaken to have a decision reconsidered by bringing it to a higher authority, especially the submission of a lower court's decision to a higher court for review and possible reversal.

An appeal, strictly so-called, is one in which the question is, whether the order of the court from which the appeal is brought was right on the material which the court had before it.

An appeal is removal of the cause from an inferior to one of superior jurisdiction for the purposes of obtaining a review or retrial.

An appeal, generally speaking, is a rehearing by a superior court on both law and fact."

11. Broadly speaking, therefore, an appeal is a proceeding taken to rectify an erroneous decision of a court by submitting the question to a higher court, and in view of the express language used in sub-section (1) of Section 34 of POTA the appeal would lie both on facts and on law. Therefore even an order granting bail can be examined on merits by the High Court without any kind of fetters on its powers and it can come to

an independent conclusion whether the accused deserves to be released on bail on the merits of the case. The considerations which are generally relevant in the matter of cancellation of bail under sub-section (2) of Section 439 of the Code will not come in the way of the High Court in setting aside an order of the Special Court granting bail. It is, therefore, evident that the provisions of POTA are in clear contradiction with that of the Code of Criminal Procedure where no appeal is provided against an order granting bail. The appeal can lie only against an order of the Special Court and unless there is an order of the Special Court refusing bail, the accused will have no right to file an appeal before the High Court praying for grant of bail to them. Existence of an order of the Special Court is, therefore, a sine qua non for approaching the High Court.

.....

13. Section 20 of TADA contained an identical provision, which expressly excluded the applicability of section 438 of the Code but said nothing about section 439 and a similar argument that the power of the High Court to grant bail under the aforesaid provision consequently remained intact was repelled in Usmanbhai Dawoodbhai Menon Vs. State of Gujarat. Having regard to the scheme of TADA, it was held that there was complete exclusion of the jurisdiction of the high Court to entertain a bail application under section 439 of the Code. This view was reiterated in State of Punjab Vs. Kewal Singh.
14. That apart, if the argument of the learned counsel for the respondents is accepted, it would mean that a person whose bail under POTA has been rejected by the Special Court will have two remedies and he can avail any one of them at his sweet will. He may move a bail application before the High Court under section 439 CrPC in the original or concurrent jurisdiction, which may be heard by a Single Judge or may prefer an appeal under sub-section (4) of Section 34 of POTA, which would be heard by a Bench of two Judges. To interpret a statutory provision in such a manner that a court can exercise both appellate and original jurisdiction in respect of the same matter will lead to an incongruous situation. The contention is therefore fallacious.
15. In the present case, the respondents did not choose to apply for bail before the Special Court for offences under POTA and consequently, there was no order or refusal of bail for offences under the said Act. The learned Single Judge exercising powers under Section 439 read with Section 482 CrPC granted them bail. The order of the High Court is clearly without jurisdiction as under the scheme of the Act the accused can only file an appeal against an order of refusal of bail passed by the Special Court

before a Division Bench of the High Court and, therefore, the order under challenge cannot be sustained and has to be set aside. Even on merits, the order of the High Court is far from satisfactory. Though it is a very long order running into 87 paragraphs but the factual aspect of the case have been considered only in one paragraph and that too in a very general way.

16. The High Court has also invoked powers under Section 482 CrPC while granting bail to the respondents. Section 482 CrPC saves the inherent power of the High Court. The High Court possesses the inherent powers to be exercised *ex-debito justitiae* to do real and substantial justice for the administration of which alone courts exist. The power has to be exercised to prevent abuse of the process of the court or to otherwise secure the ends of justice. But this power cannot be restored to if there is a specific provision in the Code for the redressal of the grievance of the aggrieved party. (See *Madhu Limaye v. State of Maharashtra*.) There being a specific provision for grant of bail, the High Court clearly erred in taking recourse to section 482 CrPC while enlarging the respondents on bail.
17. In the result, the appeals are allowed and the order passed b the High Court granting bail to the respondents is set aside. Since the respondents have not approached the Special Court for grant of bail to them for offences under POTA, they should first invoke the jurisdiction of the said court, which shall dispose of the matter expeditiously without being influenced by any observation made by the High Court and any party feeling aggrieved thereby will have a right to prefer an appeal before the High Court in accordance with Section 34 of POTA.

**Supreme Court of India
1995 (1) SCC 684**

**State of West Bengal and Another
vs
Mohammed Khalid and Others**

S. Mohan, M.K. Mukherjee, JJ.

3. All these cases arise out of writ petitions filed in the High Court of Calcutta challenging the validity of sanction and taking cognizance of the cases against each of the respondents by the Designated Court under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as 'TADA'). A further challenge in the writ petition was also made to the 'vires' of TADA. The orders of sanction and taking cognizance were quashed. The challenge to the Act was not gone into since the same was pending at the relevant time before this Court.
4. To highlight the issue involved, it is enough if we advert to the facts in Criminal Appeal No. 328 of 1994 since CO No. 8377(W) of 1993, against which this appeal has been preferred, is the main case. The same decision was applied to Criminal Appeals Nos. 327 and 329 of 1994. The short facts are as under.
5. On the evening of 16-3-1993, an explosion occurred at or near Premises No. 267, B.B. Ganguly Street, Calcutta. 69 persons died, 5 of them died as a result of direct blast and 46 others were injured. The said premises and some other buildings adjoining it collapsed and/or were badly damaged.
6. A complaint was lodged on 17-3-1993 regarding this incident by Mr B.K. Chattopadhyay, Sub-Inspector attached to Bowbazar Police Station. This complaint was treated as first information report. On that basis, Case No. 84 dated 17-3-1993 was registered in the police station under Sections 120-B/436/326/307/302 Indian Penal Code and Sections 3 and 5 of the Explosive Substances Act. Having regard to the gravity of the offence, the Commissioner of Police, Calcutta passed an order that the case shall be investigated by a team of high-ranking police officials. In the course of investigation witnesses were examined, various seizures were made and confessions made by two of the accused, namely, Pannalal Jaysoara and Mohammed Gulzar were recorded by a learned Metropolitan Magistrate on 7-4-1993 and 19-5-1993 respectively. During investigations it appeared that materials had transpired for prosecuting the accused

under Sections 3 and 4 of TADA. On 3-5-1993, information to this effect was given to the learned Chief Metropolitan Magistrate, Calcutta. The learned Magistrate made a record of this fact and observed that the investigating officer might proceed to investigate offences under TADA.

7. Upon completion of investigation, the police obtained sanction to prosecute under Sections 3 and 5 of the Explosive Substances Act from the State Government. Sanction under Section 20-A(2) of TADA from the Police Commissioner was also obtained. The charge-sheet was submitted on 14-6-1993, well within 90 days as is spoken to under Section 167(2)(a)(i) of the Code of Criminal Procedure (hereinafter referred to as the 'Code').
8. The sanction to prosecute under Sections 3 and 5 of the Explosive Substances Act and the sanction under Section 20-A(2) were obtained on 11-6-1993. While granting sanction under Section 20-A(2) of TADA it was mentioned that the records were placed before the sanctioning authority for examination and perusal. It appeared that for the last 5/6 years accused Pannalal Jaysoara had been manufacturing bombs in the "Khaskhas" room on the first floor of 267, B.B. Ganguly Street, Calcutta as and when required by accused Mohammed Rashid Khan, first respondent in Criminal Appeal No. 328 of 1994. Accused Jaysoara was introduced to other accused, namely, Mohammed Abdul Aziz, first respondent in Criminal Appeal No. 329 of 1994 and Lala alias Parwez Khan. Death of 69 persons, serious injuries to 46 persons and complete destruction of a two-storeyed building and partial collapse of other two and damage to five more buildings were caused by the accused by an explosion caused by bombs and huge quantities of extremely dangerous nitro-glycerine-based explosives which experts have opined to be dangerous to life and property. The sanctioning authority mentioned inter alia that the intention of the accused was to strike terror in the people and/or to strike terror in a particular section of the people and/or to adversely affect the harmony amongst the Hindus and the Muslims. It was also mentioned the accused had conspired and prepared to commit disruptive activities. In the charge-sheet all the necessary ingredients under Sections 3(1) and 4 of TADA had been mentioned.
9. The first respondent, Mohammed Rashid Khan moved a writ petition under Article 226 of the Constitution of India making inter alia the following prayers: That the cognizance taken by learned Chief Metropolitan Magistrate, Calcutta, Respondent 7, in TADA Case No. 1 of 1993 arising out of Section 'H' (Bowbazar Police Station) Case No. 84 dated 17-3-1993 and all subsequent proceedings thereto are illegal, void and inoperative in law;

A writ in the nature of certiorari and/or an order of direction in the like nature commanding the respondents to transmit the records relating to TADA case pending before the said respondent to this Court;

A writ in the nature of prohibition and/or an order of direction in the like nature prohibiting the respondents and/or their agents and/or their subordinates from proceeding any further with the TADA case; A writ in the nature of mandamus to respondents to forbear from applying the provisions of TADA against him and from taking any action or step thereunder and to release the petitioner from custody forthwith.

10. A declaration was also prayed for that TADA is violative of the Constitution and is liable to be struck down. But the High Court by its impugned judgment held that TADA has been wrongly applied in the case and the orders of sanction and further taking cognizance by the Designated Court on 14- 6-1993 was not proper, legal and valid and the same was quashed and set aside.
11. Aggrieved by the impugned judgment, the State of West Bengal has preferred these criminal appeals.

....

39. Having regard to the arguments the following points arise for our determination:
 1. The scope of the jurisdiction of the High Court under Article 226 to interfere with:
 - (a) according sanction; and
 - (b) taking cognizance.
 2. Whether the order of sanction is bad in law for:
 - (a) non-application of mind;
 - (b) that it does not give reasons;
 - (c) that there is no mention that there is a breakdown of law enforcement machinery;
 - (d) it does not speak of conspiracy.
40. Section 20-A of TADA with regard to taking cognizance of offence postulates under sub-section (2), that no court can take cognizance of any offence under this Act without the previous sanction of the Inspector General of Police, or as the case may be, the Commissioner of Police.

41. Such a provision relating to sanction is not new under criminal jurisprudence. Section 132 of the Code provides for sanction. This section is a bar to the prosecution of police officers under Sections 129, 130 or 131. The object is to protect responsible public servants against the institution of possible vexatious and mala fide criminal proceedings for offences alleged to be committed by them while they are acting or purported to act as such in the discharge of their official duty.

42. Section 197 contains a similar sanction. The object of the section is to provide for two things, namely, (1) to protect government servants against institution of vexatious proceedings, and (2) to secure the well-considered opinion of a superior authority before a prosecution is lodged against them.

Similar provisions are found in other enactments, for example, Prevention of Corruption Act, 1947.

43. Similarly, when Section 20-A(2) of TADA makes sanction necessary for taking cognizance - it is only to prevent abuse of power by authorities concerned. It requires to be noted that this provision of Section 20-A came to be inserted by Act 43 of 1993. Then, the question is as to the meaning of taking cognizance. Section 190 of the Code talks of cognizance of offences by Magistrates. This expression has not been defined in the Code. In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word 'cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons.

44. Cognizance is defined in Wharton's Law Lexicon 14th Edn., at page 209. It reads:

"Cognizance (Judicial), knowledge upon which a judge is bound to act without having it proved in evidence: as the public statutes of the realm, the ancient history of the realm, the order and course of proceedings in Parliament, the privileges of the House of Commons, the existence of war with a foreign State, the several seals of the King, the Supreme Court and its jurisdiction, and many other things. A judge is not bound to take cognizance of current events, however notorious, nor of the law of other countries."

It has, thus, reference to the hearing and determination of the case in connection with an offence. By the impugned judgment the High Court has quashed the orders of sanction and the Designated Court taking cognizance in the matter.

45. Before we go into the merits it is desirable to determine the limitations of power of the High Court under Article 226 in this regard. In the State of *Maharashtra v. Abdul Hamid Haji Mohammed*, (1994) 2 SCC 664 after holding that the High Court in writ petition under Article 226 can interfere only in extreme cases where charges ex facie do not constitute offence under TADA it was held in paragraph 7 at pages 669-70 as under:

"The first question is : Whether the High Court was empowered in the present case to invoke its jurisdiction under Article 226 of the Constitution to examine the correctness of the view taken by the Designated Court and to quash the prosecution of the respondent under the TADA Act?

.... It is no doubt true that in an extreme case if the only accusation against the respondent prosecuted in the Designated Court in accordance with the provisions of TADA Act is such that ex facie it cannot constitute an offence punishable under TADA Act, then the High Court may be justified in invoking the power under Article 226 of the Constitution on the ground that the detention of the accused is not under the provisions of TADA Act. We may hasten to add that this can happen only in extreme cases which would be rare and that power of the High Court is not exercisable in cases like the present where it may be debatable whether the direct accusation made in conjunction with the attendant circumstances, if proved to be true, is likely to result in conviction for an offence under TADA Act. The moment there is a debatable area in the case, it is not amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution and the gamut of the procedure prescribed under TADA Act must be followed, namely, raising the objection before the Designated Court and, if necessary, challenging the order of the Designated Court by appeal in the Supreme Court as provided in Section 19 of TADA Act. In view of the express provision of appeal to the Supreme Court against any judgment, sentence or order, not being an interlocutory order of a Designated Court, there is no occasion for the High Court to examine merits of the order made by the Designated Court that the Act applies.

We have no doubt that in the present case wherein the High Court had to perform the laboured exercise of scrutinising the material containing the accusation made against the respondent and the merits of the findings recorded by the Designated Court holding that the provisions of TADA Act were attracted, there was sufficient indication that the writ jurisdiction of the High Court under Article 226 of the Constitution was not available. The ratio of the decisions of this Court in R.P Kapur, AIR 1960 SC 866 and Bhajan Lal, 1992 Supp (1) SCC 335 on which reliance is placed by Shri Jethmalani, has no application to the facts of the present case. There was thus no justification for the High Court in the present case to exercise its jurisdiction under Article 226 of

the Constitution for examining the merits of the controversy much less for quashing the prosecution of Respondent Abdul Hamid in the Designated Court for offences punishable under TADA Act." (emphasis supplied)

From the above quotation it is clear if there is a debatable area it is not amenable to writ jurisdiction under Article 226 of the Constitution of India and the gamut of the procedure prescribed under TADA must be followed including challenging the order of the Designated Court under Section

19. It is also clear that the High Court cannot perform a laboured exercise of scrutinising the materials.

62. The order of sanction, on the face of it, shows that the sanctioning authority had perused the police papers. The High Court had to necessarily accept these averments on their face value. The correctness or otherwise of the statement could be gone into only at the time of trial. This Court in *State of Bihar v. PP Sharma, IAS 1992 Supp (1) SCC 222*, already referred to, held as under: (SCC pp. 250-25 1, paras 27, 28 and 31),

"The sanction under Section 197 CrPC is not an empty formality. It is essential that the provisions therein are to be observed with complete strictness. The object of obtaining sanction is that the authority concerned should be able to consider for itself the material before the Investigating Officer, before it comes to the conclusion that the prosecution in the circumstances be sanctioned or forbidden. To comply with the provisions of Section 197 it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is desirable that the facts should be referred to on the face of the sanction Section 197 does not require the sanction to be in any particular form. If the facts constituting the offence charged are not shown on the face of the sanction, it is open to the prosecution, if challenged, to prove before the court that those facts were placed before the sanctioning authority. It should be clear from the form of the sanction that the sanctioning authority considered the relevant material placed before it and after a consideration of all the circumstances of the case it sanctioned the prosecution.

In the present case the investigation was complete on the date of sanction and police reports had been filed before the Magistrate. The sanctioning authority has specifically mentioned in the sanction order that the papers and the case diary were taken into consideration before granting the sanction. Case diary is a complete record of the police investigation. It contains total material in support or otherwise of the allegations. The sanctioning authority having taken the case diary into consideration before the grant of sanction it cannot be said that there was non-application of mind on the part of the sanctioning authority. It is nobody's case that the averment in the sanction order to the effect that case diary was taken into consideration by the competent authority, is incorrect. We, therefore, do not agree with the finding of the High Court and set aside the same. (emphasis supplied)

Finally, we are at a loss to understand as to why and on what reasoning the High Court assumed extraordinary jurisdiction under Articles 226/227 of the Constitution of India at a stage when the Special Judge was seized of the matter."

In view of this decision, the approach of the High Court under Article 226 is clearly wrong.

63. It is true, as contended by Mr Ram Jethmalani, there must be valid sanction, otherwise there is a bar to take cognizance. In *Gokulchand Dwarkadas Morarka v. King*, AIR 1948 PC 82, it was observed thus: (AIR at p. 84)

"The sanction to prosecute is an important matter; it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. They are not, as the High Court seem to have thought, concerned merely to see that the evidence discloses a prima facie case against the person sought to be prosecuted. They can refuse sanction on any ground which commends itself to them, for example, that on political or economic grounds they regard a prosecution as inexpedient. Looked at as a matter of substance it is plain that the Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case. Nor, in their Lordships' view, is a sanction given without reference to the facts constituting the offence a compliance with the actual terms of clause 23."

66. In our considered view, certainly the Designated Court could do all these at the time of framing of charges and not the High Court under Article 226, as has been done in the instant case.
67. We are not in a position to accept the submissions of the learned counsel for the respondent that in order to find out whether a valid sanction existed, the High Court had appreciated the findings.
68. Equally, much cannot be said of the fact that the order of sanction mentions "sanction for prosecution", since it is stated "sanction for prosecution under Sections 3 and 4 of TADA Act" means only sanction to proceed under Sections 3 and 4 of TADA Act.
69. Having regard to the various acts of expressed conspiracy, it has to be "and/or". It is only during the trial the prosecution has to prove the part played by each of the accused.
72. As to the fact of conspiracy, the charge-sheet clearly mentions the same. Therefore, factually, this finding is wrong. We are not in a position to accept the argument of the learned counsel for the respondent that if the bombs are for self-defence, there is no

mens rea and therefore, no offence under TADA. The finding of the High Court on this aspect is as under:

"It may be noted that if according to the police report itself the reason or intention behind preparing and storing bombs was to defend the Muslim community in the event or riot taking place by possible attack by Hindus because the Government would not take action as was done in Bombay, it cannot possibly be inferred or said that the accused intended to strike terror or that he had any other intent specified under the TADA Act. It has, however, been submitted by Mr Roy in the course of his argument that there are statements of witnesses to the effect that the people of the locality were 'scared' of the accused, implying that they were considered as dangerous persons. It has been submitted further that assuming the fact to be true, from this fact it does not follow that the accused entered into a conspiracy to prepare and store bombs with any of the intents specified in Section 3(1) viz. to strike terror amongst the people or a section of the people. It must also be remembered that mens rea is an essential ingredient of an offence."

The least we can say is that this finding is shocking.

73. We may usefully refer to *Ajay Aggarwal* case, (1993) 3 SCC 609. At pages 617-618, paras 8-10 it is stated:

*"8. ... It is not necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should agree for design or object of the conspiracy. Conspiracy is conceived as having three elements: (1) agreement; (2) between two or more persons by whom the agreement is effected; and (3) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished. It is immaterial whether this is found in the ultimate objects. The common law definition of 'criminal conspiracy' was stated first by Lord Denman in Jones' case that an indictment for conspiracy must "charge a conspiracy to do an unlawful act by unlawful means" and was elaborated by Willies, J. on behalf of the judges while referring the question to the House of Lords in *Mulcahy v. Reg* (1868) LR 3 ML 306 and House of Lords in unanimous decision reiterated in *Quinn v. Leathem* 1901 AC 495 : (1900-3) All ER Rep 1:*

*'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful; and punishable if for a criminal object, or for the use of criminal means.'*

9. This Court in *E. G. Barsay v. State of Bombay*, (1962) 2 SCR 195 : AIR 1961 SC 1762 held: 'The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under Section 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law.' In *Yash Pal Mittal v. State of Punjab* (1977) 4 SCC 540, the rule was laid as follows: (SCC p. 543, para 9)

'The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or overshooting by some of the conspirators.'

10. In *Mohammad Usman Mohammad Hussain Maniyar v. State of Maharashtra*, (1981) 2 SCC 443 it was held that for an offence under Section 120-B IPC, the prosecution need not necessarily prove that the conspirators expressly agreed to do or cause to be done the illegal act, the agreement may be proved by necessary implication."
74. The very preparation of bombs and possession of bombs would tantamount to terrorising the people. If proved, it will be a terrorist act and sub-sections (1) and (3) of Section 3 of the Act may also be attracted. The existence of 26 live bombs is a clear indication of conspiracy.
75. As regards the non-mention of threat to sovereignty and integrity in sanction order, we think there is a misunderstanding. This Court in *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569 (at SCC p. 633) determined the legislative competence of Parliament to enact this law. What is relied on by the learned counsel for the respondents is paragraph 68 of the said judgment. That states as follows: (SCC pp. 633-34)
- "The terrorism, the Act (TADA) contemplates, cannot be classified as mere disturbance of 'public order' disturbing the 'even tempo of the life community of any specified locality' - in the words of *Hidayatullah, C.J. in Arun Ghosh v. State of W.B.*, (1970) 1 SCC

98 but it is much more, rather a grave emergent situation created either by external forces particularly at the frontiers of this country or by anti-nationals throwing a challenge to the very existence and sovereignty of the country in its democratic polity."

76. Again, in *Hitendra Vishnu Thakur v. State of Maharashtra*, (1994) 4 SCC 602 it is stated in para 7 at p. 618 as under:

"Terrorism' is one of the manifestations of increased lawlessness and cult of violence. Violence and crime constitute a threat to an established order and are a revolt against a civilised society. 'Terrorism' has not been defined under TADA nor is it possible to give a precise definition of 'terrorism' or lay down what constitutes 'terrorism'. It may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or 'terrorise' people and the society and not only those directly assaulted, with a view to disturb even tempo, peace and tranquillity of the society and create a sense of fear and insecurity."

Again, in (para 14, p. 623), this Court went on to hold:

"Therefore, it is the obligation of the investigating agency to satisfy the Designated Court from the material collected by it during the investigation, and not merely by the opinion formed by the investigating agency, that the activity of the 'terrorist' falls strictly within the parameters of the provisions of TADA before seeking to charge-sheet an accused under TADA. The Designated Court must record its satisfaction about the existence of a prima facie case on the basis of the material on the record before it proceeds to frame a charge-sheet against an accused for offences covered by TADA." (emphasis in original)

77. Without proceeding further, all that we can say, in this case, is that the materials are enough to bring the case under Section 3(1) of the Act. Of course, in order to establish this, evidence will have to be led in during the trial. Therefore, we restrain from making any further observation which may tend to prejudice the parties. If that be so, the question of mentioning in the sanction order that the ordinary law has broken down, does not arise.
78. Coming to taking cognizance, it has been held by the High Court that it is not a reasoned order. We are of the view that the approach of the High Court in this regard is clearly against the decision of this Court in *Stree Atyachar Virodhi Parishad* case, (1989) 1 SCC 715, in (para 14, p. 721), which is as under:

"It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The court, therefore, need not undertake an elaborate enquiry in sifting and weighing the material. Nor is it necessary to delve deep into various aspects. All that the court has to consider is whether the evidentiary material on record if generally accepted, would reasonably connect the accused with the crime. No more need be enquired into."

79. Again, in *Niranjan Singh K.S. Punjabi* case (1990) 4 SCC 76, para 7 it is stated at (SCC page 85, para 7), as under:

"Again in Supdt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja, (1979) 4 SCC 274, this Court observed in paragraph 18 of the judgment as under: "The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, may justify the framing of charge against the accused in respect of the commission of that offence." (emphasis supplied)

80. The confessional statements of the two accused were very much there before the Court. There is no reason to believe that the Court had not looked at the same.

81. The other finding that what can be looked at is only the police report, cannot be sustained. In *Satya Narain Musadi v. State of Bihar*, (1980) 3 SCC 152 (SCC at pages 157-158, para 10) it was held as under:

"The report as envisaged by Section 173(2) has to be accompanied as required by sub-section (5) by all the documents and statements of the witnesses therein mentioned. One cannot divorce the details which the report must contain as required by sub-section (5) from its accompaniments which are required to be submitted under sub-section (5). The whole of it is submitted as a report to the Court. But even if a narrow construction is adopted that the police report can only be what is prescribed in Section 173(2) there would be sufficient compliance if what is required to be mentioned by the statute has been set down in the report. To say that all the details of the offence must be set out in the report under Section 173(2) submitted by the police officer would be expecting him to do something more than what Parliament has expected him to set out therein. If the report with sufficient particularity and clarity specifies the contravention of the law which is the alleged offence, it would be sufficient compliance with Section 11. The details which would be necessary to be proved to bring home the guilt to the accused would emerge at a later stage, when after notice to the accused a charge is framed against him and further in the course of the trial."

84. On intention and motive, we only need to refer to *Corpus Juris Secundum (A Contemporary Statement of American Law)*, Volume 22. It is held at page 116 (Criminal Law) as under:

"Intention

(a) In general

(b) Specific or general intent crimes

(a) In general.- As actual intent to commit the particular crime toward which the act moves is a necessary element of an attempt to commit a crime. Although the intent must be one in fact, not merely in law, and may not be inferred from the overt act alone, it may be inferred from the circumstances."

85. As regards motive in *American Jurisprudence*, 2nd Edn., Vol. 21, in Section 133, it is stated as under: "133. Motive.- In criminal law motive may be defined as that which leads or tempts the mind to indulge in a criminal act or as the moving power which impels to action for a definite result."

86. Tested in the light of the above, suffice it to hold the preparation and storage of bombs, as pointed out above, are per se illegal acts. The intention that it was to defend the Muslims, is totally unwarranted. "Bomb is not a toy or top to play with". The further question is, when does the so-called right of self-defence arise? The High Court should have assumed that each of the allegations made in the charge-sheet to be factually correct and should have examined the ingredients of the offence. As rightly contended by Mr U.R. Lalit, learned Senior Counsel, the charge-sheet cannot be considered in a restricted way.

87. On a careful perusal of the judgment we are left with the impression that the High Court had indulged in a laboured exercise, without limiting itself to the proper jurisdiction under Article 226 of the Constitution of India, in matters of this kind. We do not want to elaborate on the motive to prepare bombs and the intention thereto since the trial is yet to commence.

88. For all the above reasons we have absolutely no hesitation in holding that the High Court has clearly exceeded its powers under Article 226 of the Constitution in quashing the orders of sanction and taking of cognizance. Therefore, we set aside the impugned judgment of the High Court and direct the Designated Court to proceed with the case in accordance with the law with utmost expedition.

89. In the result, the criminal appeals are allowed accordingly.

Supreme Court of India
AIR 1996 SC 2047

R.M. Tewari, Advocate

vs

State (NCT of Delhi) and Others

AND

Govt. of N.C.T., Delhi

vs

Judge, Designated Court II (TADA)

AND

Mohd. Mehfooz

vs

Chief Secretary and Another

J. S. VERMA AND K. VENKATASWAMI, JJ.

1. **J.S. Verma** J. Leave granted in special leave petitions.
2. In *Karta Singh etc., Vs. State of Punjab etc.* (1994) 3 SCC 569, the Constitutional validity of the provisions in the Terrorists and Disruptive Activities (Prevention)Act, 1987 (for short 'the TADA Act') except Section 22 therein, noticed the general perception that there was some misuse of the stringent provisions by the authorities concerned. To prevent any possible misuse of the stringent provisions, the Constitution Bench suggested a strict review of these cases in its observations made as under :

"In order to ensure higher level of scrutiny and applicability of TADA Act, there must be a Screening Committee or a Review Committee constituted by the Central Government consisting of the Home Secretary, Law Secretary and other secretaries concerned of the various departments to review all the TADA cases instituted by the Central Government as well as to have a quarterly administrative review, reviewing the States' action in the application of the TADA provisions in the respective States, and the incidental questions arising in relation thereto. Similarly, there must be a Screening or Review Committee at the State level constituted by the respective States consisting of the Chief Secretary, Home Secretary, Law Secretary, Director General of Police (Law and Order) and other officials as the respective Government may think it fit, to review the action of the enforcing authorities under the Act and screen the cases registered under the provisions of the Act and decide the further course of action in every matter and so on." (at page 683)

3. It appears that in compliance with the above observations of this Court in *Kartar Singh* (supra) Screening Committee was constituted by the Government in several States including Delhi. A High Power Committee under the Chairmanship of the Chief Secretary of Delhi reviewed the prosecutions made under the TADA Act and the Government of Delhi Conveyed its approval to the Director of Prosecution, Delhi for deletion of the charges under the TADA Act in the specified criminal cases pending before the Designated Court. The learned Special Additional Public Prosecutor filed applications in the Designated Court for withdrawal of charges under the TADA Act in all those cases pending in the Designated Court. It appears that the only reason assigned for withdrawal of charges under the TADA Act by the learned Public Prosecutor was the recommendation of the High Power Committee which was constituted to review the cases in accordance with the observations of this Court in *Kartar Singh*. The Designated Court has dismissed those applications taking the view that administrative decisions cannot interfere with the working of the judicial system. Apparently, the view taken is that a mere administrative decision taken on the basis of the recommendation of the Review Committee is not sufficient to permit withdrawal of a criminal prosecution pending in a Court of law.
4. The appeals by special leave challenge the orders of the designated Court and the writ petition by an advocate, in public interest, is for a direction to the Designated to permit withdrawal of all prosecutions recommended by the Review Committee.
5. The scope of Section 321 of Code of Criminal Procedure, 1973 (Cr. P.C.) dealing with withdrawal from prosecution is settled by decisions of this Court. In *State of Orissa Vs. Chandrika Mohapatra and Others*, (1976) 4 SCC 250, the scope was indicated under :
"Now the law as to when consent to withdrawal of prosecution would be accorded under Section 494 of the Code of Criminal Procedure is well settled as a result of several decisions of this Court. The first case in which this question came up for consideration was State of Bihar Vs. Ram Naresh Pandey, 1957 SCR 279It was pointed out by this Court in that case that in granting consent to withdrawal from prosecution the court undoubtedly exercises judicial discretion, but it does not follow that the discretion is to be exercised only with reference to material gathered by the judicial method.....
It will, therefore, be seen that it is not sufficient for the Public Prosecutor merely to say that it is not expedient to proceed with the prosecution. He has to make out some ground which would show that the prosecution is sought to be withdrawn because inter alia the prosecution may not be able to produce sufficient evidence to sustain the charge or that the prosecution does not appear to be well-founded or that there are other circumstances which clearly show that the object of administration of justice

would not be advanced or furthered by going on with the prosecution. The ultimate guiding consideration must always be the interest of administration of justice and that is the touchstone on which the question must be determined whether the prosecution would be allowed to be withdrawn." (at page 253)

6. In *Sheonandan Paswan Vs. State of Bihar & Others* [1983] 2 SCR 61, it was reiterated as under :

"From the aforesaid enunciation of the legal position governing the legal position governing the proper exercise of the power contained in Section 321 three or four things become amply clear. In the first place though it is an executive function of the Public Prosecutor for which statutory discretion is vested in him, the discretion is neither absolute nor unreviewable but it is subject to the Court's supervisory function. In fact being an executive function it would be subject to a judicial review on certain limited grounds like any other executive action, the authority with whom the discretion is vested 'must genuinely address itself to the matter before it, must not act under the dictates of another body must not do what it has been forbidden to do, must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act and not must not act arbitrarily or capriciously.These several principles can conveniently be grouped in two main categories : failure to exercise a discretion, and exercise or abuse of discretionary power. The two classes are not, however, mutually exclusive.' (vide de Smith's 'Judicial Review of Administrative Action' 4th Edition pp. 285-86). (at page 81-82)

Fourthly, the decision in R.K. Jain's case (supra) clearly shows that when paucity of evidence or lack of prospect of successful prosecution is the ground for withdrawal the Court has not merely the power but a duty to examine the material on record without which the validity and propriety of such ground cannot be determined...." (at page 83)

7. It is, therefore, clear that the Designated Court was right in taking the view that withdrawal from prosecution is not to be permitted mechanically by the Court on an application for the purpose made by the Public Prosecutor. It is equally clear that the Public Prosecutor. It is equally clear that the Public Prosecutor also has not to act mechanically in the discharge of his statutory function under Section 321 Cr. P.C. on such a recommendation being made by the Review Committee; and that it is the duty of the Public prosecutor to satisfy himself that it is a fit case for withdrawal from prosecution before he seeks the consent of the Court for that purpose.
8. It appears that in these matters, the Public Prosecutor did not fully appreciate the requirements of Section 321 Cr. P.C. and made the applications for withdrawal from prosecution only on the basis of the recommendations of the Review Committee. It

was necessary for the Public Prosecutor to satisfy himself in each case that the case is fit for withdrawal from prosecution in accordance with the settled principles indicated in the decisions of this Court and then to satisfy the Designated Court of the existence of a ground which permits withdrawal from prosecution under Section 321 Cr. P.C.

9. It would now be open to the Public Prosecutor to apply for withdrawal from prosecution under Section 321 Cr. P.C. in accordance with law on any ground available according to the settled principles; and on such an application being made, the Designated Court would decide the same in accordance with law.
10. The observations in *Kartar Singh* have to be understood in the context in which they were made. It was observed that a review of the cases should be made by a High Power Committee to ensure that there was no misuse of the stringent provisions of the TADA Act and any case in which resort to the TADA Act was found to be unwarranted, the necessary remedial measures should be taken. The Review Committee is expected to perform its functions in this manner. If the recommendation of the Review Committee, based on the material present, is, that resort to provisions of the TADA Act is unwarranted for any reason which permits withdrawal from prosecution for those offences, a suitable application made under Section 321 Cr. P.C. on that ground has to be considered and decided by the Designated Court giving due weight to the opinion formed by the Public Prosecutor on the basis of the recommendation of the High Power Committee.
11. It has also to be borne in mind that the initial invocation of the stringent provisions of the TADA Act is itself subject to sanction of the Government and, therefore, the revised opinion of the Government formed on the basis of the recommendation of the High Power Committee after Scrutiny of each case should not be lightly disregarded by the Court except for weighty reasons such as malafides or manifest arbitrariness. The worth of the material to support the charge under the TADA Act and the evidence which can be produced, is likely to be known to the prosecuting agency and, therefore, mere existence of *prima facie* material to support the framing of the charge should not by itself be treated as sufficient to refuse the consent for withdrawal from prosecution. It is in this manner an application made to withdraw the charges of offences under the TADA Act pursuant to review of a case by the Review Committee has to be considered and decided by the Designated Courts.
12. The applications made under Section 321 Cr. P.C. not having been decided on the basis indicated above, fresh applications made in all such cases pursuant to the

recommendations of the Review Committee or the revised opinion of the Government have to be considered and decided by the Designated Courts in the manner indicated above.

13. By an order dated 4.5.1995 made by this Court in these matters, it was directed that the Designated Court would consider the bail applications of all accused persons in respect of whom a prayer had been made for withdrawal of charges framed under the provisions of the TADA Act on merits in accordance with law, after excluding from consideration the accusation relating to charges under the provisions of the TADA Act. The bail granted to all such accused persons pursuant to the order would continue till conclusion of the trial in each case.
14. The writ petition and the appeals are disposed of accordingly.

Supreme Court of India
1997 (7) SCC 744

Rambhai Nathabhai Gadhvi and Others

vs

State of Gujarat

Dr.A.S.Anand, K.T.Thomas, JJ

1. The Designated Court, Jamnagar convicted 4 persons under Section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987, (for short "TADA"). They were also tried for certain offences under Section 25 of the Arms Act, 1959 but the trial Judge refrained from convicting them under that section on the premise that the other offence under TADA is a cognate offence of a graver dimension. In the matter of sentence the trial court awarded rigorous imprisonment for 7 years as against first accused Rambhai Nathabhai Gadhvi, while the three others were given only a sentence of rigorous imprisonment for 5 years each. The convicted persons have come up in appeal under Section 19 of TADA and the State of Gujarat have filed an appeal for enhancement of the sentence of the first accused to the maximum limit provided in law. We heard both appeals together.

.....

6. It is advantageous to advert first to the contention relating to validity of the sanction, for, if that contention deserves approval it renders the entire trial vitiated and then it would be unnecessary to harp on the other contention.
7. Under Section 20-A(2) of TADA :
"20-A. (2) No court shall take cognizance of any offence under this Act without the previous sanction of the Inspector General of Police, or as the case may be, the Commissioner of Police."
8. Taking cognizance is the act which the Designated Court has to perform and granting sanction is an act which the sanctioning authority has to perform. Latter is a condition precedent for the former. Sanction contemplated in the sub-section is the permission to prosecute a particular person for the offence or offences under TADA. We must bear in mind that sanction is not granted to the Designated Court to take cognizance of the offence, but it is granted to the prosecuting agency to approach the court

concerned for enabling it to take cognizance of the offence and to proceed to trial against the persons arraigned in the report. Thus a valid sanction is sine qua non for enabling the prosecuting agency to approach the court in order to enable the court to take cognizance of the offence under TADA as disclosed in the report. The corollary is that, if there was no valid sanction the Designated Court gets no jurisdiction to try a case against any person mentioned in the report as the court is forbidden from taking cognizance of the offence without such sanction. If the Designated Court has taken cognizance of the offence without a valid sanction, such action is without jurisdiction and any proceedings adopted thereunder will also be without jurisdiction.

.....

11. In such a situation, can it be said that the sanctioning authority granted sanction after applying its mind effectively and after reaching a satisfaction that it is necessary in public interest that prosecution should be launched against the accused under TADA. As the provisions of TADA are more rigorous and the penalty provided is more stringent and the procedure for trial prescribed is summary and compendious, the sanctioning process mentioned in Section 20-A(2) must have been adopted more seriously and exhaustively than the sanction contemplated in other penal statutes. One of us (Dr. Anand, J.) has explained in *Hitendra Vishnu Thakur v. State of Maharashtra* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087] while dealing with sanction under Section 20-A of TADA, that : (SCC p. 647, para 56)

"56. The section was obviously introduced to safeguard a citizen from any vexatious prosecution under TADA. Vide Section 20-A(2) of TADA no court can take cognizance of an offence under TADA unless there is a valid sanction accorded by the competent authority as prescribed by the section."

12. In *Anirudhsinhji Karansinhji Jadeja v. State of Gujarat* [(1995) 5 SCC 302 : 1995 SCC (Cri) 902] a three-Judge Bench had looked at the broad principles governing sanction contemplated under TADA. The Bench noted in that case that for prosecution under TADA the State Government had provided two administrative instructions as additional safeguards against the drastic provisions of TADA wherein the DSP would require the consent of the State Government. When the consent relied on by the prosecution in that case was considered the three-Judge Bench observed that it was given by the State Government without proper application of mind, even though the said consent was granted on the strength of "a quite exhaustive" letter addressed by the DSP. The following observations are pertinent : (SCC p. 308, para 15)

"15. ... Now, no doubt the message of the DSP is quite exhaustive, as would appear from that message which has been quoted above in full, we are inclined to think that before agreeing to the use of harsh provisions of TADA against the appellants, the Government ought to have taken some steps to satisfy itself whether what had been stated by the DSP was borne out by the records, which apparently had not been called for in the present case, as the sanction/consent was given post-haste on 18-3-1995, i.e., the very next day of the message of the DSP."

13. If the consenting exercise even in respect of an administrative instruction was construed to be of such a meaningful and serious matter it is needless to point out that sanctioning exercise under a statutory provision like Section 20-A(2) would be no less.
14. Apart from what we have noticed above, the non-application of mind by the Director General of Police, Gujarat State, is even otherwise writ large in this case. A perusal of Ext. 63 (supra) shows that the Director General of Police in fact did not grant any sanction for the prosecution of the appellants. Last part of the order reads : "I A.K. Tandon, Director General of Police, Gujarat State, Ahmedabad under the powers conferred under the amended provisions of TADA (1993) Section 20-A(2) give permission to add Sections 3, 4 and 5 of TADA." Thus, what the Director General of Police did was to grant permission "to add Sections 3, 4 and 5 of TADA" and not any sanction to prosecute the appellants. It is pertinent to note here that the permission to add Sections 3, 4 and 5 of TADA had been granted by the Home Secretary, the competent authority, much earlier and no such permission was sought for from the Director General of Police by the DSP. The Designated Court thus, failed to notice that Ext. 63 was not an order of sanction but an unnecessary permission of the Director General of Police to add Sections 3, 4 and 5 of TADA. The Director General of Police, apparently, acted in a very casual manner and instead of discharging his statutory obligations under Section 20-A(2) to grant (or not to grant) sanction for prosecution proceeded to deal with the request of the DSP contained in his letter dated 9-8-1993, as if it was a letter seeking permission to apply the provisions of TADA. The exercise exhibits that the Director General of Police did not even read, let alone consider "carefully", the FIR and the letter of the DSP dated 9-8-1983. We cannot but express our serious concern at this casual approach of the Director General of Police. On a plain reading of Ext. 63, therefore, we must hold that it is not an order of sanction to prosecute the appellants as required by Section 20-A(2) of the Act.

15. In view of the aforesaid legal and factual position we have no doubt that sanction relied on by the prosecution in this case was not accorded by the Director General of Police in the manner required by law. Ext. 63 is not the result of a serious consideration and the document reflects scanty application of the mind of the sanctioning authority into vital and crucial aspects concerning the matter. It vitiates sanction and hence Ext. 63 cannot be treated as sanction under Section 20-A(2) of TADA.

.....

19. In view of the above legal position we have to record an order of acquittal of the accused. We, therefore, set aside the conviction and sentence passed on them and acquit them and direct them to be set at liberty forthwith unless they are required in any other case. Bail bonds executed by Accused 4 shall stand discharged.

**Supreme Court of India
1996 Cri. LJ 1986**

**Writ Petn. (CRI.) No. 117 of 1995 D/- 27-2-1996
AND
Shaheen Welfare Association
vs
Union of India and Others**

Mrs. Sujata V. Manohar, J.

This is a public interest litigation in which the petitioner has prayed for certain reliefs to under-trial prisoners charged under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as 'TADA'). The petitioner has asked, inter alia, for a direction that the respondents should file a list of detenus lodged in jails in different States under TADA and has asked for a direction for the release of TADA detenus against whom proper evidence is not with the prosecution and where proper procedure prescribed under law is not followed.

2. Under orders passed from time to time in this petition the States of Gujarat, Rajasthan and Maharashtra as well as the Central Government have filed affidavits giving information relating to the number of cases under TADA pending in different Designated Courts in various States of the country. We have also been furnished with the Statewise numbers of Designated Courts constituted under TADA. In the affidavit filed on behalf of the Union of India by Shri A.K. Shrivastava, Deputy Secretary to the Government of India, Ministry of Home Affairs, New Delhi, a statement is annexed showing live cases under TADA and the number of Designated Courts in different States and Union Territories. The statement is as follows:

(See table below)

Thus, for example, in the State of Assam the number of live cases are 2908. There is only one Designated Court to try all these cases. In Jammu & Kashmir, there are only four Designated Courts for trial of 5041 cases. In Rajasthan there is only one Designated Court for the trial of 77 cases while in Delhi there are four Designated Courts for the trial of 759 pending cases. The number of Designated Court is also somewhat deceptive in the sense that in some States the existing Sessions Courts are also designated as courts under TADA, with the result that these Courts do not

deal exclusively with the trial of TADA cases. They also deal with other criminal cases. Therefore, the entire time of such Courts is not available for the trial of TADA cases. It is quite clear that in many States there is no prospect of a speedy trial of pending TADA cases. A statement which is annexed to an earlier affidavit filed on behalf of the Union of India by Shri R.S. Tanwar, Under Secretary to the Government of India, Ministry of Home Affairs, New Delhi, shows that in respect of 14446 cases under investigation and pending trial in the various States of the Country, the detentions involved are 42488, out of which the number of persons actually arrested and under detention is 5998. Those released on bail are 30357, and those absconding and yet to be arrested are 6044. This is after taking into account the cases which were reviewed by the State Review Committees, and were either withdrawn or where charges under the provisions of TADA were dropped. The total number of cases so reviewed comes to 9203 and the number of persons discharged from TADA provisions are 7968.

Sr. No.	Name of the State/UT	No. of live cases	No. of Designated
(1)	(2)	(3)	(4)
	TADA Courts		
1.	Andhra Pradesh	1937	61
2.	Arunachal Pradesh	15	11
3.	Assam	2908	1
4.	Bihar	4	35
5.	Gujarat	72	18
6.	Haryana	348	8
7.	Himachal Pradesh	5	3
8.	Jammu & Kashmir	5041	4
9.	Karnataka	25	19
10.	Kerala	—	1
11.	Manipur	603	4
12.	Madhya Pradesh	76	10
13.	Maharashtra	244	8
14.	Meghalaya	8	1
15.	Punjab	2248	18
16.	Rajasthan	77	1

17.	Tamil Nadu	26	5
18.	Uttar Pradesh	39	15
19.	West Bengal	1	18
20.	Chandigarh Admn.	9	2
21.	Delhi	759	4
22.	Goa	1	1
Total		14446	248

3. The National Human Rights Commission has also furnished a statement showing the position of TADA detenus in jail as on 30-6-1995. While the statewise figures given by it do not tally with the figures given by the Union of India, the total number of under-trials in jail according to the National Human Rights Commission is 6000, (after taking into account its corrections for Assam, Punjab and Rajasthan) which is close to the figure of 5998 given by the Union of India.
6. In spite of such review, from the figures which we have cited above, it is clear that there is very little prospect of a speedy trial of cases under TADA in some of the States because of the absence of an adequate number of Designated courts even in cases where a chargesheet has been filed and the cases are ready for trial. We are conscious of the fact that even the trial of ordinary criminal cases does take some time because of the courts being over-loaded with work and the concept of a speedy trial in the case of TADA cases must be viewed in the context of pendency in relation to criminal trials also. But when the release of under trials on bail is severely restricted as in the case of TADA by virtue of the provisions of Section 20 (8) of TADA, it becomes necessary that the trial does proceed and conclude within a reasonable time. Where this is not practical, release on bail which can be taken to be embedded in the right of a speedy trial may, in some cases be necessary to meet the requirements of Article 21.
7. It was on this basis that in the case of Supreme Court Legal Aid Committee Representing Under-trial Prisoners v. Union of India, (1994) 6 SCC 731 : (1994 AIR SCW 5115) this Court considered similar provisions restricting the grant of bail under Narcotic Drugs and Psychotropic Substances Act, 1985 and directed release of under-trials on bail in certain situations and subject to the terms and conditions set out there. The Court while doing so observed. (p. 748) (of SCC): (at p. 5132 of AIR) “.....we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of

deprivation of personal liberty cannot be avoided in such cases: but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters."

8. It is in this context that it has become necessary to grant some relief to those persons who have been deprived of their personal liberty for a considerable length of time without any prospect of the trial being concluded in the near future. Undoubtedly, the safety of the community and of the nation needs to be safeguarded looking to the nature of the offences these under-trials have been charged with. But the ultimate justification for such deprivation of liberty pending trial can only be their being found guilty of the offences for which they have been charged. If such a finding is not likely to be arrived at within a reasonable time some relief becomes necessary.
9. The petition thus poses the problem of reconciling conflicting claims of individual liberty versus the right of the community and the nation to safety and protection from terrorism and disruptive activities. While it is essential that innocent people should be protected from terrorists and disruptionists, it is equally necessary that terrorists and disruptionists are speedily tried and punished. In fact the protection to innocent civilians is dependent on such speedy trial and punishment. The conflict is generated on account of the gross delay in the trial of such persons. This delay may contribute to absence of proper evidence at the trial so that the really guilty may have to be ultimately acquitted. It also causes irreparable damage to innocent persons who may have been wrongly accused of the crime and are ultimately acquitted, but who remain in jail for a long period pending trial because of the stringent provisions regarding bail under TADA. They suffer severe hardship and their families may be ruined.
10. Bearing in mind the nature of the crime and the need to protect the society and the nation, TADA has prescribed in Section 20 (8) stringent provisions for granting bail. Such stringent provisions can be justified looking to the nature of the crime, as was held in Kartar Singh's case (1994 Cri LJ 3139) (*supra*), on the presumption that the trial of the accused will take place without undue delay. No one can justify gross delay in disposal of cases when under-trials perforce remain in jail, giving rise to possible situations that may justify invocation of Article 21.

11. These competing claims can be reconciled by taking a pragmatic approach.
12. The proper course is to identify from the nature of the role played by each accused person the real hardcore terrorists or criminals from others who do not belong to that category; and apply the bail provisions strictly in so far as the former class is concerned and liberally in respect of the latter class. This will release the pressure on the courts in the matter of priority for trial. Once the total number of prisoners in jail shrinks, those belonging to the former class and, therefore, kept in jail can be tried on a priority basis. That would help ensure that the evidence against them does not fade away on account of delay. Delay may otherwise harm the prosecution case and the harsh bail provisions may prove counter-productive. A pragmatic approach alone can save the situation for, otherwise, one may find that many of the under-trials may be found to have completed the maximum punishment provided by law by being in jail without a trial. Even in cases where a large number of persons are tied up with the aid of Section 120B or 147, IPC., the role of each person can certainly be evaluated for the purpose of bail and those whose role is not so serious or menacing can be more liberally considered. With inadequate number of courts, the only pragmatic way is to reduce the prison population of TADA detenus and then deal with hardcore under-trials on priority basis before the evidence fades away or is lost. Such an approach will take care of both the competing interests. This is the approach which we recommend to courts dealing with TADA cases so that the real culprits are promptly tried and punished.
13. For the purpose of grant of bail to TADA detenus, we divide the under-trials into three classes, namely, (a) hardcore under-trials whose release would prejudice the prosecution case and whose liberty may prove to be a menace to society in general and to the complainant and prosecution witnesses in particular, (b) other under-trials whose overt acts or involvement directly attract Sections 3 and/or 4 of the TADA Act; (c) under-trials who are roped in not because of any activity directly attracting Sections 3 and 4, but by virtue of Section 120B or 147, I.P.C., and : (d) those under-trials who were found possessing incriminating articles in notified areas and are booked under Section 5 of TADA.
14. Ordinarily, it is true that the provisions of Sections 20 (8) and 20 (9) of TADA would apply to all the aforesaid classes. But while adopting a pragmatic and just approach, no one can dispute the fact that all of them cannot be dealt with by the same yardstick. Different approaches would be justified on the basis of the gravity of the charges. Adopting this approach we are of the opinion that under-trials falling within group (a)

cannot receive liberal treatment. Cases of under-trials falling in group (b) would have to be differently dealt with in that, if they have been in prison for five years or more and their trial is not likely to be completed within the next six months, they can be released on bail unless the court comes to the conclusion that their antecedents are such that releasing them may be harmful to the lives of the complainant, the family members of the complainant, or witnesses. Cases of under-trials falling in groups (c) and (d) can be dealt with leniently and they can be released if they have been in jail for three years and two years respectively. Those falling in group (b), when released on bail, may be released on bail of not less than Rupees 50,000/- with one surety for like amount and those falling in grounds (c) and (d) may be released on bail on their executing a bond for Rs. 30,000/- with one surety for like amount, subject to the following terms:

- (1) The accused shall report to the concerned police station once a week;
- (2) The accused shall remain within the area of jurisdiction of the Designated Court pending trial and shall not leave the area without the permission of the Designated Court;
- (3) The accused shall deposit his passport, if any, with the Designated Court. If he does not hold a passport, he shall file an affidavit to that effect before the Designated Court. The Designated Court may ascertain the correct position from the passport authorities, if it deems it necessary;
- (4) The Designated Court will be at liberty to cancel the bail if any of these conditions is violated or a case for cancellation of bail is otherwise made out.
- (5) Before granting bail, a notice shall be given to the public prosecutor and an opportunity shall be given to him to oppose the application for such release. The Designated Court may refuse bail in very special circumstances for reasons to be recorded in writing.

These conditions may be relaxed in cases of those under groups (c) and (d) and, for special reasons to be recorded, in the case of group (b) prisoners. Also these directions may not be applied by the Designated Court in exceptionally grave cases such as the Bombay Bomb Blast Case where a lengthy trial is inevitable looking to the number of accused, the number of witnesses and the nature of charges unless the court feels that the trial is being unduly delayed. However, even in such cases it is essential that the Review Committee examines the case against each accused bearing the above directions in mind, to ensure that TADA provisions are not unnecessarily invoked.

15. The above directions are a one-time measure meant only to alleviate the current situation.
16. When stringent provisions have been prescribed under an Act such as TADA for grant of bail and a conscious decision has been taken by the legislature to sacrifice to some extent, the personal liberty of an under-trial accused for the sake of protecting the community and the nation against terrorist and disruptive activities or other activities harmful to society, it is all the more necessary that investigation of such crimes is done efficiently and an adequate number of Designated Courts are set up to bring to book persons accused of such serious crimes. This is the only way in which society can be protected against harmful activities. This would also ensure that persons ultimately found innocent are not unnecessarily kept in jail for long periods. It is unfortunate that none of the States to whom notices have been issued by us nor the Union of India have come forward to state that they would set up an adequate number of Designated Courts in each State so that cases pertaining to TADA can be speedily disposed of. This has necessitated the above order as a one-time measure.
17. With the above directions, the writ petition is disposed of.

Order according.

**Supreme Court of India
2001 (3) SCC 221**

**Lal Singh
vs
State of Gujarat and Another**

M.B. Shah, S.N. Phukan, JJ

.....

19. The aforesaid section provides for various acts which would be considered as terrorist acts and punishment thereof. It also provides for punishment of acts which are not terrorist acts. Section 3(1) enumerates various activities which are considered to be terrorist acts and sub-section (2) provides for punishment of such acts. Sub-section (3) contemplates acts which are not terrorist acts by themselves, but activities prior or subsequent to the terrorist act. Under this section, a person can be convicted if it is proved that he - (a) conspired, (b) advocated, (c) abetted, (d) advised, (e) incited, or (f) knowingly facilitated - the commission of a terrorist act or any act preparatory to a terrorist act. Any of these acts by itself constitutes an offence. Therefore, for conviction under sub-section (3), it is not necessary that there should be a conviction under sub-section (2) for a terrorist act. The aforesaid activities are not only abetment of terrorist act, but include other acts which are not covered by the concept of abetment as provided under the Indian Penal Code, namely, "advocates", "advises" and "any act preparatory to a terrorist act". Further, under the TADA Act Section 2(1) (a) defines the word "abet" in the wider sense as under -

"2. Definitions. - (1) In this Act, unless the context otherwise requires, -

(a) 'abet', with its grammatical variations and cognate expressions, includes -

- (i) the communication or association with any person or class of persons who is engaged in assisting in any manner terrorists or disruptionists;*
- (ii) the passing on, or publication of, without any lawful authority, any information likely to assist the terrorists or disruptionists and the passing on, or publication of, or distribution of, any document or matter obtained from terrorists or disruptionists;*
- (iii) the rendering of any assistance, whether financial or otherwise, to terrorists or disruptionists."*

20. This concept of making such activities an offence is not new to criminal jurisprudence. Chapter V of the Indian Penal Code provides for abetment and punishment for the same. Section 115 deals with punishment in case where abetted offence is not committed. It inter alia provides that whoever abets the offence punishable with death or imprisonment for life shall, if that offence is not committed in consequence of the abetment, be punished as provided thereunder. Similarly, Section 116 provides for punishment in case where abetted offence punishable with imprisonment is not committed. Section 118 also contemplates punishment in case where offence is not committed. It inter alia provides for punishing a person who conceals design to commit an offence punishable with death or imprisonment for life inter alia by any act or illegal omission. Similar provisions are there under Sections 119 and 120. Hence, in our view, for convicting the accused under Section 3(3), it is not necessary that someone should be convicted under Section 3(2) for commission of a terrorist act. Therefore, the contention of the learned counsel for the accused that except Accused 1 - Lal Singh, no other accused can be convicted under Section 3(3), is without any substance.

(2) Admissibility of confessional statements:

21. Next question would be - whether confessional statements are inadmissible in evidence because (a) the statements were recorded by the investigating officers or the officers supervising the investigation; (b) the accused were not produced before the Judicial Magistrate immediately after recording the confessional statements; and (c) the guidelines laid down in the case of Kartar Singh ((1994) 3 SCC 569 : 1994 SCC (Cri) 899) are not followed. For deciding this contention, we have to refer to Section 15 of the TADA Act and flush out from our mind the concept evolved because of provisions of the Evidence Act. The confessional statement recorded by the investigating officer is not admissible in evidence because of specific bar under Sections 25 and 26 of the Evidence Act. When that bar is lifted by the legislature, it would be difficult to hold that such confessional statement is inadmissible. For this, we would first refer to some part of the judgement in the case of Kartar Singh ((1994) 3 SCC 569 : 1994 SCC (Cri) 899) where this Court held that if the exigencies of certain situation warrant such a legislation then it is constitutionally permissible. The Court observed (in paras 253, 254 and 255) that in some advanced countries like United Kingdom, United States of America, Australia and Canada etc. confession of an accused before the police is admissible and having regard to the legal competence of the legislature to make the law prescribing a different mode of proof, the meaningful purpose and object of the

legislation, the gravity of terrorism unleashed by the terrorists and disruptionists endangering not only the sovereignty and integrity of the country but also the normal life of the citizens, and the reluctance of even the victims as well as the public in coming forward, at the risk of their life, to give evidence, the impugned section cannot be said to be suffering from any vice of unconstitutionality. The Court further observed that if there is no breach of procedure and the accepted norms of recording the confession which should reflect only the true and voluntary statement, then there should be no room for hyper-criticism that the authority has obtained an invented confession as a source of proof irrespective of the truth and credibility. The Court also observed : (SCC p. 680, para 255)

"[A] confession made by a person before a police officer can be made admissible in the trial of such person not only as against the person but also against the co-accused, abettor or conspirator provided that the co-accused, abettor or conspirator is charged and tried in the same case together with the accused, namely, the maker of the confession. The present position is in conformity with Section 30 of the Evidence Act."

22. The Court finally held that though it is entirely for the court trying the offence to decide the question of admissibility and reliability of a confession in its judicial wisdom strictly adhering to the law, it must, while so deciding the question, should satisfy itself that there was no trap, no trick and no importune seeking of evidence during the custodial interrogation and all the conditions required are fulfilled.
23. In view of the settled legal position, it is not possible to accept the contention of learned Senior Counsel Mr. Sushil Kumar that as the accused were in police custody, the confessional statements are either inadmissible in evidence or are not reliable. Custodial interrogation in such cases is permissible under the law to meet grave situation arising out of terrorism unleashed by terrorist activities by persons residing within or outside the country. The learned counsel further submitted that in the present case the guidelines suggested by this Court in Kartar Singh ((1994) 3 SCC 569 : 1994 SCC (Cri) 899) were not followed. In our view, this submission is without any basis because in the present case confessional statements were recorded prior to the date of decision in the said case i.e. before 11-3-1994. Further, despite the suggestion made by this Court in Kartar Singh case ((1994) 3 SCC 569 : 1994 SCC (Cri) 899), the said guidelines are neither incorporated in the Act nor in the Rules by Parliament. Therefore, it would be difficult to accept the contention raised by learned counsel for the accused that as the said guidelines are not followed, confessional statements even if admissible in evidence, should not be relied upon for convicting the accused. Further, this Court has not held in Kartar Singh case ((1994) 3 SCC 569 : 1994 SCC

(Cri) 899) that if suggested guidelines are not followed then confessional statement would be inadmissible in evidence. Similar contention was negated by this Court in S. N. Dube v. N. B. Bhoir ((2000) 2 SCC 254 : 2000 SCC (Cri) 343) by holding that a police officer recording the confession under Section 15 is really not bound to follow any other procedure and the rules or the guidelines framed by the Bombay High Court for recording the confession by a Magistrate under Section 164 CrPC; the said guidelines do not by themselves apply to recording of a confession under Section 15 of the TADA Act and it is for the court to appreciate the confessional statement as the substantive piece of evidence and find out whether it is voluntary and truthful. Further, by a majority decision in State v. Nalini ((1999) 5 SCC 253 : 1999 SCC (Cri) 691) the Court negated the contentions that confessional statement is not a substantive piece of evidence and cannot be used against the co-accused unless it is corroborated in material particulars by other evidence and the confession of one accused cannot corroborate the confession of another, by holding that to that extent the provisions of the Evidence Act including Section 30 would not be applicable. The decision in Nalini case ((1999) 5 SCC 253 : 1999 SCC (Cri) 691) was considered in S. N. Dube case ((2000) 2 SCC 254 : 2000 SCC (Cri) 343). The Court observed that Section 15 is an important departure from the ordinary law and must receive that interpretation which would achieve the object of that provision and not frustrate or truncate it and that the correct legal position is that a confession recorded under Section 15 of the TADA Act is a substantive piece of evidence and can be used against a co-accused also.

24. In the present case, undisputedly, when the accused were produced before the Magistrate they did not make a complaint that the confessional statements were recorded under coercion. Further, Rule 15 of the TADA Rules is complied with and each accused making the confession was explained that he was not bound to make it and in case he makes it, it could be used against him as evidence. Further, the officer had also verified that the accused was making the confessional statement voluntarily and certificate to that effect is also attached to the said confessional statement. For its reliability and truthfulness, prosecution has produced on record other corroborative evidence, which we would discuss hereinafter.
25. Once it is held that confessional statements are admissible in evidence, for deciding - to what extent such statements are reliable and truthful on the basis of corroborative evidence, we have to refer to the same. The prosecution story revolves around Accused 1 and 2 and all charges against the remaining accused are inter se connected with both of these accused.

In such cases, to what extent burden of proof is on the prosecution ?.

In the light of the aforesaid evidence led by the prosecution next question for consideration is - whether the accused have been rightly convicted;

At this stage, we would reiterate submissions of Mr. Sushil Kumar, learned Senior Counsel for A-1 and A-4, that A-1 Lal Singh was arrested on 16-7-1992 by PW 56 in CR No. 423/92 of Santa Cruz Police Station but the case was registered prior to his arrest. A-1 was interrogated by PW 9 at Santa Cruz Police Station on 22-7-1997 and his statement was also recorded but no FIR was registered. A-1 made a confession to PW 128 on 12-9-1992 and report under Section 169 CrPC was submitted on 10-12-1992 in RC No. 5 but there is no evidence on record of the same. He was never told that his confession may be used against him in TADA case. Further, confessional statement is not recorded in CR No. 423/92. He has not stated about his visiting the Madras Stock Exchange and about his getting the places with the help of A-4, where arms were recovered. The submission of learned counsel that A-1 has not stated in his confessional statement about his visit to Madras after verification of the said confessional statement, appears to be incorrect because A-1 has specifically stated that he along with Raveesh and his friend went to Madras by flight and stayed in different rooms in Hotel Woodland. They came back to Bombay on 4-7-1992 by flight.

Further, we would State that presuming that there is some irregularity with regard to the recording of FIR it would not vitiate recording of his confessional statement. The report under Section 169 CrPC submitted in RC No. 5/92 on 10-12-1992 has no bearing on the present case. Further, for this purpose there is evidence of PW 56 Shamray Baburav Jedhe, Senior PI Crime Branch, CID, Greater Bombay, who stated that at the relevant time he was posted as Police Inspector in anti-terrorist squad, North Region, Bombay. In the year 1985, there was a bomb blast of Kanishka Aircraft in Canada and Lal Singh was wanted in that case and intelligency had provided photographs and other information of Lal Singh to them. On 15-7-1992, Mr. A. A. Khan, Additional PC directed him to arrest Lal Singh, who was reported to be coming at Dadar Railway Station by Dadar-Amritsar Express on 16-7-1992 at 5.00 a.m. After due preparation, they apprehended Lal Singh outside Dadar Railway Station. Lal Singh told his name as Kishore Kumar. In the presence of two panchas namely Mohd. Imran and Stivan Francis, he took personal search of Lal Singh and prepared panchnama Ext. 350, which bears his signature and signature of both the panchas. The driving licence found in the pocket of Lal Singh, which was issued by RTO, Ahmedabad in the name of Kishore Kumar was also seized, which is Ext. 351. The visiting card of Hotel

Samrat, Ahmedabad found in the purse of Lal Singh is Ext. 352. He further stated that he recovered Rs. 30,664 and 200 American dollars from the possession of Lal Singh. He has identified A-1 Lal Singh as the person who was arrested by him. Thereafter, Lal Singh was taken to Santa Cruz Police Station and he was arrested for the offence CR No. 423/92, which was registered prior to the arrest of Lal Singh as he was wanted in that case. Further, PW 124 Mithileshkumar Avadhnarayan Zha, who at the relevant time was Deputy SP, CBI, New Delhi stated that the investigations of RC No. 5-S/92 and of the instant case were being conducted simultaneously. In any case, if these are considered as irregularities, the same are of no significance as they would not in any way affect the prosecution case. As stated earlier, qua A-1 the evidence, apart from his confessional statement, is in abundance. In short, during his interrogation it was revealed that in two premises at Ahmedabad, he had kept large quantity of arms, ammunitions and explosive substances. The evidence on this aspect is that of police officers with regard to the raid and seizure. Apart from the evidence of police officers including SP A.K.R Surolia (PW 103) who conducted the raid, with regard to the stay of A-1 in the said premises, there is evidence of independent panchas which supports the prosecution version. For hiring of the premises Flat No. C-33, Paresh Apartments and for purchasing of the house Bungalow No. 4-A, Usman Harun Society, Ahmedabad, there is unimpeachable evidence on record. Further, prosecution has led evidence with regard to the stay of A-1 and A-4 in hotels at Ahmedabad and Madras.

For A-2, learned counsel submitted that the evidence against A-2 nowhere indicates that A-2 visited Delhi and Aligarh for establishing contacts for alleged conspiracy and that prosecution has not led any independent evidence to connect the accused with the recovery of the arms etc.

In our view, this submission is required to be considered from a different angle in view of the fact that A-2 is a Pakistani national. If a foreign national is found staying in the country without valid passport and visa and his movements from one place to another with A-1 are established and from the premises occupied by A-1, large quantities of arms and ammunitions etc. are found, it would be prudent and reasonable to draw inference of criminal conspiracy.

The learned Senior Counsel Mr. Sushil Kumar submitted that prosecution has not proved beyond reasonable doubt all the links relied upon by it. In our view, to say that prosecution has to prove the case with a hundred per cent certainty is a myth. Since last many years the nation is facing great stress and strain because of misguided militants and cooperation to the militancy, which has affected the social security,

peace and stability. It is common knowledge that such terrorist activities are carried out with utmost secrecy. Many facts pertaining to such activities remain in personal knowledge of the person concerned. Hence, in case of conspiracy and particularly such activities, better evidence than acts and statements including that of co-conspirators in pursuance of the conspiracy is hardly available. In such, cases, when there is confessional statement it is not necessary for the prosecution to establish each and every link as confessional statement gets corroboration from the link which is proved by the prosecution. In any case, the law requires establishment of such a degree of probability that a prudent man may on its basis, believe in the existence of the facts in issue. For assessing evidence in such cases, this Court in Collector of Customs v. D. Bhoormall ((1974) 2 SCC 544 : 1974 SCC (Cri) 784) dealing with smuggling activities and the penalty proceedings under Section 167 of the Sea Customs Act, 1878 observed that many facts relating to illicit business remain in the special or peculiar knowledge of the person concerned in it and held thus : (SCC pp. 553-55, paras 30-32 and 37)

"30. that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and - as Prof. Brett felicitously puts it - 'all exactness is a fake'. El Dorado of absolute proof being unattainable, the law accepts for it probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.

.....

Learned Senior Counsel Mr. K. T. S. Tulsi appearing for A-20, submitted that the trial court has given the benefit of doubt to 16 co-accused despite their confessional statements and there was no reason for the Court not to give benefit of doubt to A-20. He submitted that confessional statement of A-20 was recorded under coercion and torture and that confessional statement is having serious discrepancies. He also pointed out that presuming that A-20 was found in the company of A-1 at Aligarh or at Bombay, this would not indicate that he was involved in any criminal conspiracy with A-1 or A-2. It is his contention that confession of other co-accused cannot be used against the appellant.

We have already dealt with confessional statements in earlier paragraphs and, therefore, we do not want to repeat the same. Confessional statements are held to be admissible in evidence. With regard to the confessional statement of a co-accused,

it has been held that it can be relied upon. The next question would be whether benefit of doubt ought to have been given to A-20. It is well-understood that concept of benefit of doubt is vague. Since years it has been considered that before granting benefit of doubt to the accused, doubt should be a reasonable one which occurs to a prudent man and not to a weak or unduly vacillating or confused mind. On this point in *Vijayee Singh v. State of U.P.* ((1990) 3 SCC 190 : 1990 SCC (Cri) 378) this Court succinctly observed thus : (SCC p. 218, para 29)

"29. There is a difference between a flimsy or fantastic plea which is to be rejected altogether. But a reasonable though incompletely proved plea which casts a genuine doubt on the prosecution version indirectly succeeds. The doubt which the law contemplates is certainly not that of a weak or unduly vacillating, capricious, indolent, drowsy or confused mind. It must be the doubt of the prudent man who is assumed to possess the capacity to 'separate the chaff from the grain'. It is the doubt of a reasonable, astute and alert mind arrived at after due application of mind to every relevant circumstance of the case appearing from the evidence. It is not a doubt which occurs to a wavering mind."

In that case, the Court also referred to the following observations in *Miller v. Minister of Pensions* ((1947) 2 All ER 372 : 177 LT 536) by Lord Denning, J.

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt."

It is true that under our existing jurisprudence in criminal matter, we have to proceed with presumption of innocence, but at the same time, that presumption is to be judged on the basis of conceptions of a reasonable prudent man. Smelling doubts for the sake of giving benefit of doubt is not the law of the land. In such type of terrorist activities if arms and ammunitions are recovered at the instance of or on disclosure by the accused, it can be stated that presumption of innocence would not thereafter exist and it would be for the accused to explain its possession or discovery or recovery and would depend upon facts of each case which are to be appreciated on the scales of common sense of a prudent man possessing capacity to "separate the chaff from grain". In such cases, as stated by Lord Denning, J., law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If it is established on record that A-20 was found in the company of A-1 and A-2 at Aligarh

and that at Bombay also he had introduced himself as a friend of A-1 and A-3 to PW 87, who is his childhood friend, then it would be reasonable to infer that he was co-conspirator and assisting A-1 and A-2, as stated in his confessional statement.

The learned Senior Counsel Mr. Sushil Kumar further contended that Rule 14 of the TADA Rules was not followed in this case, which contemplates procedure of issuing warrant authorising any police officer above the rank of constable to enter and search the place in the manner specified in the warrant and to seize anything found in or on such place, which the police officer has reason to believe, has been or is being, or is intended to be, used for the purpose of or in connection with any such contravention or offence. Power to issue search warrants by a District Magistrate under Rule 14 is, to some extent, similar to the power which could be exercised under Section 94 CrPC. This contention was not raised by the learned counsel for the accused before the trial court, may be, because at the time of carrying out the search, there was no pending case under the TADA Act and that police officers were entitled to carry out the search and seizure under Section 165 of the Criminal Procedure Code. The search and seizure was carried out by higher officer, namely SP, CID Crime Branch. Further, exercise of such power by the District Magistrate does not take away the authority of the police officer to search under Section 165 CrPC. In the present case, there is no question of application of Rule 14 of the TADA Act as at that stage, no case for the offence was pending. Being a cognizable offence, on the basis of information received that large quantity of arms and explosive substances were stored in the premises, the police officer was entitled to exercise power under Section 165 CrPC. Hence, we find no force in this contention.

The learned counsel pointed out that before carrying out the raids neither was FIR registered and even after breaking open locks the procedure was not followed. It is true that in this case FIR was registered after carrying out the raids. For this contention, it has been pointed out on behalf of the prosecution that before raids were carried out there was no certainty that arms and ammunitions would be recovered. These raids were carried out only on the basis of information received after interrogation of A-1 Lal Singh. Secondly, the raid was carried out in the presence of higher officer, namely Mr. A. K. R. Surolia, Deputy CP (PW 103). For breaking of locks in the said premises, there is no question of different procedure in such cases. For this purpose panchnama was prepared and it is mentioned that after breaking open the locks, search was carried out. Learned counsel further submitted that there was no justifiable reason to deposit the arms and ammunitions which were found in the said two premises at the police

headquarters. It is the say of the witness that muddamal arms and ammunitions were deposited at the police headquarters because of its large quantity. It is quite possible that there may not be sufficient space at the police station where FIR was registered. In any case, for the purpose of safety if the muddamal articles are deposited at the police headquarters, it cannot be said that the recovery is in any way vitiated.

The next contention that Rule 15 of the TADA Rules has not been followed also does not carry any weight. For this purpose, we would refer to the evidence of PW 128, PW 132 and PW 133. PW 128 Satishchandra Rajnaraylanlal, who was SP, CBI II, Punjab Cell at New Delhi in 1992 stated that he registered the offence RC No. 6-SII/92. He recorded the confessional statements of A-1 Lal Singh, Ext. 620 and A-3 Tahir Jamal, Ext. 618 along with other accused. Before recording confessional statements, he ascertained from every accused whether they were voluntarily ready to give confessional statements. Necessary questions were put to them and time was given to them to think over the matter. After being satisfied that they were willing to give voluntary confessional statements, he recorded their confessional statements. PW 132 Padamchandra Laxmichandra Sharma, who was SP, CBI, SIC II at the relevant time stated that when he took over the charge of this case RC No. 6-(S)/92 from Mr. Satishchandra, this case was in the last phase. Deputy SP, CBI, D. P. Singh (PW 136) had produced A-2 Mohd. Sharief and A-20 Shoaib Mukhtiar before him on 8-7-1993 and 6-2-1994 for recording their voluntary confessional statements, which are Ext. 650 and Ext. 654 respectively. Before recording their statements, he warned them of the consequences of making confessional statements and further gave them time to think over the matter. On being satisfied that they wanted to give confessional statements, he recorded their statements. PW 133 Sharadkumar Laxminarayan, DIG Police, CBI, SIC II Branch, New Delhi stated that in the year 1992 he was SP in the same branch at New Delhi. On 5-11-1992 he was directed by DIG M. L. Sharma to proceed to Ahmedabad in order to record statement of A-4 Saquib Nachan under Section 15 of the TADA Act. On 6-11-1992 after reaching at Ahmedabad, Saquib Nachan was produced before him. He put necessary questions to A-4 Saquib Nachan. Before recording confessional statement, he ascertained from him whether he was voluntarily ready to give confessional statement and warned him that if he made confessional statement, the same can be used against him. He also apprised the accused that he is not bound to make such statement. When the accused replied that he wanted to make clean admission of guilt, he recorded the confessional statement of A-4 Saquib Nachan. From the above evidence, it is clear that Rule 15 was fully followed by the witnesses, who recorded the confessional statements of accused.

In view of the aforesaid evidence, the prosecution has proved its case beyond reasonable doubt against the appellants who are convicted by the trial court.

- (1) For Accused 1, the evidence as narrated above proves, beyond reasonable doubt, his involvement in the criminal conspiracy. He moved from one place to another in India under different fake names; he along with other persons went to Ahmedabad, hired Flat No. C-33, Paresh Apartments and got transferred to Bungalow No. 4-A in Usman Harun Society, Juhapura, Ahmedabad. On the basis of his interrogation, the police at Ahmedabad raided the premises and found large quantity of arms, ammunitions and explosive substances. His stay at Ahmedabad in the said premises is established without any shadow of doubt, by examining independent witnesses including the residents of aforesaid two premises, the washerman and other persons. He was staying under the name of Ashok Kumar Khanna or Iqbal. His stay in different hotels is also established. The purchase of Mahindra jeep and Maruti Gypsy is also proved. Therefore, it cannot be said that the trial court erred in convicting him for the offences punishable under Sections 3(3) and 5(1) of the TADA Act as well as Section 120-B IPC and under Section 25(1) (a) of the Arms Act.
- (2) Against Accused 2, apart from his confessional statement, it is proved that he is a Pakistani national. He moved from one place to another in India. He stayed at Aligarh with A-1 and in Qureshi Guest House at Delhi under different names during different periods. Hence, there is no reason to discard his confessional statement that he was an ISI agent and that he was involved in terrorist activities and hatched conspiracy with A-1.
- (3) For Accused 3, apart from proving his confessional statement, the prosecution has proved that he was found in the company of A-1 and A-20 at Bombay. From his premises, the letter written by him (Exts. 602 and 603) was found indicating his secret activities.
- (4) For accused 4, apart from his confessional statement, it is proved that he accompanied A-1 at Ahmedabad and Madras and stayed in different hotels under different names. He was present at Aligarh along with A-1 and A-2. He was also absconding.
- (5) Similarly for A-20, in addition to the confessional statement, the prosecution has led the evidence to establish his association with A-1 and A-2 at Aligarh. Thereafter it is proved that he went to Bombay and introduced A-1 and A-3 as his friends to his friend PW 87.

The next question would be with regard to the conviction of A-3, A-4 and A-20 for the offence punishable under Section 3(3) of the TADA Act. In our view, there cannot by any doubt that A-3, A-4 and A-20 have conspired along with A-1 and A-2 in their preparatory terrorist activities. Apart from conspiring, A-4 specifically accompanied A-1 at Ahmedabad for the purpose of finding a hideout. He also accompanied A-1 at Madras for surveying the Madras Stock Exchange. If A-4 was not at all connected with A-1, there was no necessity of travelling together under fake names. For Accused 3 and 20, it is true that apart from their confessional statements, the role proved against them in conspiring with A-1 is limited. However, A-3 Tahir Jamal had kept substantial amount for carrying the expenditure incurred in these activities. The torn letter Exts. 602 and 603 establishes that he was involved in secret "karobar". In this view of the matter, it cannot be said that their conviction under Section 3(3) of the TADA Act is in any way illegal or erroneous. However, considering the role played by A-3, A-4 and A-20, we think interest of justice would be served if their sentence is reduced from life imprisonment to RI for 10 years.

In the result, Criminal Appeal No. 219 of 1997 filed by A-1 Lal Singh and Criminal Appeals Nos. 1409-11 of 1999 filed by A-2 Mohd. Sharief are dismissed and their conviction and sentence as imposed by the learned Designated Judge are confirmed. Conviction of A-3 Tahir Jamal, A-4 Mohd. Saquib Nachan and A-20 Shoaib Mukhtiar for the offence under Section 3(3) of TADA Act is confirmed, but their sentence is modified to the extent that they are directed to suffer RI for 10 years for the same and to pay a fine of Rs. 10,000 each, and in default to suffer RI for 6 months. However, their conviction and sentence under Sections 120-B and 120-B(1) IPC imposed by the Designated Court are maintained. Hence, Criminal Appeal No. 244 of 1997, Criminal Appeal No. 294 of 1997 and Criminal Appeals Nos. 407-09 of 1997 filed by A-4, A-20 and A-3 respectively are allowed to the aforesaid extent only.

**Supreme Court of India
1999 (5) SCC 253**

**T. Suthenthiraraja, P. Ravichandran, Robert Payas & Others
vs
State by DSP, CBI, SIT, Chennai**

D.P. WADHWA, J.

I have studied the draft judgment prepared by my learned and noble brother K.T. Thomas,J. It is a judgment so well written, but, regrettably, I find myself unable to agree with him entirely both on certain questions of law and conviction and sentence proposed by him on some of the accused. Moreover, keeping in view the fact that since sentence of death passed on 26 accused by the Designated Court has been submitted to this Court for confirmation evidence needs to be considered in somewhat greater detail, I venture to render separate judgment.

On the night of 21.5.1991 a diabolical crime was committed. It stunned the whole nation. Rajiv Gandhi, former Prime Minister of India, was assassinated by a human bomb. With him 15 persons including 9 policemen perished and 43 suffered grievous or simple injuries. Assassin Dhanu an LTTE (Liberation Tigers of Tamil Elam) activist, who detonated the belt bomb concealed under her waist and Haribabu, a photographer (and also a conspirator) engaged to take photographs of the horrific sight, also died in the blast. As in any crime, criminals leave some footprints. In this case it was a camera which was found intact on the body of Haribabu at the scene of the crime. Film in the camera when developed led to unfolding of the dastardly act committed by the accused and others. A charge of conspiracy for offences under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), Indian Penal Code (IPC), Explosive Substances Act, 1908, Arms Act, 1959, Passport Act, 1967, Foreigners Act, 1946, and the Indian Wireless Telegraphy Act, 1933 was laid against 41 persons, 12 of whom were already dead having committed suicide and three absconded. Out of these, 26 faced the trial before the Designated Court. Prosecution examined 288 witnesses and produced numerous documents and material objects. Statements of all the accused were recorded under Section 313 of the Code of Criminal Procedure (Code). They denied their involvement. The Designated Court found them guilty of the offences charged against them. Thereafter all the accused were heard on the question of sentence. Designated Court awarded death sentence to all of them on the charge of conspiracy to murder. "A judicial massacre", bemoaned Mr. Natarajan,

learned senior counsel for the accused, and rightly so in our opinion. Designated Court also sentenced each of the accused individually for various offences for which they had been separately charged.

In view of the provisions of Section 20 of TADA, Designated Court submitted the sentence of death to this Court for confirmation. The accused also filed appeals under Section 19 of TADA challenging their conviction and sentence.

The accused have different alias and while mentioning the accused name it may not be necessary to refer to them with all their respective alias and alias of an accused will be indicated wherever necessary. There is no dispute about these alias. For proper comprehension of the facts it will be appropriate to refer to the appellants as accused.

Prosecution case is that Prabhakaran, Pottu Amman, Akila and Sivarasan masterminded and put into operation the plan to kill Rajiv Gandhi which was executed by Sivarasan, and Dhanu, of the two assassins (other being Subha), with the back-up of other accused, who conspired and abetted them in the commission of the crime which included providing them safe haven before and after the crime. Charge of conspiracy is quite complex and when analysed it states that 26 accused before us, and those absconding, deceased and others, are charged with having entered into criminal conspiracy between July, 1987 and May, 1992 at various places in Sri Lanka and India to do or cause to be done illegal acts, namely :-

1. to infiltrate into India clandestinely,
2. to carry and use unauthorized arms, ammunition and explosives,
3. to set up and operate unauthorized wireless sets to communicate with LTTE leaders in Sri Lanka from time to time,
4. to cause and carry out acts of terrorism and disruptive activities in Tamil Nadu and other places in India by use of bombs, explosives and lethal weapons so as to scare and create panic by such acts in the minds of the people and thereby to strike terror in the people,
5. in the course of such acts to assassinate Rajiv Gandhi, former Prime Minister of India and others, who were likely to be with him,
6. to cause disappearance of evidence thereof and to escape,
7. to screen themselves from being apprehended,

8. to harbour the accused and escape from the clutches of law, and
9. to do such other acts as may be necessary to carry out the object of the criminal conspiracy as per the needs of situation, and in pursuance of the said criminal conspiracy and in furtherance of the same to carry out the object of the said criminal conspiracy.

Including the charge of conspiracy, which is charge No. 1, there are 251 other charges framed against the accused for having committed various offences in pursuance to the conspiracy under Charge No. 1. Out of these Nalini (A-1) has been charged on 121 different counts. Second charge against her is that in pursuance to the conspiracy and in the course of the same transaction and in furtherance to the common intention of the accused she and the deceased accused Sivarasan, Dhanu, Subha and Haribabu did "commit murder of Rajiv Gandhi and others, who were likely to be with him on 21.5.1991 at about 10.20 P.M. at Sriperumbudur in the public meeting where Nalini (A1) was physically present at the scene of crime and provided the assassin Dhanu [deceased accused (DA)] the necessary cover from being detected as a foreigner, which enabled the assassin to move freely in the scene of crime and gain access nearer to Rajiv Gandhi to accomplish the object of conspiracy, where Dhanu did commit murder and intentionally caused the death of Rajiv Gandhi by detonating the improvised explosive device which was kept concealed in her waist belt when she was in close proximity to Rajiv Gandhi and thereby she (Nalini) committed an offence punishable under Section 302 read with Section 34 IPC."

Charges 3 to 17 are also under Section 302 read with Section 34 IPC for having caused the death of persons, who were in close proximity to Rajiv Gandhi. Charges 18 to 34 are under Section 326/34 IPC for voluntarily causing grievous hurt to the persons who were in close proximity to Rajiv Gandhi at the time of explosion. Charges 35 to 60 are under Section 324 read with Section 34 IPC for voluntarily causing hurt to the persons at the same time. Charges 61 to 119 are under Section 3(2) TADA read with Section 34 IPC. In these charges under Section 3(2) TADA it is mentioned that Nalini (A-1) committed terrorist acts by providing cover to Dhanu (DA) who detonated the improvised explosive device resulting in the bomb blast and in the murder of Rajiv Gandhi and others. Charge No. 120 is for offence under Section 3(3) TADA and this charge is as under:-

That Nalini (A-1) in pursuance of the said criminal conspiracy referred to in Charge No. 1, and in the course of the same transaction she in furtherance of the common intention, of Nalini (A-1) she proceeded to Sriperumbudur along with Sivarasan, Subha, Dhanu and Haribabu on the night of 21.5.1991 at about 10.20 P.M. in the public meeting having

knowledge of the commission of the terrorist act viz., explosion of bomb for killing Rajiv Gandhi and others and causing injuries to those, who were likely to be around him, and also striking terror in the people and rendered assistance to the terrorists Dhanu, Sivarasan and Subha prior to the terrorist act by taking them to the bus, hotel, the venue of public meeting and the like and intentionally aided the said terrorist act by being present on 21.5.1991 at Sriperumbudur in the public meeting, where the terrorist act was committed by Dhanu by detonating the improvised explosive device kept concealed in her waist belt resulting in the bomb blast, and with intent to aid and facilitate the commission of the said terrorist act Nalini (A-1) provided a cloak to Dhanu and Subha from being easily identified as Sri Lankan Tamils at the scene of crime and also facilitated the escape of the above said accused concerned in the crime, and thus Nalini (A-1) abetted the commission of the terrorist act and acts preparatory to the terrorist act or knowingly facilitated the commission of the terrorist act and acts preparatory to the terrorist act and thereby Nalini (A-1) committed the offence punishable under Section 3(3) of the TADA of 1987.

Last charge against Nalini (A-1) is under Section 4(1) TADA read with Section 34 IPC for having committed offence under Section 4(3) TADA for killing of nine police officials, who were public servants and were at that time with Rajiv Gandhi on duty.

Santhan (A-2) has been charged for an offence under Section 3(3) TADA and Section 14 of Foreigners Act (Charges 122 and 123). Other accused have also been similarly charged.

Before we consider the evidence and the arguments advanced by both the parties it may be more appropriate to set out various provisions of law which are the subjectmatter of the charges against the accused.

Mr. Natrajan said that confessions of the accused could not be taken into consideration. His arguments were:

- (1) all these confessions have been retracted by the accused having been taken under coercion and under Police influence;
- (2) sufficient time was not given to accused before recording of the confession. They were given only few hours to reflect if they wanted to make any confession;
- (3) under the provisions of the Code as amended by TADA, the Police took full remand of the accused for 60 days and when a day or so before the remand was to expire the accused were made to give their confessions. There is, thus, every possibility of the confessions being extracted. It cannot also be ruled out that the confessions were obtained by causing physical harm to the accused and playing upon their psychology;

- (4) confessions of Nalini (A-1) and Arivu (A-18) are otherwise inadmissible as mandatory provisions contained in Section 15 of TADA and Rule 15(3) of TADA Rules have been violated;
- (5) all the accused were kept together in a building called Malagai situated at Green Pass Road, Madras which were the headquarters of CBI. Firstly, remand was taken for one month but no confession came to be recorded. Further remand of one month was taken. During this period, Ponamalai sub-jail was denotified as jail and handed over to CBI and converted into Police Station. All the accused were transferred there and again kept together under the control of special investigating team of CBI. Legal principles required that the accused should have been kept separate and sufficient time should have been given to them for their minds to reflect if they wanted to make clean breast of the whole thing;
- (6) it is settled law that confession of an accused cannot be used for corroboration of the confession made by co-accused. The rule of prudence so requires; and
- (7) all these confessions are post-arrest confessions and confession of one accused cannot be used against the other even with reference to Section 10 of the Evidence Act. It could not be said that object of conspiracy was not accomplished by the assassination of Rajiv Gandhi and that the conspiracy was still in existence.

....

Rule 15 of the TADA Rules imposes certain conditions on the police officer with regard to the mode of recording the confession and requires the police officer to make a memorandum at the end of the confession to the effect that he has explained to the maker that he was not bound to make the confession and that the confession, if made by him, would be used as against him and that he recorded the confession only on being satisfied that it was voluntarily made. Rule 15(5) requires that every confession recorded under Section 15 should be sent forthwith either to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and the Magistrate should forthwith forward the recorded confession received by him to the Designated Court taking cognizance of the offence.

For the foregoing discussion, we hold that Section 15 is not liable to be struck down since that section does not offend either Article 14 or Article 21 of the Constitution.

Notwithstanding our final conclusion made in relation to the intendment of Section 15, we would hasten to add that the recording of a confession by a Magistrate under Section

164 of the Code is not excluded by any exclusionary provision in the TADA Act, contrary to the Code but on the other hand the police officer investigating the case under the TADA Act can get the confession or statement of a person indicted with any offence under any of the provisions of the TADA Act recorded by any Metropolitan Magistrate, Judicial Magistrate, Executive Magistrate or Special Executive Magistrate of whom the two latter Magistrates are included in Section 164(1) by sub-section (3) of Section 20 of the TADA Act and empowered to record confession.

The net result is that any confession or statement of a person under the TADA Act can be recorded either by a police officer not lower in rank than of a Superintendent of Police, in exercise of the powers conferred under Section 15 or by a Metropolitan Magistrate or Judicial Magistrate or Executive Magistrate or Special Executive Magistrate who are empowered to record any confession under Section 164 (1) in view of sub-section (3) of Section 20 of the TADA Act."

...

We think sufficient time was given to the accused in the circumstances of the case for them to reflect if they wanted to make confession. Merely because confession was recorded a day or so before the police remand was to expire would not make the confession involuntary. No complaint was made before the trial court that confession was the result of any coercion, threat or use of any third degree methods or even playing upon psychology of the accused.

As to whether any offence under Section 3 or 4 of TADA is made out in the present case, we will consider at subsequent stage of the judgment. In view of the decision of this Court in Bilal Ahmed Kaloo's case contention of Mr. Natrajan is rather correct. However, it appears to us that while holding the confession to be inadmissible in a trial when the accused is acquitted of offences under Section 3 or 4 of TADA, provisions of Section 12 of the TADA were not taken into consideration by this Court in the said judgment. Section 12 reads as under :

"12. Power of Designated Courts with respect to other offences.-(1) When trying any offence, a Designated Court may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence.

(2) If, in the course of any trial under this Act of any offence, it is found that the accused person has committed any other offence under this Act or any rule made thereunder or under any other law, the Designated Court may convict such person of such other offence and pass any sentence authorised by this Act or such rule or, as the case may be, such other law for the punishment thereof."

It is apparent that provisions of Section 12 of TADA were not brought to the notice of the Court in Bilal Ahmed Kaloo's case. This judgment which was rendered by two learned Judges of this Court, does not lay a good law on this aspect of the matter. Continuing Mr. Natrajan said that even if the confession of an accused is admissible under Section 15 of TADA it is not a substantive piece of evidence and cannot be used against a co-accused unless it is corroborated in material particulars by other evidence. Confession of one accused cannot corroborate the confession of another. In support of his submission, he referred to another two Judge Bench decision in Kalpnath Rai vs. State (Through CBI) [(1997) 8 SCC 732] where this Court said that confession under Section 15 of TADA cannot be used as substantive evidence and that it has only corroborative value. This is how this Court considered this question:

- "70. Section 15 of TADA provides that "notwithstanding anything in the Code or in the Indian Evidence Act ... a confession made by a person before a police officer not lower in rank than a Superintendent of Police ... shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder, provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused". In this context we may point out that the words "or co-accused, abettor or conspirator" in the proviso were not in the section until the enactment of Act 43 of 1993 by which those words were inserted. By the same Amendment Act Section 21 was also recast which, as it originally stood, enabled the Designated Court to draw a legal presumption that the accused had committed the offence "if it is proved that a confession has been made by a co-accused that the accused had committed the offence".
71. The legal presumption linked to an accused vis-a-vis a confession made by a coaccused has been deleted by Parliament through Act 43 of 1993 and as a package inserted the words mentioned above in Section 15.
72. What is the effect of such deletion from Section 21 and addition to Section 15 of TADA? It should be remembered that under Sections 25 and 26 of the Evidence Act no confession made by an accused to a police officer, or to any person while he was in police custody could be admitted in evidence, and under Section 162 of the Code no statement made by any person during investigation to a police officer could be used in a trial except for the purpose of contradiction. In view of the aforesaid ban imposed by the legislature Section 15 of TADA provides an exception to the ban. But it is well to remember that other confessions which are admissible even under the Evidence Act could be used as against a co-accused only upon satisfaction of certain conditions. Such conditions are stipulated in Section 30 of the Evidence Act, which reads thus :
- "30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of

such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession."

73. *The first condition is that there should be a confession i.e. inculpatory statement. Any exculpatory admission is not usable for any purpose whatsoever as against a coaccused. The second condition is that the maker of the confession and the co-accused should necessarily have been tried jointly for the same offence. In other words, if the coaccused is tried for some other offence, though in the same trial, the confession made by one is not usable against the co-accused. The third condition is that the confession made by one accused should affect him as well as the co-accused. In other words, if the confessor absolves himself from the offence but only involves the co-accused in the crime, while making the confession, such a confession cannot be used against the coaccused.*
74. *Even if no conditions are satisfied the use of a confession as against a co-accused is only for a very limited purpose i.e. the same can be taken into consideration as against such other person. It is now well settled that under Section 30 of the Evidence Act the confession made by one accused is not substantive evidence against a co-accused. It has only a corroborative value (vide Kashmira Singh v. State of M.P. (AIR 1952 SC 159 : 1952 SCR 526), Nathu v. State of U.P. (AIR 1956 SC 56) and Haricharan Kurmi v. State of Bihar (AIR 1964 SC 1184).*
75. *A confession made admissible under Section 15 of TADA can be used as against a co-accused only in the same manner and subject to the same conditions as stipulated in Section 30 of the Evidence Act."*

Mr. Altaf Ahmad, learned Additional Solicitor General submitted that the statement of law as spelled out in para 75 of the judgment in Kalpnath Rai's case needs re-consideration. He said what Section 15 contains is a non-absente clause and it applies notwithstanding the provisions of the Evidence Act and the Code.

Section 21 of TADA was amended by the amending Act 43 of 1993 and clauses (c) and (d) were omitted. Section 21 before deletion of clauses (c) and (d) was as under :-

- "21. *Presumption as to offences under Section 3. - (1) In a prosecution for an offence under sub-section (1) of Section 3, if it is proved -*
- (a) *that the arms or explosives or any other substances specified in Section 3 were recovered from the possession of the accused and there is reason to believe that such arms or explosives or other substances of a similar nature, were used in the commission of such offence; or*
- (b) *that by the evidence of an expert the finger prints of the accused were found at the site of the offence or on anything including arms and vehicles used in connection with the commission of such offence; or*

- (c) that a confession has been made by a co-accused that the accused had committed the offence; or
 - (d) that the accused had made a confession of the offence to any person other than a police officer, the Designated Court shall presume, unless the contrary is proved, that the accused had committed such offence.
- (2) In a prosecution for an offence under sub-section (3) of Section 3, if it is proved that the accused rendered any financial assistance to a person accused of, or reasonably suspected of, an offence under that section, the Designated Court shall presume, unless the contrary is proved, that such person has committed the offence under that subsection."

By the same amending Act words "or co-accused, abettor or conspirator" were introduced in Section 15 TADA after the words "shall be admissible in the trial of such person". Now this Section reads as under :-

"15. Certain confessions made to police officers to be taken into consideration. - (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder.

Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

- (2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily."

In *Kalpnath Rai's* case this Court said that Sections 25 and 26 of the Evidence Act were excluded and not Section

30. The question that arises for consideration is as to what is the effect of deletion clauses (c) and (d) in Section 21 and addition of words in Section 15.

Mr. Altaf Ahmad said that the provisions of Sections 15 and 21 after their amendment provided that a confession of an accused is now admissible in evidence against co-accused. It is the substantive evidence against the co-accused as well. Concept of drawing presumption though as was earlier mentioned in Section 21 now no more existed.

When Section 15 TADA says that confession of an accused is admissible against co-accused as well it would be substantive evidence against the co-accused. It is a different matter as to what value is to be attached to the confession with regard to the coaccused as that would fall in the realm of appreciation of evidence.

The term 'admissible' under Section 15 has to be given a meaning. When it says that confession is admissible against a co-accused it can only mean that it is substantive evidence against him as well as against the maker of the confession.

Mr. Natrajan said that the confession may be substantive evidence against the accused who made it but not against his co-accused. He reasoned that the confession was not that of the co-accused and it was not the evidence; it is the confessor who owned his guilt and not the co-accused; it is not evidence under Section 3 of the Evidence Act; it is not tested by cross-examination; and lastly, after all it is the statement of an accomplice. According to him it can have only corroborative value and that is a well established principle of the evidence even though Section 3 and Section 30 of the Evidence Act be ignored. But then Section 15 TADA starts with non-absente clause. It says Evidence Act will not apply and neither the Code of Criminal Procedure. This is certainly a departure from the ordinary law. But then it was also the submissions of Mr. Natrajan that the bar which is removed under Section 15 is qua Sections 24, 25 and 26 of the Evidence Act and not that all the provisions of the Evidence Act have been barred from its application. He, therefore, said that the view taken by this Court in Kalpnath Rai's case [(1997) 8 SCC 732] that Section 30 Evidence Act was in any case applicable, was correct. We think, however, that the view expressed in that case needs reconsideration.

If we analyze Section 15 the words which have been added by the Amending Act, 1993 have to be given proper meaning and if we accept the argument of Mr. Natrajan these words will be superfluous which would be against the elementary principles of interpretation of statute. For the confession of accused to be admissible against coaccused proviso to Section 15 says that they should be tried together. That is also Section 30 Evidence Act. Clauses (c) and (d) of Section 21 were deleted which raised a presumption of guilt against the co-accused. According to Mr. Natrajan that provision made the confession of co-accused a substantive evidence and Parliament did not think it proper that it should be so. But then why add the words in Section 15?

'Admissible' according to Black's Law Dictionary means, "pertinent and proper to be considered in reaching a decision. Used with reference to the issues to be decided in any judicial proceeding."

It defines 'Admissible evidence' as, "As applied to evidence, the term means that the evidence introduced is of such a character that the court or judge is bound to receive it; that is, allow it to be introduced at trial. To be "admissible" evidence must be relevant, and, inter alia, to be "relevant" it must tend to establish material proposition...." If we again refer to Black's Law Dictionary 'substantive evidence' means "that adduced for the purpose of proving a fact in issue, as opposed to evidence given for the purpose of discrediting a witness (i.e. showing that he is unworthy of belief), or of corroborating his testimony".

TADA was enacted to meet extra-ordinary situation existing in the country. Its departure from the law relating to confession as contained in Evidence Act is deliberate. Law has to respond to the reality of the situation. What is admissible is the evidence. Confession of the accused is admissible with the same force in its application to the coaccused who is tried in the same case. It is primary evidence and not corroborative. When the legislature enacts that Evidence Act would not apply which would mean all the provisions of the Evidence Act including Section 30. By judicial interpretation or judicial rigmarole, as we may put it, the Court cannot again bring into operation Section 30 of the Evidence Act and any such attempt would not appear to be quite warranted. Reference was made to a few decisions on the question of interpretation of Sections 3 and 30 of the Evidence Act, foremost being that of the Privy Council in *Bhuboni Sahu vs. The King* (AIR 1949 PC 257), and though we note this decision it would not be applicable because of the view which we have taken on the exclusion of Section 30 of the Evidence Act. In *Bhuboni Sahu*'s case the Board opined as under :-

"Section 30 seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained in S. 3, Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities. Section 30, however, provides that the Court may take the confession into consideration and thereby, no doubt, makes it evidence on which the Court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. Their Lordships think that the view which has prevailed in most of the High Courts in India, namely that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction, is correct."

In *Kashmira Singh vs. State of Madhya Pradesh* (1952 SCR 526) one of the questions was how far and in what way the confession of an accused person can be used against a co-accused. The Court relied on the observations made by the Privy Council in *Bhuboni Sahu's* case and said that testimony of an accomplice can in law be used to corroborate another though it ought not to be used save in exceptional circumstances and for reasons disclosed.

In *Hari Charan Kurmi and Jogia Hajam vs. State of Bihar* (1964 (2) SCR 623) this Court again relied on its earlier decision in *Kashmira Singh's* case and on the decision of the Privy Council in *Bhuboni Sahu's* case. It said that technically construed, definition of evidence as contained in Section 3 of the Evidence Act will not apply to confession. Even so, Section 30 provides that a confession may be taken into consideration not only against its maker, but also against a co-accused person; that is to say, though such a confession may not be evidence as strictly defined by Section 3 of the Act, it is an element which may be taken into consideration by the criminal court and in that sense, it may be described as evidence in a non-technical way. But it is significant that like other evidence which is produced before the Court, it is not obligatory on the court to take the confession into account. When evidence as defined by the Act is produced before the Court, it is the duty of the Court to consider that evidence. What weight should be attached to such evidence, is a matter in the discretion of the Court. But a Court cannot say in respect of such evidence that it will just not take that evidence into account. Such an approach can, however, be adopted by the Court in dealing with a confession, because section 30 merely enables the Court to take the confession into account.

In view of the above discussions, we hold the confessions of the accused in the present case to be voluntarily and validly made and under Section 15 of TADA confession of an accused is admissible against co-accused as a substantive evidence. Substantive evidence, however, does not necessarily mean substantial evidence. It is the quality of evidence that matters. As to what value is to be attached to a confession will fall within the domain of appreciation of evidence. As a matter of prudence court may look for some corroboration if confession is to be used against a co-accused though that will again be with the sphere of appraisal of evidence.

Under Section 3 of TADA in order there is a terrorist act three essential conditions must be present and these are contained in sub-section (1) of Section 3 - (1) criminal activity must be committed with the requisite intention or motive, (2) weapons must have been used, and (3) consequence must have ensued. As to what is a terrorist act and what is the intention contemplated under Section 3 of TADA reference may be made to a decision

of this Court in *Hitendra Vishnu Thakur and others vs. State of Maharashtra and others* (1994 (4) SCC 602). In this judgment Section 3(1) of TADA has been analyzed. It would be useful to quote from the judgment in extenso:-

"Terrorism' is one of the manifestations of increased lawlessness and cult of violence. Violence and crime constitute a threat to an established order and are a revolt against a civilized society. 'Terrorism' has not been defined under TADA nor is it possible to give a precise definition of 'terrorism' or lay down what constitutes 'terrorism'. It may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or "terrorise" people and the society and not only those directly assaulted, with a view to disturb even tempo, peace and tranquillity of the society and create a sense of fear and insecurity. A 'terrorist' activity does not merely arise by causing disturbance of law and order or of public order. The fall out of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law. Experience has shown us that 'terrorism' is generally an attempt to acquire or maintain power or control by intimidation and causing fear and helplessness in the minds of the people at large or any section thereof and is a totally abnormal phenomenon. What distinguishes 'terrorism' from other forms of violence, therefore, appears to be the deliberate and systematic use of coercive intimidation. More often than not, a hardened criminal today takes advantage of the situation and by wearing the cloak of 'terrorism', aims to achieve for himself acceptability and respectability in the society because unfortunately in the States affected by militancy, a 'terrorist' is projected as a hero by his group and often even by the misguided youth. It is, therefore, essential to treat such a criminal and deal with him differently than an ordinary criminal capable of being tried by the ordinary courts under the penal law of the land. Even though the crime committed by a 'terrorist' and an ordinary criminal would be overlapping to an extent but then it is not the intention of the Legislature that every criminal should be tried under TADA, where the fall out of his activity does not extent beyond the normal frontiers of the ordinary criminal activity. Every 'terrorist' may be a criminal but every criminal cannot be given the label of a 'terrorist' only to set in motion the more stringent provisions of TADA. The criminal activity in order to invoke TADA must be committed with the requisite intention as contemplated by Section 3(1) of the Act by use of such weapons as have been enumerated in Section 3(1) and which cause or are likely to result in the offences as mentioned in the said section."

"Thus, unless the Act complained of falls strictly within the letter and spirit of Section 3(1) of TADA and is committed with the intention as envisaged by that section by

means of the weapons etc. as are enumerated therein with the motive as postulated thereby, an accused cannot be tried or convicted for an offence under Section 3(1) of TADA. When the extent and reach of the crime committed with the intention as envisaged by Section 3(1), transcends the local barriers and the effect of the criminal act can be felt in other States or areas or has the potential of that result being felt there, the provisions of Section 3(1) would certainly be attracted. Likewise, if it is only as a consequence of the criminal act that fear, terror or/and panic is caused but the intention of committing the particular crime cannot be said to be the one strictly envisaged by Section 3(1), it would be impermissible to try or convict and punish an accused under TADA. The commission of the crime with the intention to achieve the result as envisaged by the section and not merely where the consequence of the crime committed by the accused create that result, would attract the provisions of Section 3(1) of TADA. Thus, if for example a person goes on a shooting spree and kills a number of persons, it is bound to create terror and panic in the locality but if it was not committed with the requisite intention as contemplated by the section, the offence would not attract Section 3(1) of TADA. On the other hand, if a crime was committed with the intention to cause terror or panic or to alienate a section of the people or to disturb the harmony etc. it would be punishable under TADA, even if no one is killed and there has been only some person who has been injured or some damage etc. has been caused to the property, the provisions of Section 3(1) of TADA would be squarely attracted. Where the crime is committed with a view to overawe the Government as by law established or is intended to alienate any section of the people or adversely affect the harmony amongst different sections of the people and is committed in the manner specified in Section 3(1) of TADA, no difficulty would arise to hold that such an offence falls within the ambit and scope of the said provision. Some difficulty, however, arises where the intended activity of the offender results in striking terror or creating fear and panic amongst the people in general or a section thereof. It is in this situation that the courts have to be cautious to draw a line between the crime punishable under the ordinary criminal law and the ones which are punishable under Section 3(1) of TADA. It is of course neither desirable nor possible to catalogue the activities which would strictly bring the case of an accused under Section 3(1) of TADA. Each case will have to be decided on its own facts and no rule of thumb can be applied."

In the present case applying the principles set out above on the interpretation of Section 3(1) and analyses of this subsection of the TADA we do not find any difficulty in concluding that evidence does not reflect that any of the accused entertained any such intention or had any of the motive to overawe the Government or to strike terror among people. No doubt evidence is there that the absconding accused Prabhakaran, supreme leader of LTTE had personal animosity against Rajiv Gandhi and LTTE cadre developed hatred towards Rajiv Gandhi, who was identified with the atrocities allegedly committed by IPKF in Sri Lanka. There was no conspiracy to the indiscriminate killing of persons. There is no evidence directly or circumstantially that Rajiv Gandhi was killed with the intention contemplated

under Section 3(1) of TADA. State of Tamil Nadu was notified under TADA on 23.6.1991 and LTTE were declared an unlawful association on 14.5.1992 under the provisions of the Unlawful Activity (Prevention) Act, 1957. Apart from killing of Rajiv Gandhi no other terrorist act has been alleged in the State of Tamil Nadu. Charge may be there but there is no evidence to support the charge. Mr. Natarajan said that prosecution might refer to the killing of Padmanabhan in Tamil Nadu, leader of EPRLF, which fact finds mention in the confession statement of Santhan (A-2). But then he said it was not a terrorist act. It was killing of a rival Sri Lankan and in any case killing of Padmanabhan is not a charge in the case before this Court. Mr. Altaf Ahmad said that when he earlier mentioned the killing of Padmanabhan, it was only to show that LTTE was an organization which brook no opposition and anyone opposing its objective was eliminated. Mr. Natarajan said it was the case of the prosecution itself that Prabhakaran had personal animosity against Rajiv Gandhi developed over a period of time and had motive to kill him.

The question before us is to consider the charge in its proper way and to examine the evidence with reference to that. Quite a number of judgments on the question of power of Reference Court were cited, principal of these being two judgments in *Jumman and others vs. The State of Punjab* (AIR 1957 SC 469) and *Ram Shankar Singh and others vs. State of West Bengal* (1962 Suppl. (1) SCR 49).

In *Jumman and others vs. State of Punjab* (AIR 1957 SC 469) this court considered scope of the reference under Section 374 and 375 of the old Code (Section 366 and 367 of the new Code) and powers of the High Court in its disposal. Statement of law has been laid in paras 11 and 12 of the judgment which is as under :-

"(11) Before we propose to discuss the evidence on which reliance has been placed by the counsel in this Court, it is necessary to advert to a circumstance which calls for some comment. Along with the appeals filed by the accused, there was before the High Court, a reference under s. 374, Criminal P.C., by the Sessions Judge, submitting to the High Court the proceedings before him for confirmation of the sentences of death passed by him. Under s. 375, Criminal P.C., the High Court has power to direct further inquiry to be made or additional evidence to be taken in such matters and according to s. 376, Criminal P.C., the High Court has to confirm the sentence, or pass any other sentence warranted by law, or alternatively it may annul the conviction and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge or the High Court may acquit the accused person. Section 377, Criminal P.C., provides that the confirmation of the sentence or order passed by the High Court, shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them."

(12) *It is clear from a perusal of these provisions that in such circumstances the entire case is before the High Court and in fact it is a continuation of the trial of the accused on the same evidence and any additional evidence and that is why the High Court is given power to take fresh evidence if it so desires. In an appeal under o.41, Civil P.C., an appellate Court has to find whether the decision arrived at by the Court of first instance is correct or not on facts and law; but there is a difference when a reference is made under s. 374, Criminal P.C., and when disposing of an appeal under s.423, Criminal P.C., and that is that the High Court has to satisfy itself as to whether a case beyond reasonable doubt has been made out against the accused persons for the infliction of the penalty of death. In fact the proceedings before the High Court are a reappraisal and the reassessment of the entire facts and law in order that the High Court should be satisfied on the materials about the guilt or innocence of the accused persons. Such being the case, it is the duty of the High Court to consider the proceedings in all their aspects and come to an independent conclusion on the materials, apart from the view expressed by the Sessions Judge. In so doing, the High Court will be assisted by the opinion expressed by the Sessions Judge, but under the provisions of the law abovementioned it is for the High Court to come to an independent conclusion of its own."*

In *Ram Shankar Singh and others vs. State of West Bengal* (1962 Suppl. (1) SCR 49) this Court held that powers under Section 374 (1) and Section 376 of the Old Code were manifestly of wide amplitude and exercised thereof was not restricted by the provisions of Section 418(1) and Section 423 of the old Code. Irrespective of whether the accused, who is sentenced to death prefers an appeal, High Court is bound to consider the evidence and arrive at an independent conclusion as to the guilt or innocence of the accused and this the High Court must do even if the trial of the accused was held by jury. Indeed, duty is imposed upon the High Court to satisfy itself that the conviction of the accused is justified on the evidence, and that the sentence of death in the circumstances of the case, is the only appropriate sentence.

These are the basic judgments on the scope of reference and the powers of the High Court while disposing of the same. Other judgments of this Court on this aspect reiterate the principles laid in these two judgment. It is, therefore, not necessary for us to refer to all those judgments.

We have certainly kept in view principles laid in these judgments.

Prosecution case now made out before us is that the object of conspiracy was to commit terrorist acts during the period 1987 to 1992; that the assassination of Rajiv Gandhi was one of such acts with the intention to overawe the Government and to strike terror; and the

assassination was an act which struck terror and was also a disruptive activity. As to how it was intended to overawe the Government it was submitted that it was on account of Indo-Sri Lankan Accord, which the Government of India was to honour and that did not suit the aspirations of LTTE and thus the conspiracy was hatched to eliminate the person who was the author of the Accord and to threaten the successive Governments not to follow the Accord, otherwise that Government would also meet the same fate. But then, as noted above that there was a conspiracy to overawe the Government is nowhere in the charge. Though it could be said that terror was struck by assassination of Rajiv Gandhi but the question is if striking of terror was intended and for that again there is no evidence. Apart from the assassination of Rajiv Gandhi no other act which could be termed as terrorist act has been suggested. The Designated Court in its impugned judgment does not record any such argument now advanced before us. There is no discussion in the judgment and there is no evidence to which judgment refers to hold that there was any terrorist act intended to overawe the Government or to strike terror. The Designated Court has clearly held that on the assassination of Rajiv Gandhi object of conspiracy was successfully accomplished. Even if thus examining the proceedings in reference our decision has to be made on the basis of the evidence on record. When there is no evidence inference cannot be drawn that act of killing of Rajiv Gandhi was to overawe the Government. Even though there is no bar to the examination of the accused under Section 313 of the Code by this Court in these proceedings but then what is required to be put to the accused is to enable him to personally explain any circumstance appearing in the evidence against him and when there is no evidence, there is no necessity to examine the accused at this stage as that would be a futile exercise. When the prosecution during the course of the trial, which lasted over a number of years, had taken the stand that killing of Rajiv Gandhi was a terrorist act, it cannot now turn about and say that killing itself was not a terrorist act but was committed to achieve the object of conspiracy which was to overawe the Government. As a matter of fact in the statement of Kasi Anandhan (PW-242), who was a member of the Central Committee of LTTE, it has come on record that he met Rajiv Gandhi in March, 1991 when Rajiv Gandhi supported the stand of LTTE and had admitted that it was his mistake in sending IPKF to Sri Lanka and wanted LTTE to go ahead with its agitation. That being the evidence brought on record by the prosecution there is no question of it now contending that there was conspiracy to overawe the Government. Its stand throughout has been that it was the personal motive of Prabhakaran and others to commit terrorist act by killing Rajiv Gandhi. Under Section 3(1) of TADA overawing the Government cannot be the consequence but it has to be the primary object. There is nothing on record to show that the intention to kill Rajiv Gandhi was to overawe the Government. Reference to the Indo-Sri Lankan Accord is merely by way of narration.

Support to the struggle of LTTE in Sri Lanka was from Tamil Nadu and it does not appeal to reason that LTTE would commit any act to overawe the Government. It is matter of common knowledge that all terrorist acts are publicized and highlighted which is fundamental to terrorism. Whenever a terrorist act is committed some organisation or the other comes forward to claim responsibility for that. In the present case LTTE tried to conceal the fact that it was behind the murder of Rajiv Gandhi. The object to assassinate Rajiv Gandhi was kept a closely guarded secret. In the wireless message dated 7.5.1991 (Exh. P-392) from Sivarasan to Pottu Amman he conveyed that "our intention is not known to anybody except we three" meaning thereby himself, Subha and Dhanu. There is another wireless message dated 22.5.1991 (Exh. P-396) from Pottu Amman to Sivarasan that "even to our people in higher places we informed that we have no connection with this" meaning thereby that the assassination of Rajiv Gandhi a day before was not carried out by LTTE. LTTE was not owning the assassination of Rajiv Gandhi and it cannot, therefore, be said that it was done to overawe the Government. LTTE did not want publicity and wanted to keep friendly relations with India and the people of India. Pottu Amman even cautioned Sivarasan in his wireless message dated 22.5.1991 (Exh. P-396) not to send long messages as "it will create suspicion" meaning thereby that LTTE might be suspected to be behind the assassination. Two letters of Subha and Dhanu to Akila and Pottu Amman dated 9.5.1991 which were carried by Murugan (A-3) did not spell out their mission. Trichy Santhan (deceased accused) in his letter dated 7.9.1991 (Exh.P-129) to Prabhakaran, which was recovered from Irumburai (A-19) complained about the operation of Sivarasan which led to the name of LTTE being publicized as behind the assassination of Rajiv Gandhi and further about the illicit relationship that developed between Murugan (A-3) and Nalini (A1). He wrote that due to Murugan (A-3) incident the press was writing ridiculously about the movement and the newspapers were magnifying that Murugan (A-3) and Nalini (A-1) were lovers and that Nalini (A-1) was pregnant of five months.

We accept the argument of Mr. Natarajan that terrorism is synonymous with publicity and it was sheer personal animosity of Prabhakaran and other LTTE cadre developed against Rajiv Gandhi which resulted in his assassination. LTTE would not do any act to overawe the Government in Tamil Nadu or in the Centre as otherwise their activities in this country in support of their struggle in Sri Lanka would have been seriously hampered.

Charge of disruptive activities under Section 4(3) of TADA is against Nalini (A-1) and Arivu (A-18). There is no charge under Section 3(3) of TADA against Rangam (A-24), Vicky (A-25) and Ranganath (A-26). They are charged under Section 3(4) of TADA. Charge under Section 3(3) is against A-1 to A-23. If we examine one such charge, say charge No. 235 against A-21 which says that she in pursuance to the criminal conspiracy referred to in charge No. 1 and

in course of same transaction during the period between January 91 and June, 1991 at Madras and other place in Tamil Nadu she had actively associated with and assisted other conspirators for carrying out the object of criminal conspiracy and thus she knowingly facilitated the commission of terrorist act or any act preparatory to terrorist act and which was committing the terrorist act by detonating the improvised explosive device concealed in waist belt of Dhanu and thereby A-21 committed an offence punishable under Section 3(3) of TADA.

Designated Court held that hatred which developed in the minds of Prabhakaran, further developed into animosity against Rajiv Gandhi in view of the events which took place after IPKF was inducted in Sri Lanka.

Thus examining the whole aspect of the matter we are of the opinion that no offence either under Sections 3 or 4 of TADA has been committed. Since we hold that there is no terrorist act and no disruptive activity under Sections 3 and 4 of TADA, charges under Section 3(3), 3(4) and 4(3) of TADA must also fail against all the accused.

Arguments were then addressed as to what is nature of conspiracy made out from the evidence on record and the applicability of Section 10 of the Evidence Act. Various judgments of this Court were cited on the nature, scope and existence of criminal conspiracy under Section 120A and 120B, IPC. We may refer to some of them.

In *Major E.G. Barsay vs. The State of Bombay* (1962 (2) SCR 195 at 228) this Court said :-

"The gist of the offence of criminal conspiracy under Section 120A IPC is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under Section 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law. Under the first charge the accused are charged with having conspired to do three categories of illegal acts, and the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They are all guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable."

In *Sardar Sardul Singh Caveeshar vs. State of Maharashtra* (1964 (2) SCR 378) reference of which was made while considering the impact of Section 10 of the Evidence Act, the Court said that the essence of conspiracy was that there should be an agreement between persons to do one or other of the other of the acts described in Section 120A IPC. The said

agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties.

In *Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra* [(1970) 1 SCC 696] it was held that Section 120-B IPC makes the criminal conspiracy as a substantive offence which offence postulates an agreement between two or more persons to do or cause to be done an act by illegal means. It differs from other offences where mere agreement is made an offence even if no steps are taken to carry out that agreement.

In *Yash Pal Mittal v. State of Punjab* [(1977) 4 SCC 540] the Court said as under:

"9. The offence of criminal conspiracy under Section 120A is a distinct offence introduced for the first time in 1913 in Chapter V-A of the Penal Code. The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes mis-fire or overshooting by some of the conspirators. Even if some steps are resorted to by one or two of the conspirators without the knowledge of the others it will not affect the culpability of those others when they are associated with the object of the conspiracy."

In *Shivnarayan Laxminarayan Joshi and others vs. State of Maharashtra* (1980 (2) SCC 465) this Court said that it was manifest "that a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the same. The offence can be only proved largely from the inference drawn from acts or illegal omission committed by the conspirators in pursuance of a common design."

In *Mohammad Usman Mohammad Hussain Maniyar and others vs. State of Maharashtra* (1981 (2) SCC 443) this Court again asserted :-

"It is true that there is no evidence of any express agreement between the appellants to do or cause to be done the illegal act. For an offence under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or cause to be done the illegal act; the agreement may be proved by necessary implication."

In *State of Himachal Pradesh vs. Kishan Lal Pradhan and others* (1987 (2) SCC 17) the Court said that everyone of the conspirators need not have taken active part in the commission of each and every one of the conspiratorial acts for the offence of conspiracy to be made out. It added that :-

"The offence of criminal conspiracy consists in a meeting of minds of two or more persons for agreeing to do or causing to be done an illegal act or an act by illegal means, and the performance of an act in terms thereof. If pursuant to the criminal conspiracy the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of the offences."

In *Kehar Singh and others vs. State (Delhi Administration)* (1988 (3) SCC 609) the Court said that the most important ingredient of the offence of conspiracy is agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. It further added as under :-

"Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the court must inquire whether the two persons are independently pursuing the same end or they have come together in the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Gerald Orchard of University of Canterbury, New Zealand explains the limited nature of this proposition :

"Although it is not in doubt that the offence requires some physical manifestation of agreement. It is important to note the limited nature of this proposition. The law does not require that the act of agreement take any particular form and the fact of agreement may be communicated by words or conduct. Thus, it has been said that it is unnecessary to prove that the parties "actually came together and agreed in terms" to pursue the unlawful object : there need never have been an express verbal agreement, it being sufficient that there was "a tacit understanding between conspirators as to what should be done".

In *Ajay Aggarwal vs. Union of India and others* (1993 (3) SCC 609) this Court considering the ingredients of the offence of conspiracy said:-

"Section 120-A of the IPC defines 'conspiracy' to mean that when two or more persons agree to do, or cause to be done an illegal act, or an act which is not illegal by illegal means, such an agreement is designated as "criminal conspiracy". No agreement except an agreement to commit an offence shall amount to a criminal conspiracy, unless some act besides the agreement is done by one or more parties to such agreement in furtherance thereof. Section 120-B of the IPC prescribes punishment for criminal conspiracy. It is not necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should agree for design or object of the conspiracy. Conspiracy is conceived as having three elements : (1) agreement (2) between two or more persons by whom the agreement is effected; and (3) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished. It is immaterial whether this is found in the ultimate objects."

The Court then considered the common law definition of 'criminal conspiracy' and for that referred to statement of law by Lord Denman in *King v. Jones* (1832 B & AD 345) that an indictment for conspiracy must "charge a conspiracy to do an unlawful act by unlawful means" and was elaborated by Willies, J. on behalf of the judges while referring the question to the House of Lords in *Mulcahy v. Reg* [(1868) LR 3 HL 306] and the House of Lords in unanimous decision reiterated in *Quinn v. Leathem* (1901 AC 495, 528):

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful; and punishable if for a criminal object, or for the use of criminal means."

The Court also referred to another decision of English House of Lords in *Director of Public Prosecutions v. Doot* (1973 AC 807) where Lord Pearson held that :- (A) conspiracy involved an agreement express or implied. A conspiratorial agreement is not a contract, not legally binding because it is unlawful. But as an agreement it has its three stages, namely, (1) making or formation; (2) performance or implementation; (3) discharge or termination. When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed, and the conspirator can be prosecuted even though no performance had taken place. But the fact that of the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of its performance or by abandonment or frustration or, however, it may be."

The Court then considered the question whether conspiracy is a continuing offence and said as under:-

"Conspiracy to commit a crime itself is punishable as a substantive offence and every individual offence committed pursuant to the conspiracy is separate and distinct offence to which individual offenders are liable to punishment, independent of the conspiracy. Yet, in our considered view, the agreement does not come to an end with its making, but would endure till it is accomplished or abandoned or proved abortive. Being a continuing offence, if any acts or omissions which constitute an offence are done in India or outside its territory the conspirators continuing to be parties to the conspiracy and since part of the acts were done in India, they would obviate the need to obtain sanction of the Central Government. All of them need not be present in India nor continue to remain in India."

Finally the Court said as under :-

"Thus, an agreement between two or more persons to do an illegal act or legal acts by illegal means is criminal conspiracy. If the agreement is not an agreement to commit an offence, it does not amount to conspiracy unless it is followed up by an overt act done by one or more persons in furtherance of the agreement. The offence is complete as soon as there is meeting of minds and unity of purpose between the conspirators to do that illegal act or legal act by illegal means. Conspiracy itself is a substantive offence and is distinct from the offence to commit which the conspiracy is entered into. It is undoubted that the general conspiracy is distinct from number of separate offences committed while executing the offence of conspiracy. Each act constitutes separate offence punishable, independent of the conspiracy. The law had developed several or different models or technics to broach the scope of conspiracy. One such model is that of a chain, where each party performs even without knowledge of the other a role that aids succeeding parties in accomplishing the criminal objectives of the conspiracy. An illustration of a single conspiracy, its parts bound together as links in a chain, is the process of procuring and distributing narcotics or an illegal foreign drug for sale in different parts of the globe. In such a case, smugglers, middlemen and retailers are privies to a single conspiracy to smuggle and distribute narcotics. The smugglers knew that the middlemen must sell to retailers; and the retailers knew that the middlemen must buy of importers of someone or another. Thus the conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their settlers. The accused embarked upon a venture in all parts of which each was a participant and an abettor in the sense that, the success of the part with which he was immediately concerned, was dependent upon the success of the whole. It should also be considered as a spoke in the hub. There is a rim to bind all the spokes together in a single conspiracy. It is not material that a rim is found only when there is proof that each spoke was aware of one another's existence but that all promoted in furtherance of some single illegal objective. The traditional concept

of single agreement can also accommodate the situation where a well-defined group conspires to commit multiple crimes; so long as all these crimes are the objects of the same agreement or continuous conspiratorial relationship, and the conspiracy continues to subsist though it was entered in the first instance. Take for instance that three persons hatched a conspiracy in country A to kill D in country B with explosive substance. As far as conspiracy is concerned, it is complete in country A. One of them pursuant thereto carried the explosive substance and hands it over to them pursuant thereto carried the explosive substance and hands it over to third one in the country B who implants at a place where D frequents and got exploded with remote control. D may be killed or escape or may be got exploded with remote control. D may be killed or escape or may be diffused. The conspiracy continues till it is executed in country B or frustrated. Therefore, it is a continuing act and all are liable for conspiracy in country B though first two are liable to murder with aid of Section 120-B and the last one is liable under Section 302 or 307 IPC, as the case may be. Conspiracy may be considered to be a march under a banner and a person may join or drop out in the march without the necessity of the change in the text on the banner. In the comity of International Law, in these days, committing offences on international scale is a common feature. The offence of conspiracy would be a useful weapon and there would exist no conflict in municipal laws and the doctrine of autrefois convict or acquit would extend to such offences. The comity of nations are duty-bound to apprehend the conspirators as soon as they set their feet on the country's territorial limits and nip the offence in the bud.

25. A conspiracy thus, is a continuing offence and continues to subsist and committed wherever one of the conspirators does an act or series of acts. So long as its performance continues, it is a continuing offence till it is executed or rescinded or frustrated by choice or necessity. A crime is complete as soon as the agreement is made, but it is not a thing of the moment. It does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry into effect the design. Its continuance is a threat to the society against which it was aimed at and would be dealt with as soon as that jurisdiction can properly claim the power to do so. The conspiracy designed or agreed abroad will have the same effect as in India, when part of the acts, pursuant to the agreement are agreed to be finalised or done, attempted or even frustrated and vice versa."

In *State of Maharashtra and others vs. Som Nath Thapa and others* (1996 (4) SCC 659 at 668) this Court referred to its earlier decision in *Ajay Aggarwal* case (1993 (3) SCC 609) and said :-

"The aforesaid decisions, weighty as they are, lead us to conclude that to establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to any lawful use. Finally,

when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service to an unlawful use."

In the present case, there is no evidence to support the charge as regards the period of conspiracy. It is as important to know the period as to ascertain the object of conspiracy. It appears that period of conspiracy in the charge from July 1987 to May 1992 has been mentioned as the Indo-Sri Lankan Accord was entered into in July 1987 and LTTE was declared an unlawful association by notification dated May 14, 1992 issued under the Unlawful Activities (Prevention) Act, 1987. There is, however, no evidence that the conspiracy was hatched immediately on entering into the accord and was terminated only on the issue of the notification. A statement made by a conspirator before the commencement of the conspiracy is not admissible against the coconspirator under Section 10 of the Evidence Act. Similarly, a statement made after the conspiracy has been terminated on achieving its object or it is abandoned or it is frustrated or the conspirator leaves the conspiracy in between, is not admissible against the co-conspirator. Fixing the period of conspiracy is, thus, important as provisions of Section 10 would apply only during the existence of the conspiracy. We have held that object of the conspiracy was the killing of Rajiv Gandhi. It is not that immediately the object of conspiracy is achieved, Section 10 becomes inapplicable. For example principle like that of res gestae as contained in Section 6 of the Evidence Act will continue to apply.

Principle of law governing Section 10 has been succinctly stated in a decision of this Court in *Sardar Sardul Singh Caveeshar vs. State of Maharashtra* [(1964) 2 SCR 378] where this Court said:

"Before dealing with the individual cases, as some argument was made in regard to the nature of the evidence that should be adduced to sustain the case of conspiracy, it will be convenient to make at this stage some observations thereon. Section 120-A of the Indian Penal Code defines the offence of criminal conspiracy thus :

"When two or more persons agree to do, or cause to be done an illegal act, or an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy."

The essence of conspiracy is, therefore, that there should be an agreement between persons to do one or other of the acts described in the section. The said agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties. There is no difference between the mode of proof of the offence of conspiracy and that of any other offence : it can be established by direct evidence or by circumstantial evidence.

But s.10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied, the acts done by one are admissible against the coconspirators. The said section reads:

"Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

This section, as the opening words indicate, will come into play only when the Court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be a *prima facie* evidence that a person was a party to the conspiracy before his acts can be used against his co-conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. The evidentiary value of the said acts is limited by two circumstances, namely, that the acts shall be in reference to their common intention and in respect of a period after such intention was entertained by any one of them. The expression "in reference to their common intention" is very comprehensive and it appears to have been designedly used to give it a wider scope than the words "in furtherance of" in the English law; with the result, anything said, done or written by a co-conspirator, after the conspiracy was formed, will be evidence against the other before he entered the field of conspiracy or after he left it. Another important limitation implicit in the language is indicated by the expressed scope of its relevancy. Anything so said, done or written is a relevant fact only "as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it". It can only be used for the purpose of proving the existence of the conspiracy or that the other person was a party to it. It cannot be used in favour of the other party or for the purpose of showing that such a person was not a party to the conspiracy. In short, the section can be analysed as follows: (1) There shall be a *prima facie* evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy; (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other; (3) anything said, done or written by him should have been

said, done or written by him after the intention was formed by any one of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it; and (5) it can only be used against a coconspirator and not in his favour."

Then in *State of Gujarat vs. Mohammad Atik & Ors.* [(1998) 4 SCC 351] this Court said as under:

"It is well-nigh settled that Section 10 of the Evidence Act is founded on the principle of law of agency by rendering the statement or act of one conspirator binding on the other if it was said during subsistence of the common intention as between the conspirators. If so, once the common intention ceased to exist any statement made by a former conspirator thereafter cannot be regarded as one made "in reference to their common intention". In other words, a post-arrest statement made to a police officer, whether it is a confession or otherwise, touching his involvement in the conspiracy, would not fall within the ambit of Section 10 of the Evidence Act."

In *Mirza Akbar vs. King Emperor* (AIR 1940 PC 176) the Privy Council said the following on the scope of Section 10 :

"This being the principle, their Lordships think the words of S.10 must be construed in accordance with it and are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. In their Lordships' judgment, the words "common intention" signify a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. In their Lordships' judgment S.10 embodies this principle. That is the construction which has been rightly applied to S.10 in decisions in India, for instance, in 55 Bom 839 and 38 Cal 169. In these cases the distinction was rightly drawn between communications between conspirators while the conspiracy was going on with reference to the carrying out of conspiracy and statements made, after arrest or after the conspiracy has ended, by way of description of events then past."

It was submitted that once the conspirator is nabbed that would be an end to the conspiracy and Section 10 would be inapplicable. That may be so in a given case but is not of universal application. If the object of conspiracy has not been achieved and there is still agreement to do the illegal act, the offence of criminal conspiracy is there and Section 10

of the Evidence Act applies. Prosecution in the present case has not led any evidence to show that any particular accused continued to be a member of the conspiracy after his arrest.

Though we have held that confession of an accused recorded under Section 15 of TADA is substantive evidence against coaccused we may take note of an alternative argument of Mr. Altaf Ahmad. He said even if it is held that the confession under Section 15 TADA can be admitted only if there is corroboration, under Section 10 of the Evidence Act the confession of an accused can nevertheless be a substantive evidence against co-accused if it satisfies the requirement of that Section.

It is true that provision as contained in Section 10 is a departure from the rule of hearsay evidence. There can be two objections to the admissibility of evidence under Section 10 and they are (1) the conspirator whose evidence is sought to be admitted against co-conspirator is not confronted or crossexamined in Court by the co-conspirator and (2) prosecution merely proves the existence of reasonable ground to believe that two or more persons have conspired to commit an offence and that brings into operation the existence of agency relationship to implicate co-conspirator. But then precisely under Section 10 Evidence Act statement of a conspirator is admissible against co-conspirator on the premise that this relationship exists. Prosecution, no doubt, has to produce independent evidence as to the existence of the conspiracy for Section 10 to operate but it need not prove the same beyond a reasonable doubt. Criminal conspiracy is a partnership in agreement and there is in each conspiracy a joint or mutual agency for the execution of a common object which is an offence or an actionable wrong. When two or more persons enter into a conspiracy any act done by any one of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution of or in reference to their common intention is deemed to have been said, done or written by each of them. A conspirator is not, however, responsible for acts done by a conspirator after the termination of the conspiracy as aforesaid. The Court is, however, to guard itself against readily accepting the statement of a conspirator against the co-conspirator. Section 10 is a special provision in order to deal with dangerous criminal combinations. Normal rule of evidence that prevents the statement of one co-accused being used against another under Section 30 of the Evidence Act does not apply in the trial of conspiracy in view of Section 10 of that Act. When we say that court has to guard itself against readily accepting the statement of a conspirator against co-conspirator what we mean is that court looks for some corroboration to be on the safe side. It is not a rule of law but a

rule of prudence bordering on law. All said and done ultimately it is the appreciation of evidence on which the court has to embark.

In *Bhagwandas Keshwani and another vs. State of Rajasthan* (1974 (4) SCC 611 at 613), this Court said that in cases of conspiracy better evidence than acts and statements of coconspirators in pursuance of the conspiracy is hardly ever available.

Some of the broad principles governing the law of conspiracy may be summarized though, as the name implies, a summary cannot be exhaustive of the principles.

1. Under Section 120A IPC offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. When it is legal act by illegal means overt act is necessary. Offence of criminal conspiracy is exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the accused had the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever, horrendous it may be, that offence be committed.
2. Acts subsequent to the achieving of object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy like giving shelter to an absconder.
3. Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.
4. Conspirators may, for example, be enrolled in a chain A enrolling B, B enrolling C, and so on; and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrolls. There may be a kind of umbrella-spoke enrollment, where a single person at the centre doing the enrolling and all the other members being unknown to each other, though they know that there are to be other members. These are theories and in practice it may be difficult to tell whether the conspiracy in a particular case falls into which category. It may, however, even overlap. But then there has to be present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse role to play. It is not

a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.

5. When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy.
6. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.
7. A charge of conspiracy may prejudice the accused because it is forced them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of object of conspiracy but also of the agreement. In the charge of conspiracy court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by Judge Learned Hand that “this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders”.
8. As stated above it is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement, which is the gravaman of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances,

especially declarations, acts, and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy.

9. It has been said that a criminal conspiracy is a partnership in crime, and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incident to and growing out of the original purpose. A conspirator is not responsible, however, for acts done by a co-conspirator after termination of the conspiracy. The joinder of a conspiracy by a new member does not create a new conspiracy nor does it change the status of the other conspirators, and the mere fact that conspirators individually or in groups perform different tasks to a common end does not split up a conspiracy into several different conspiracies.
10. A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.

Having thus held that the object of the conspiracy was to kill Rajiv Gandhi; that no offence under Sections 3 or 4 of TADA had been committed and after having considered the principles regarding the ingredients of criminal conspiracy; appreciation of evidence in a case of conspiracy; submissions of Mr. Natarajan that he is not challenging the convictions and sentence passed on the accused under the provisions of the Arms Act, Explosives Substance Act, Indian Wireless and Telegraphy Act, Passport Act, Foreigners Act and Sections 201, 212 and 216 IPC, we proceed to consider as to whether all or any one of the accused before us were members of the criminal conspiracy, still keeping in view the following aspects:-

1. Presence of LTTE on Indian soil before and after Indo-Sri Lankan Accord is undisputed. Its activities went ostensibly underground after the Accord. LTTE was having various

activities in India and some of these were (1) printing and publishing of books and magazines for LTTE propaganda, (2) holding of camps for arms training in India and various other places in Tamil Nadu (This was done openly till the Indo-Sri Lankan Accord), (3) collection and raising of funds for its war efforts in Sri Lanka, (4) treatment of injured LTTE cadres in India, (5) medical assistance and (6) transporting of goods like petrol, diesel, lungies, medicines, wireless equipments and explosives and even provisions to Sri Lanka.

2. Hiring of houses in Tamil Nadu was for various activities of the LTTE, which included houses for the treatment of injured LTTE cadres.
3. Sivarasan was having other activities in Tamil Nadu. He was to make arrangements for Santhan (A-2) to go to Switzerland and for Kangasabapathy (A-7) and Athirai (A-8) to go to Delhi and from there to Germany. He was to make arrangement to recruit persons to impart arms training in Sri Lanka through Ravi (A-16) and Suseendran (A-17) and to arrange houses at Madras through Robert Payas (A-9), Jayakumar (A10) and Vijayan (A-12) for the stay of LTTE cadres not necessarily for conspirators. He financed Vijayanandan (A5) in Madras for purchase of books for LTTE library in Jaffna. Shanmugham (DA) in his confession (Exh.P-1300) stated that Sivarasan with others stayed in a house at Kodiakkrai and they were arranging to send petrol and diesel oil by boat to LTTE in Sri Lanka.
4. In case of some of the accused including deceased accused there is no evidence whatsoever that they were members of the conspiracy. Prosecution has been unfair to charge them with conspiracy.
5. There is no evidence that all the nine persons, who arrived in India by boat on 1.5.1991, namely, Sivarasan, Subha, Dhanu, Nero, Dixon, Santhan (A-2), Shankar (A-4), Vijayanandan (A-5) and Ruben (A-6), were members of the conspiracy. In this group there was Ruben (A-6), who came to India to have an artificial leg fixed which he had lost in a battle with Sri Lankan army.
6. Prosecution also named Jamuna @ Jameela (DA) as a conspirator, who had also come to India for fixing an artificial limb, which she had also lost in a battle with Sri Lankan army. There is not even a whisper in the whole mass of evidence that she had even knowledge of any conspiracy to kill Rajiv Gandhi. Simply because she was found dead having committed suicide along with Sivarasan, Subha and others at Bangalore, could not make her a member of the conspiracy.

7. From frequent and unexplained meetings of some of the accused with others, who have been charged with conspiracy, it cannot be assumed that they all were members of the conspiracy. This is particularly so when LTTE was having various activities on Indian soil for its war efforts in Sri Lanka. Notebook (Exh.P-1168) seized by the police gives bio-data of some LTTE cadre working in India though that list is not extensive. It also contains the bio-data of Irumborai (A-19).
8. All the persons, who came from Sri Lanka during the strife, did not come through authorized channels. It is also to be seen if the accused now charged with conspiracy and alleged to have come to India in the guise of refugees were not in fact refugees. Rather evidence shows that Robert Payas (A9), Jayakumar (A-10) and Shanthi (A-11) as one group and Vijayan (A-12), Selvaluxmi (A-13) and Bhaskaran (A-14) as the second group, were in fact wanting to come to India due to conditions prevailing in Sri Lanka. They had no money to pay to LTTE. They were exempted from paying any toll to LTTE on their agreeing to hire houses in Tamil Nadu for stay of LTTE cadre and on their being promised help by LTTE. When they so agreed they were not aware that what was the object behind their hiring the houses. Evidence regarding providing shelter to the conspirators either before or after the object of the conspiracy has been achieved, is not conclusive to support the charge of conspiracy against them.
9. Robert Payas (A-9), Jayakumar (A-10) and Vijayan (A-12) were hard-core LTTE activists. They were living in Sri Lanka with their families and suffered because of the turmoil there. They may be sympathizers of LTTE having strong feelings against IPKF. Consider the background in which they accepted the offer of LTTE to meet their expenses in India. It could be that they themselves fell into the trap because of the circumstances in which their families were placed in Sri Lanka and the conditions prevailing there.

Having thus considered the case of each accused now charged before us we have to examine what sentence is to be awarded particularly where charge of murder has been proved against some of the accused.

In spite of the concession of Mr. Natarajan we have independently examined the evidence with respect to charges against each of the accused. We acquit Shanthi (A-11), Selvaluxmi (A-13) and Shanmugavadielv (A-15) of all charges. Their conviction and sentence are set aside.

None of the accused has committed any offence under Section 3, 4 or 5 of TADA. Their conviction and sentence under these Sections are set aside.

**Supreme Court of India
2000 (1) SCC 498**

**Gurdeep Singh Alias Deep
vs
State (Delhi Admn.)**

A.P. Misra, K.T. Thomas, JJ

.....

21. Thus from the aforesaid premise it has to be seen whether on the facts and circumstances of this case the appellant's confession was voluntary or not. Learned counsel for the appellant has submitted the following three reasons for holding the same to be not voluntary :
 - (a) the confessional statement was made when the appellant was in handcuffs;
 - (b) while recording the confession another policeman in the room at some distance was present who was holding the chain of his handcuffs; and
 - (c) outside the room where his confession was recorded he was surrounded by armed guards.
22. No other, as a fact, threat, inducement or promise by any other word or deed is said to have been made to the appellant, in any other form nor was it contended at any stage of the proceedings culminating in his conviction. The only ground that the confessional statement was not voluntary are the three factual situations, as aforesaid.
23. Whenever an accused challenges that his confessional statement is not voluntary, the initial burden is on the prosecution for it has to prove that all requirements under Section 15 and Rule 15 under the TADA Act and Rules have been complied with. Once this is done the prosecution discharges its initial burden and then the burden shifts on the accused person. Then it is for him to prove through facts that the confessional statement was not made voluntarily. If such fact was pleaded and brought on record during trial the court must test its veracity, whether such fact constitutes to be such as to make his confessional statement not voluntarily made. Returning to the facts of the present case the prosecution has proved to the hilt the initial burden of compliance of both Section 15 and Rule 15 under the TADA Act and Rules. We may at the outset record that it is also not in dispute that the appellant was handcuffed while the confessional

statement was recorded and there was another policeman with the chain of his handcuffs at some distance in the room and there were armed guards outside the room, where the confessional statement was recorded. This leaves us to consider the question whether this set of situation could be construed to be such as to infer that the confessional statement recorded was not voluntary. In considering this we have to keep in mind, the distinction between the TADA Act and the other criminal trial. While a confession recorded under the TADA Act before a police officer not below the rank of Superintendent of Police even under police custody is admissible but not under other criminal trials. Keeping an accused under police custody in what manner with what precautions is a matter for the police administration to decide. It is for them to decide what essential measures are to be taken in a given case for the purpose of security. What security, in which manner are all in the realm of administrative exigencies and would depend on the class of accused, his antecedents and other information etc. The security is also necessary for the police personnel keeping him in custody or other personnel of the police administration including the public at large. Thus what measure has to be taken is for the police administration to decide and if they feel greater security is required in a case of trial under the TADA Act, it is for them to decide accordingly. The Preamble of the TADA Act itself reveals that this Act makes special provisions for the prevention of and for coping with terrorists and disruptive activities. In fact the earlier TADA Act of 1985 was repealed to bring in the present Act to strengthen the prosecution to bring to book those involved under it without their filtering out, by bringing in more stringent measures under it. In this background, we do not find the handcuffing of the appellant or another policeman being present in the room with the chain of his handcuffs or armed guards present outside the room to be such as to constitute (sic conclude) that the appellant's confessional statement was not made voluntarily. It has to be kept in mind that Section 15 and Rule 15 of the TADA Act and the Rule have taken full precaution to see that confessional statement is only recorded when one makes it voluntarily. First, confession could only be recorded by a police officer of the rank of Superintendent of Police or above. Such police officer has to record in his own handwriting, he has to clearly tell such accused person that such confession made by him shall be used against him and if such police officer after questioning comes to the conclusion that it is not going to be voluntarily he shall not record the same. Keeping this in the background which is complied with in the present case and keeping the administrative exigencies under which an accused is kept under handcuffs with armed guards etc. which may be for the antecedent activities of the appellant as a terrorist, for the purpose of security, then this could in no way

be constituted to be a threat or coercion to the accused for making his confessional statement. The policeman holding the chain of his handcuffs was only a constable and the person recording his confession was of the rank of Superintendent of Police. The Superintendent of Police conveyed confidence to the appellant and made it clear to the appellant as aforesaid. After all this, if the appellant was still ready and made his confessional statement, then merely the presence of a constable, a subordinate of the Superintendent of Police, who was holding the chain cannot be constituted to be such a threat which could induce him not to make any voluntary statement. Hence, we have no hesitation to hold that the presence of a constable in a room could not in fact or law be constituted to be such to hold that such confessional statement was not made voluntarily. Mere handcuffing and the presence of a policeman we fail to understand in what way could it be said to be a threat to the accused appellant. It is not the case that before making confessional statement any inducement, threat or promise by any other word or deed was made to him by any person which resulted in his making the said confessional statement. Firstly, we find a total absence of inducement, threat or promise in the present case as against the appellant and as we have said handcuffing, the presence of a policeman holding the chain of the handcuffs or even keeping armed guards outside the room which being parts of the security measure by itself cannot penetrate into the realm as to make a confessional statement not to be voluntarily made.

24. For the aforesaid reasons and on the facts and circumstances of this case, we have no hesitation to hold that the confessional statement of the appellant is not only admissible but was voluntarily and truthfully made by him on which the prosecution could rely for his conviction. Such confessional statement does not require any further corroboration. Before reliance could be placed on such confessional statement, even though voluntarily made, it has to be seen by the court whether it is truthfully made or not. However, in the present case we are not called upon nor is it challenged that the confessional statement was not made truthfully. So for all these reasons we hold that the impugned judgement passed by the Designated Court was just and proper which does not require any interference by this Court. We confirm the conviction and sentence. The appeal is accordingly dismissed.
25. Before concluding we would like to record our conscientious feeling for the consideration by the legislature, if it deem fit and proper. Punishment to an accused in criminal jurisprudence is not merely to punish the wrongdoer but also to strike a warning to those who are in the same sphere of crime or to those intending to join in

such crime. This punishment is also to reform such wrongdoers not to commit such offence in future. The long procedure and the arduous journey of the prosecution to find the whole truth is achieved sometimes by turning on the accused as approvers. This is by giving incentive to an accused to speak the truth without fear of conviction. Now turning to the confessional statement, since it comes from the core of the heart through repentance, where such accused is even ready to undertake the consequential punishment under the law, it is this area which needs some encouragement to such an accused through some respite may be by reducing the period of punishment, such incentive would transform more such incoming accused to confess and speak the truth. This may help to transform an accused, to reach the truth and bring to an end successfully the prosecution of the case.

26. In view of the finding, as aforesaid, we uphold the judgement and order passed by the Designated Court No. III and uphold the conviction of the appellant under the aforesaid sections. The appeal is accordingly dismissed.

Supreme Court of India
AIR 2002 SC 1661

Devender Pal Singh

vs

State, N.C.T of Delhi and Another

M.B. Shah, B.N. Agrawal and Arijit Pasayat, JJ.

.....

2. It is the prosecution version that on 11.9.1993, Mr. M.S. Bitta, the then President of India Youth Congress(I) was in his office at 5, Raisina Road, New Delhi. At about 2.30 p.m., Mr. Bitta left the office and the car in which he was traveling came out of the main gate of 5, Raisina Road and one pilot car, in which security personnel provided to him were sitting, was ahead of his car. The pilot car slowed down in order to take right turn on Raisina Road. In the meantime, one bus came on Raisina Road, from the side of Windsor Palace. At that time, there was an explosion in a car parked outside 5, Raisina Road. Though Mr. Bitta was not hurt badly, a number of other vehicles parked on the road and footpath caught fire. Because of the bomb blast, nine persons succumbed to the injuries and 29 other persons sustained injuries. During the course of investigation, it was learnt that Kudeep Singh, Sukhdev Singh, Harnek Singh, Devenderpal Singh and Daya Singh Lahoria, all members of KLF, a terrorist organization, were behind this blast and their aim was to assassinate Mr. Bitta.
3. It is further prosecution version that secret information was received that appellant Devender Pal Singh who was in custody of German authorities was to come to Delhi from Frankfurt on the night of 18/19.1.1995. On his arrival, he was handed over to IGI Airport police authorities by Lufthansa Airlines staff. Immediately upon his arrest, he tried to swallow cyanide capsule. However, he was prevented.
4. Other accused Daya Singh Lahoria, who was extradited from USA to India was also arrested. He was also tried along with the appellant but was acquitted by the designated court on the ground that there was no evidence against him and that he has not made any confessional statement. The court also observed that there was no iota of material on record to corroborate confessional statement made by accused Devender Pal Singh against his co-accused Daya Singh Lahoria and prudence requires that in absence of corroboration, benefit should go to Daya Singh Lahoria.

5. In this appeal, learned counsel for the appellant submitted that except the so called confessional statement, there is no other evidence against the appellant and the said confessional statement is neither voluntary nor true and in any case there is no corroborative evidence. Hence, the judgement and order passed by the designated court convicting the appellant requires to be set aside.
6. From the aforesaid evidence led by the prosecution, questions that arise for consideration are – (i) whether the confessional statement is true and voluntary? And (ii) whether there is any corroboration to the said statement?
7. Before considering the evidence led by the prosecution, it is to be stated that accused in his statement recorded under Section 313 Cr.P.C stated that he had sought asylum in Germany and was deported from there on refusal of asylum. He has denied recovery of cyanide capsule from him. He has also denied having made the application Exhibit PW 121/B expressing desire to make a confessional statement. He has also denied having made the confessional statement before Mr. Bola on 23.1.1995. According to him, he was made to sign some blank and partly written papers under threat and duress and entire proceedings were fabricated upon those documents. He has also stated that before he was produced before the ACMM, he was told that if he made any statement to the court he would be handed over to Punjab police who would kill him in an encounter, and as he was under fear, he made a statement before learned ACMM. He has also stated that he was taken to Punjab and brought back after about three months and thereafter, he sent an application from jail on 21.4.1995 retracting his confessional statement and clarifying the circumstances under which said statement was recorded.

.....

Further, sub-section (1) of Section 15 of TADA specifically provides inter alia that in case confession made by a person before the police officer is recorded by such police officer either in writing or on any mechanical device like cassette, tape or sound tracks out of which sounds or images can be reproduced, shall be admissible in trial of such person for an offence under this Act or rules made thereunder. The confessional statement was recorded on computer and floppy thereof is not produced in the court and is admitted to have not been saved in the computer by ASI Kamlesh.

16. From the aforesaid evidence, it is apparent that the confessional statement of the appellant is recorded by DCP, B.S. Bola (PW.121) who was the investigating officer at the relevant time. Admittedly, the accused was in police custody. Thereafter he was

handed over to the Punjab police. Further, from the record it appears that accused was wanted in bomb blast case since 1993 and as soon as he arrived at the IGI Airport, he was arrested and was handed over to PW.130 Mr. K.S. Bedi, ACP. It is stated that Mr. Bedi also recorded the disclosure statement of the appellant on 21.1.1995, wherein, he admitted his involvement in the bomb blast case. Thereafter, confessional statement under Section 15 of the TADA was recorded by DCP B.S. Bola. In such state of affairs, doubt may arise whether the accused has made any confessional statement at all. In Kartar Singh vs. State of Punjab, (1994) 3 SCC 569, this court observed thus:

"Though it is entirely for the court trying the offence to decide the question of admissibility or reliability of a confession in its judicial wisdom strictly adhering to the law, it must, while so deciding the question, should satisfy itself that there was no trap, no trick and no importune seeking of evidence during the custodial interrogation and all the conditions required are fulfilled."

17. In such case, it would be unsafe to solely rely upon the alleged confession recorded by investigation officer. Further looking at the original confessional statement, there appears to be some substance in what is contended by the accused in his statement under Section 313 Cr.P.C. that his signatures were taken on blank paper. Under rule 15(3)(b) of the TADA rules, the police officer who is recording the confession has to certify the same "under his own hand" that the said confession was taken in his presence and recorded by him and at the end of confession, he has to give certificate as provided thereunder. In the present case, the certificate was not given under the hands of D.C.P. but was a typed one.
18. Further, for finding out-whether the statement is truthful or not there must be some reliable independent corroborative evidence. In the present case, co-accused Daya Singh Lahoria who was tried together with the appellant was acquitted on the ground that there was no evidence against him and that he had not made any confessional statement. However, for connecting the appellant, the learned judge has relied upon the decision in *Gurdeep Singh vs. State (Delhi Admn.)* (2000) 1 SCC 498 for holding that when the confessional statement is voluntary, corroboration is not required. It appears that the court has not read the entire paragraph of the said judgement and has missed the previous lines which read thus:

"For the aforesaid reasons and on the facts and circumstances of this case, we have no hesitation to hold that the confessional statement of the appellant is not only admissible but was voluntarily and truthfully made by him on which the prosecution could rely for his conviction. Such confessional statement does not require any further corroboration. Before reliance could be placed on such confessional statement, even

though voluntarily made, it has to be seen by the court whether it is truthfully made or not. However, in the present case we are not called upon nor is it challenged that the confessional statement was not made truthfully."

19. From the aforesaid judgement, it is clear that before solely relying upon the confessional statement, the court has to find out whether it is made voluntarily and truthfully by the accused. Even if it is made voluntarily, the court has to decide whether it is made truthfully or not. But in Gurdeep Singh's case(supra), there was no challenge made to the fact that it was not made truthfully.

.....

21. In any set of circumstances, let us consider the confessional statement as it is. In the present case other accused D.S. Lahoria was tried along with the appellant and was acquitted. The role assigned to D.S. Lahoria in the confessional statement is major one.

.....

22. There is nothing on record to corroborate the aforesaid confessional statement. Police could have easily verified the hospital record to find out whether D.S. Lahoria went to the hospital and registered himself under the name of V.K. Sood on the date of incident and left the hospital after getting first aid. In any set of circumstances, none of the main culprits i.e. Harnek Singh or Lahoria is convicted. In these set of circumstances, without there being corroborative evidence, it would be difficult to solely rely upon the so-called confessional statement and convict the accused and that too when the confessional statement is recorded by the investigating officer, or this purpose, it would be worthwhile to refer to the decision in Topandas vs. State of Bombay, AIR 1956 SC 33 para 6.

In this view of the matter, when rest of the accused who are named in the confessional statement are not convicted or tried, this would not be a fit case for convicting the appellant solely on the basis of so-called confessional statement recorded by the police officer.

24. Finally, such type of confessional statement as recorded by the investigating officer cannot be the basis for awarding death sentence.
25. In the result, criminal appeal No.993 of 2001 filed by the accused is allowed and the impugned judgement and order passed by the designated court convicting the

appellant is set-aside. The accused is acquitted for the offences for which he is charged and he is directed to be released forthwith if not required in any other case.

26. In view of the above, death reference case (Crl.) No.2 of 2001 would not survive and stands disposed of accordingly.

Arijit Pasayat, J.

20. Notwithstanding my profound respect for brother Shah's erudition, I am unable to agree with his conclusions. While dealing with an accused tried under the TADA, certain special features of the said statute need to be focused. It is not necessary to find out the legislative intent for enacting it. It defines "terrorist acts" in Section 2(h) with reference to Section 3(1) and in that context defines a terrorist. It is not possible to define the expression 'terrorism' in precise terms. It is derived from the word 'terror'. As the statement of objects and reasons leading to enactment of the TADA is concerned, reference to the Terrorist and Disruptive Activities (Prevention) Act, 1985 (hereinafter referred to as the 'Old Act') is necessary. It appears that the intended object of the said Act was to deal with persons responsible for escalation of terrorist activities in many parts of the country. It was expected that it would be possible to control the menace within a period of two years, and life of the Act was restricted to the period of two years from the date of its commencement. But noticing the continuance of menace, that too on a larger scale, TADA has been enacted. Menace of terrorism is not restricted to our country, and it has become matter of international concern and the attacks on the World Trade Centre and other places on 11th September, 2001 amply show it. Attack on the Parliament on 13th December, 2001 shows how grim the situation is. TADA is applied as an extreme measure when police fails to tackle with the situation under the ordinary penal law. Whether the criminal act was committed with an intention to strike terror in the people or section of people would depend upon the facts of each case. As was noted in *Jayawant Dattatray Suryarao and others vs. State of Maharashtra and others (2001) AIR SCW 4717*, for finding out the intention of the accused, there would hardly be a few cases where there would be direct evidence. It has to be mainly inferred from the circumstances of each case.

.....

29. The main plea of accused-appellant is that there was no corroboration to the alleged confessional statement. Various circumstances, according to him, clearly show that it was not voluntary. Strong reliance is placed in *State vs. Nalini and others, (1999) 5 SCC 253* to contend that corroboration is necessary. It is to be noted that Legislature has

set different standards of admissibility of a confessional statement made by an accused under the TADA from those made in other criminal proceedings. A confessional statement recorded by police officer not below the rank of Superintendent of Police under Section 15 of the TADA is admissible, while it is not so admissible unless made to the magistrate under Section 25 of the Indian Evidence Act, 1872 (in short the 'Evidence Act'). It appears consideration of a confessional statement of an accused to a police officer except to the extent permitted under Section 27 of the Evidence Act is not permissible. These aspects are noted by this Court in *Sahib Singh vs. State of Haryana*, (1997) 7 SCC 231 and Gurdeep Singh's case (*supra*). There is one common feature, both in Section 15 of the TADA and Section 24 of the Evidence Act that the confession has to be voluntary. Section 24 of the evidence Act interdicts a confession, if it appears to the court to be result of any inducement, threat or promise in certain conditions. The principle therein is that confession must be voluntary. Section 15 of the TADA also requires the confession to be voluntary. Voluntary means that one who makes it out of his own free will inspired by the sound of his own conscience to speak nothing but the truth. As per Stroud's judicial dictionary, 5th Edition at p. 2633, threat means:

*"It is the essence of a threat that it be made for the purpose of intimidating, or overcoming, the will of the person to whom it is addressed (per Lush, J. **Wood vs. Bowron, (1866) QB 21** cited intimidate)"*

Words and Phrases, permanent edition, vol.44, p. 622, defines "voluntary" as "Voluntary" means a statement made of the free will and accord of accused, without coercion, whether from fear of any threat of harm, promise, or inducement or any hope of reward- *State vs. Mullin*, 85 NW 2d 598, 600, 249 Iowa 10."

At p. 629, "confession" is defined as:

*"Where used in connection with statements by accused, words 'voluntary' and 'involuntary' import statements made without constraint or compulsion by others and the contrary. **Commonwealth vs. Chin Kee, (186) NE 253, 260, 283 Mass 248**".*

In words and phrases by John B. Saunders, 3rd edition, vol. 4 p. 401, "voluntary" is defined as:

*"..... The classic statement of the principle is that of Lord Sumner in **Ibrahim vs. Regem, 1914 AC 599 (at p. 609)** where he said, "It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to be voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercise or held out by a person in authority. The principle is as old as Lord*

Hale". However, in five of the eleven textbooks cited to us support is to be found for a narrow and rather technical meaning of the word "voluntary". According to this view, "voluntary" means merely that the statement has not been made in consequence of (i) some promise of advantage or some threat (ii) of a temporal character (iii) held out or made by a person in authority, and (iv) relating to the charge in the sense that it implies that the accused's position in the contemplated proceedings will or may be better or worse according to whether or not the statement is made". *R. vs. Power*, (1966) 3 All ER 433 (at pp. 454, 455) per *Cantley, V.*"

So the crux of making a statement voluntarily is what intentional, intended, unimpelled by other influences, acting on one's own will, through his own conscience. Such confessional statements are made mostly out of a thirst to speak the truth which at a given time predominates in the heart of the confessor to speak out the truth normally emerges when one is in despondency or in a perilous situation when he wants to shed his cloak of guilt and nothing but disclosing the truth would dawn on him. It sometimes becomes so powerful that he is ready to face all the consequences for clearing his heart.

30. As was observed in Nalini's case (*supra*), TADA was enacted to meet extraordinary situation existing in the country. Its departure from the law relating to confession as contained in the Evidence Act is deliberate. Section 24 of the Evidence Act deals with confession caused by inducement, threat or promise, which is irrelevant in criminal proceedings. The expression "confession" has not been defined in the evidence Act. Broadly speaking, it is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed that crime. Law relating to confessions is to be found generally in Section 24 to 30 of the evidence Act, and Sections 162 and 164 of the Code of Criminal Procedure, 1898 (hereinafter described as "old Code") corresponding to identical provisions of Code of Criminal Procedure, 1973 (described as "Code" hereinafter). Confession is a species of admission. A confession or admission is evidence against maker of it, if its admissibility is not excluded by some provision of law. Law is clear that a confession cannot be used against an accused person unless the court is satisfied that it was voluntary. At that stage question whether it is true or false does not arise. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the voluntariness of the confession, the court may refuse to act upon the confession, even if it is admissible in evidence. The question whether a confession is voluntary or not is always a question of fact. A free and voluntary confession is deserving of highest credit, because it is presumed to flow from the highest sense of guilt. In principle and digest of law of

evidence, volume I, new edition by Chief Justice M. Monir, after noticing conflicting views and discussing various authorities, the learned author summarized the position as follows:

"The rule may therefore, be stated to be that whereas the evidence in proof of a confession having been made is always to be suspected the confession, if once proved to have been made and made voluntarily, is one of the most effectual proofs in the law."

31. As was noted in Gurdeep Singh's case (*supra*), whenever an accused challenges that his confessional statement is not voluntary, the initial burden is on the prosecution for it has to prove that all requirements under Section 15 of TADA and rule 15 of Terrorist and Disruptive Activities (Prevention) Rules, 1987 (hereinafter referred to as "rules") have been complied with. Once this is done the prosecution discharges its burden and then it is for the accused to show and satisfy the court that the confessional statement was not made voluntarily. The confessional statement of the accused can be relied upon for the purpose of conviction, and no further corroboration is necessary if it relates to the accused himself. It has to be noted that in Nalini's case (*supra*) by majority it was held that as a matter of prudence the Court may look for some corroboration if confession is to be used against a co-accused though that will be again within the sphere of appraisal of evidence. It is relevant to note that in Nalini's case (*supra*), the court was considering the permissibility of conviction of a co-accused on the confessional statement made by another accused. In this case, we are concerned with the question as to whether the accused making the confessional statement can be convicted on the basis of that alone without any corroboration. The following observations in Jayawant Dattatray's case (*supra*) are relevant:

"Confessional statement before the police officer under Section 15 of the TADA is substantive evidence and it can be relied upon in the trial of such person or co-accused, abettor or conspirator for an offence punishable under the act or the rules. The police officer before recording the confession has to observe the requirement of sub-section (2) of Section 15. Irregularities here and there would not make such confessional statement inadmissible in evidence. If the Legislature in its wisdom has provided after considering the situation prevailing in the society that such confessional statement can be used as evidence, it would not be just, reasonable and prudent to water down the scheme of the Act on the assumption that the said statement was recorded under duress or was not recorded truly by the concerned officer in whom faith is reposed. It is true that there may be some cases where the power is misused by the concerned authority. But such contentions can be raised in almost all cases and it would be for the court to decide to what extent the said statement is to be used. Ideal goal may be: confessional statement is made by the accused as repentance for his crime but for

achieving such ideal goal there must be altogether different atmosphere in the society. Hence, unless a fool-proof method is evolved by the society or such atmosphere is created, there is no alternative, but to implement the law as it is." (Underlined for emphasis)

32. Learned counsel for the appellant has tried to show that the witnesses examined have given lie to some parts of the confessional statement, like hiring of the room, purchase of the car etc. It is true that the witnesses have not spoken about the role of the appellant in the alleged transactions. But, as was rightly submitted by the learned counsel for the respondent, the very fact that these witnesses have stated about the identity disclosed by the respective tenants and purchase of the car. Learned counsel for the appellant contended that these facts had come to the knowledge of the police prior to the apprehension of the accused-appellant and, therefore, they have utilized their previous knowledge and put it in the confessional statement. Such a contention has to be noticed to be rejected. Once it is held that the confessional statement is voluntary, it would not be proper to hold that the police has incorporated certain aspects in the confessional statement which were gathered in the investigation conducted earlier. It is to be noted further that the appellant's so called retraction was long after he was taken into judicial custody. While he was taken to judicial custody on 24.3.1995, after about a month, he made a grievance about the statement having been forcibly obtained. This is clearly a case of after-thought. Since the confessional statement was voluntary, no corroboration for the purpose of its acceptance is necessary.
33. Three other aspects are highlighted to raise doubt about authenticity of prosecution version. They are: (i) circumstances about the alleged attempt to swallow the cyanide pill, (ii) non-despatch of the confessional statement to the ACMM or the CJM and (iii) the typed certificate given by the officer recording the evidence, when under rule 15(3)(b) of the rules, requirement is a certification "under his own hand".
.....
39. No doubt in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available.

Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.

.....

48. Where the trustworthy evidence establishing all links of circumstantial evidence is available, the confession of a co-accused as to conspiracy even without corroborative evidence can be taken into consideration.(See *Baburao Bajirao Patil vs. State of Maharashtra, 1971(3) SCC 432*). It can in some cases be inferred from the acts and conduct of parties. (See *Shivanarayan Laxminarayan Joshi and others vs. State of Maharashtra and others, AIR 1980 SC 439*).
49. It is submitted that benefit of doubt should be given on account of co-accused's acquittal.
50. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law. (See *Gurbachan Singh vs. Satpal Singh and others, AIR 1990 SC 209*). Prosecution is not required to meet any and every hypothesis put forward by the accused. (See *State of U.P. vs. Ashok Kumar Srivastava,AIR 1992 SC 840*).
51. If a case is proved perfectly, it is argued that it is artificial if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fettish. (See *Inder Singh and another vs. State(Delhi Administration), AIR 1978 SC 1091*). Vague hunches cannot take place of judicial evaluation. "A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties." Per Viscount Simon in *Stirland vs. Director of Public Prosecution, 1944 AC (PC) 315* quoted in *State of U.P. vs. Anil Singh, AIR 1988 SC 1998*).
52. When considered in the aforesaid background, the plea that acquittal of co-accused has rendered prosecution version brittle, has no substance. Acquittal of co-accused was on the ground of non-corroboration. That principle as indicated above has no application to the accused himself.

53. It has been pleaded that prosecution has failed to place any material to show as to why accused would make a confessional statement immediately on return to India. Acceptance of such a plea would necessarily mean putting of an almost impossible burden on the prosecution to show something which is within exclusive knowledge of the accused. It can be equated with requiring the prosecution to show motive for a crime. One cannot normally see into the mind of another. What is the emotion which impels another to do a particular act is not expected to be known by another. It is quite possible that said impelling factors would remain undiscoverable. After all, the factors are psychological phenomenon. No proof can be expected in all cases as to how mind of the accused worked in a particular situation. Above being the position, learned trial judge has rightly held the appellant to be guilty.
54. Coming to the question of sentence of death as awarded by the learned trial judge, the same has to be judged in the background of what was stated by this Court in several cases.

55. From *Bachan Singh vs. State of Punjab*, AIR 1980 SC 898 and *Machhi Singh and others vs. State of Punjab*, 1983(3) SCC 470, the principle culled out is that when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, same can be awarded. It was observed:

"The community may entertain such sentiment in the following circumstances:

- (1) *When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.*
- (2) *When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.*
- (3) *When murder of a member of a scheduled caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of bride burning or dowry deaths or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.*
- (4) *When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons or a particular caste, community, or locality, are committed.*

- (5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

56. As the factual scenario of the present case shows, at least nine persons died, several persons were injured, a number of vehicles caught fire and were destroyed on account of the perpetrated acts. The dastardly acts were diabolic in conception and cruel in execution. The "terrorists" who are sometimes described as "death merchants" have no respect for human life. Innocent persons lose their lives because of mindless killing by them. Any compassion for such persons would frustrate the purpose of enactment of TADA, and would amount to misplaced and unwarranted sympathy. Death sentence is the most appropriate sentence in the case at hand, and learned trial judge has rightly awarded it.
57. However, a question arises as to the effect of brother Shah, J. holding the accused innocent, while deciding the question of sentence. Observations made by this Court in *Ramdeo Chauhan vs. State of Assam, 2001 (5) SCC 714* are relevant. It was inter alia observed as follows:

"But a question that remains to be considered further is the effect of conclusion arrived at by my learned brother Mr. Justice Thomas. Is the accused remediless; that remains to be seen. Few provisions in the Code of Criminal Procedure (for short "the Code") and others in the Constitution deal with such situation. Section 432, 433 and 433-A of the Code and Articles 72 and 161 of the Constitution deal with pardon. Article 72 of the Constitution confers upon the President, power to grant pardons, reprieves, respites or remission of punishment or to suspend, remit or commute sentence of any person of any offence. The power so conferred is without prejudice to the similar power conferred on the Governor of the State. Article 161 of the Constitution confers upon the governor of a State similar powers in respect of any offence against any law relating to a matter of which the executive power of the State extends. The power under Article 72 and Article 161 of the Constitution is absolute and cannot be fettered by any statutory provisions such as sections 432, 433 and 433A of the Code or by any prison rules. Sections 432 of the Code empowers the appropriate Government to suspend or remit sentences. The expression 'appropriate government' means the Central Government in cases where the sentences or order relates to the matter to which the executive power of the union extend and the State Government in other cases. The release of the prisoners condemned to death in exercise of the powers conferred under section 432 and Article 161 of the Constitution does not amount to

interference with due and proper course of justice, and the power of the court to pronounce upon the validity, propriety and correctness of the conviction and sentence remains unaffected. Similar power as that contained in Section 432 of the Code or Article 161 of the Constitution can be exercised before, during or after trial. The power exercised under Section 432 of the Code is largely an executive power vested in the appropriate government and by reducing the sentence or remission of the whole or any part of the punishment. Section 432 of the code gives no power to the government to revise the judgement of the court. It only provides power of remitting the sentence. Remission of punishment assumes the correctness of the conviction and only reduces punishment in part or whole. The word "remit" are "to pardon, to refrain from inflicting, to give up". It is, therefore, no obstacle in the way of the President or Governor, as the case may be in remitting the sentence of death. A remission of sentence does not mean acquittal.

*The power to commute a sentence of death is independent of Section 433A. The restriction under Section 433A of the Code comes into operation only after power under Section 433 is exercised. Section 433-A is applicable to two categories of convicts:(a) those who could have been punished with sentence of death, and (b) those whose sentence has been converted into imprisonment for life under Section 433. It was observed in **Maru Ram vs. Union of India, (1981) (1) SCC 107** that section 433A does not violate Article 20(1) of the Constitution.*

In the circumstances, if any motion is made in terms of Sections 432, 433 and 433A of the Code and/or the Article 72 or Article 161 of the Constitution as the case may be, the same may be appropriately dealt with. It goes without saying that at the relevant stage, the factors which have weighed with my learned brother Mr. Justice Thomas can be duly taken note of in context of Section 432(2) of the Code."

58. The principles set out above have application to the present case.
59. There is no reason to interfere with the order of learned trial Judge. The appeal deserves to be dismissed which I direct. Reference as made for confirmation of death sentence imposed under Section 3(2)(1) is accepted.

B.N. Agrawal, J.

60. I respectfully agree with brother Pasayat, J.

Order of the Court

61. The conviction and sentence passed by the trial court stands confirmed by dismissal of the appeal filed by the accused-appellant and the death reference is accordingly answered.

**Supreme Court of India
1997 (8) SCC 732**

Kalpnath Rai

vs

State (Through CBI)

K.T. Thomas, M.K. Mukherjee, JJ

1. Out of twelve accused persons arraigned before a Designated Court in Delhi, ten were convicted of different offences under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short "TADA"). They are the appellants before us. Some of them were found to be members of a terrorists gang called "Dawood Ibrahim group". Three persons, including a former Union Minister of State for Power (Kalpnath Rai) were found to have harboured hard-core terrorists, besides fastening such a finding with A-12 (M/s East West Travel and Trade Links Ltd.). All of them except the Company were sentenced to varying terms of imprisonment (three of them to life imprisonment) and fine ranging from Rupees ten lakhs downwards. A-12, the Company was sentenced to a whopping fine of Rs. fifty lakhs.

.....

14. We deem it necessary to deal first with the contention pertaining to the requirement in Section 20-A(1) of TADA. If that contention deserves acceptance the entire charge and the subsequent proceedings would stand vitiated. The sub-section reads like this:

"20-A. (1) Notwithstanding anything contained in the Code, no information about the commission of an offence under this Act shall be recorded by the police without the prior approval of the District Superintendent of Police."

15. All the Senior Counsel contended that the said requirement was not complied with in this case before the FIR was registered in respect of each of the five accused intercepted on 23-7-1993. PW 1 (Prithvi Singh - Inspector of Crime Branch) who claimed to have been in the raiding operation has deposed that immediately after the arrest of the armed men he sent a written application to DCP (same rank as District Superintendent of Police) seeking permission to register the case against the first accused under TADA. According to PW 1 the application so forwarded is Ext. PW 1/A and DCP has accorded approval thereon. Similar applications were forwarded by the persons who headed the other three teams also and they too claimed to have obtained similar approval.

The said factual position adopted by the Crime Branch was very hotly assailed during cross-examination.

16. All the applications for approval were typewritten records. PW 1 has said during the cross-examination, that one typewriter was brought from the office of the ACP to the venue of capture of the accused and all the applications were got typewritten on it. The trial Judge was not persuaded to believe this part of the evidence of the prosecution because the types found on different applications could only have been produced from different typewriters.
17. We scrutinised the applications and we are satisfied that there is considerable force in the contention of the defence that all the applications were not typed on the same typewriter. So the stand of the prosecution that written requests were made by the police party for approval cannot be believed and the contention of the defence on that score was rightly repelled by the Designated Court.
18. But the above finding is not enough to end the travails of the appellants in this case. Ex. PW 1/D is the report (rukka) which PW 1 submitted to the Crime Branch Police Station and Ex. PW 10/A is the FIR prepared by the said police on its basis. It is clearly mentioned in the former that "permission for registration of the case was obtained from DCP/CR after informing him of the facts and circumstances". The said fact is mentioned in the FIR also. So the factual position is this. PW 10/A is the FIR. It could only have been made with the approval obtained from the DCP, though it might not have been a written approval.
19. Then the question is whether prior approval envisaged in Section 20-A(1) of TADA should necessarily be in writing. There is nothing in the sub-section to indicate that prior approval of the District Superintendent of Police should be in writing. What is necessary is the fact of approval which is sine qua non for recording the information about the commission of the offence under TADA. The provision is intended to operate as a check against the police officials of lower ranks commencing investigation into offences under TADA because of the serious consequences which such action befalls the accused. However, the check can effectively be exercised if a superior police official of the rank of DSP first considers the need and feasibility of it. His approval can be obtained even orally if such an exigency arises in a particular situation. So oral approval by itself is not illegal and would not vitiate the further proceedings.

.....

36. "Terrorist act" is defined in Section 2(h) as having the meaning assigned to it in Section 3(1). That sub-section reads thus :

"3. (1) Whoever with intent to overawe the government as by law established or to strike terror in people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the government or any other person to do or abstain from doing any act, commits a terrorist act."

37. The requirements of the sub-section are : (1) the person should have done an act in such a manner as to cause, or as is likely to cause death or injuries to any person or damage to any property, or disruption of any supplies; (2) doing of such act should have been by using bombs, dynamite, etc.; (3) or alternatively he should have detained any person and threatened to kill or injure him in order to compel the government or any other person to do or abstain from doing anything.

38. He who does a terrorist act falling within the aforesaid meaning is liable to be punished under sub-section (2) of Section 3. But there are some other acts closely linked with the above but not included in sub-section (1), such as entering into a conspiracy to do the above acts or to abet, advise, incite or facilitate the commission of such acts. Such acts are also made punishable under sub-section (3) which reads thus :

"3. (3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine."

39. Can it be said that a person who conspires, abets, advises or incites or facilitates the commission of the acts specified in sub-section (1) was not committing a terrorist act? It would be illogical to delink the acts enumerated in sub-section (3) from those specified in sub-section (1) for the purpose of understanding the meaning of "terrorist act" indicated in Section 3(5).

40. It is a cardinal principle of interpretation of law that the definition given in a statute is not always exhaustive unless it is expressly made clear in the statute itself. The

key words in the definition section (Section 2) themselves are a clear guide to show that the definitions given thereunder are to be appropriately varied if the context so warrants. The key words are these : "In this Act, unless the context otherwise requires."

41. Therefore the meaningful understanding should be this. For the purpose of sub-section (2) the terrorist acts are those specified in sub-section (1) whereas for the purpose of sub-section (5) the terrorist acts would embrace not only those enumerated in sub-section (1) but those other acts closely linked to them and indicated in sub-section (3) also.
42. When so understood, if there is any evidence to show that the gang to which A-1, A-2, A-3 or A-6 or any of them was a member, has done any such act after 23-5-1993 then the accused concerned is liable to be convicted under Section 3(5) of TADA.
43. But the fact is, in none of the charges framed against the above accused there is any specification that any terrorist act has been committed by a gang subsequent to 23-5-1993, nor has any evidence, whatsoever, been adduced to show that any terrorists' gang (of which those accused are the members or not) has committed any terrorist act after the said date.
44. In the light of stark paucity of materials in evidence and in view of total want of any averment in the charges regarding any activity after the said date it would be an idle exercise to further probe into the width and amplitude of the expression "terrorists' gang" or "terrorists' organisation" or as to whether A-1, A-2, A-3 or A-6 were members of any such gang.
45. The result of the above discussion is that conviction of A-1 to A-6 for the offence under Section 3(5) of TADA cannot be sustained under law.

.....

54. The word "harbours" used in TADA must be understood in its ordinary meaning as for penal provisions. In Black's Law Dictionary its meaning is shown as "to afford lodging to, to shelter, or to give a refuge to".

Quoting from *Susnjar v. U.S., CCA Ohio [27 F 2d 223] (F 2d at p. 224)* the celebrated lexicographer has given the meaning of the word harbour as "receiving clandestinely and without lawful authority a person for the purpose of so concealing him that another having a right to the lawful custody of such person shall be deprived of the

same". In the other dictionaries the meaning of the said word is delineated almost in the same manner as above. It is, therefore, reasonable to attribute a mental element (such as knowledge that the harboured person was involved in a terrorist act) as indispensable to make it a penal act. That apart, there is nothing in the Act, either expressly or even by implication, to indicate that mens rea has been excluded from the offence under Section 3(4) of TADA.

55. There is a catena of decisions which has settled the legal proposition that unless the statute clearly excludes mens rea in the commission of an offence the same must be treated as essential ingredient of the criminal act to become punishable. (*State of Maharashtra v. Mayer Hans George* [AIR 1965 SC 722 : (1965) 35 Comp Cas 557], *Nathulal v. State of M.P.* [AIR 1966 SC 43 : (1965) 2 An LT 206])
56. If Section 3(4) is understood as imposing harsh punishment on a person who gives shelter to a terrorist without knowing that he was a terrorist, such an understanding would lead to calamitous consequences. Many an innocent person, habituated to offer hospitality to friends and relatives or disposed to zeal of charity, giving accommodation and shelter to others without knowing that their guests were involved in terrorist acts, would then be exposed to incarceration for a long period.
57. For all the above reasons we hold that mens rea is an essential ingredient for the offence envisaged in Section 3(4) of TADA.
57. On the above understanding of the legal position we may say at this stage that there is no question of A-12 - the Company to have had the mens rea even if any terrorist was allowed to occupy the rooms in Hotel Hans Plaza. The Company is not a natural person. We are aware that in many recent penal statutes, companies or corporations are deemed to be offenders on the strength of the acts committed by persons responsible for the management or affairs of such company or corporations e.g. Essential Commodities Act, Prevention of Food Adulteration Act, etc. But there is no such provision in TADA which makes the Company liable for the acts of its officers. Hence, there is no scope whatsoever to prosecute a company for the offence under Section 3(4) of TADA. The corollary is that the conviction passed against A-12 is liable to be set aside.

.....
62. Learned Judge of the Designated Court has relied on two letters which he had received presumably from A-7 while the accused was languishing in jail during the pre-trial

period. Learned Judge while questioning A-7 under Section 313 of the Code whisked out those letters from his pocket, marked them as Exs. DA-7/1 and DA-7/2 and asked the following question :

Question : You had submitted to this Court documents Exs. DA-7/1 and DA-7/2 under your signatures. What have you got to say ?

Before A-7 answered the question he wanted to go through them and after going through the letters he answered thus :

"Both documents bear my signatures. They were prepared by my brother and my representatives but I had signed them without reading them. They were submitted to the court on my behalf but I was not having any knowledge whether these have been submitted to the court or not."

63. The above letters, read as a whole, were in substance a litany of his innocence. Such as :

"My lord, Sir, I suffered all these 9 months for not being guilty. Sir, I have a family. I have only a small dream, to lead a good life with my family without any over ambitions.

With pain and sorrow I request you to please take appropriate action against the people who tell and spread the untold story which you or CBI was never told because that is an assassination of the character of a person who does not know anything or did not do anything wrong. My Lordship, I have never even heard the names of A-1 to A-6, or met them in my life before I came to jail. In the name of Jesus I can assure you these things. My Lordship, I am swearing in the name of God, I am an innocent man, and I look for your mercy and justice.

Please relieve me from this agony and pain. If not, I do not think I can take all these things for long. Please have pity on me."

But the unfortunate aspect is, learned Judge has extricated one sentence out of those letters and used it as though it was part of prosecution evidence against the accused and jettisoned the entire remaining bulk of the letters which are lengthy supplications for kindness and mercy.

64. It was illegal on the part of the learned Judge of the Designated Court to have used any part of the said letters, especially when those letters were not adduced as evidence in the case through any procedure known to law. Not even an affidavit has been filed by anyone at least for formally proving those letters in evidence. Section 313 of the Code is intended to afford opportunity to an accused "to explain any circumstance appearing in the evidence against him". It is trite that an accused cannot be confronted during such questioning with any circumstance which is not in evidence. Section 313 of the

Code is not intended to be used as an interrogation. No trial court can pick out any paper or document from outside the evidence and abruptly slap it on the accused and corner him for giving an answer favourable or unfavourable. The procedure adopted by the learned Judge in using the said two letters is not permitted by law. We, therefore, disapprove the said course and dispel the said letters book, bell and candle.

65. What remains as against A-7 is that one person by name Suhel Ahmed had stayed in Hotel Hans Plaza - nothing more and nothing else. We need not, therefore, proceed further to the other three requirements necessary to fasten him with liability under Section 3(4) of TADA. The result is, conviction of A-7 in this case cannot be upheld.
66. The case against A-8 (S.P. Rai) and A-9 (Kalpnath Rai) can be considered together so that much overlappings and repetitions can be averted. A-8 was the Additional Personal Private Secretary of A-9 during the time when the latter was Union Minister of State for Power. The charge against them is that they have sheltered two terrorists (A-1 Subhash Singh Thakur and another person called "V.N. Rai") in the guest house attached to the National Power Transmission Corporation (NPTC for short), now known as Power Grid Corporation. V.N. Rai is said to be an accused in JJ shoot-out case. The finding of the Designated Court is that A-8 had harboured A-1 Subhash Singh Thakur and A-9 has harboured V.N. Rai during certain period in 1992.
67. Shri Jaitley, learned Senior Counsel who argued for the accused has contended that even assuming that a person by name V.N. Rai had stayed in the NPTC Guest House there is no evidence that he was a terrorist and that there is no shred of evidence that A-9 knew that the said person was a terrorist.

.....
76. Even if no conditions are satisfied the use of a confession as against a co-accused is only for a very limited purpose i.e. the same can be taken into consideration as against such other person. It is now well settled that under Section 30 of the Evidence Act the confession made by one accused is not substantive evidence against a co-accused. It has only a corroborative value, (vide Kashmira Singh v. State of M.P. [AIR 1952 SC 159: 1952 SCR 526], Nathu v. State of U.P. [AIR 1956 SC 56 : 1956 Cri LJ 152], Haricharan Kurmi v. State of Bihar [AIR 1964 SC 1184 : (1964) 2 Cri LJ 344]).
77. A confession made admissible under Section 15 of TADA can be used as against a co-accused only in the same manner and subject to the same conditions as stipulated in Section 30 of the Evidence Act.

78. In view of the above legal position the confession made by A-1 (Subhash Singh Thakur), A-2 (Jayendra Thakur and A-3 (Shyam Kishore Garikapati) cannot be used against A-4 (Chanderkant Patil), even as for corroborative purposes because the former set of accused were not tried for the offence under Section 3(4) of TADA. So the first condition set forth in Section 30 of the Evidence Act is non-existent. Though under Section 15 of TADA such a confession is admissible in evidence even when the confessor and the co-accused are tried in the same case (no matter that they are not tried together for the same offence) the utility of such a confession as against the co-accused gets substantially impaired for all practical purposes unless both of them are tried for the same offence. Consequently in the present trial the confessions made by the first three accused would remain at bay so far as A-4 (Chanderkant Patil) is concerned as for Section 3(4) of TADA. The further corollary is since there is no substantive evidence against A-4 regarding Section 3(4) of TADA, he cannot be convicted under this section.

**Supreme Court of India
1997 (7) SCC 231**

**Sahib Singh
vs
State of Haryana**

M.K.Mukherjee, S.Saghir Ahmad, JJ

1. Hallucination, as a disease, is an apparent perception without any corresponding external object. It is defined as any of the numerous sensations, auditory, visual or tactile, experienced without external stimulus and caused by mental derangement or intoxication. It may occur with relation to any of the special senses, namely, hearing sounds or seeing things that do not exist.
2. The prosecution in this case presents before us a story of hallucination where a dead person is seen by the eyewitnesses to have come armed with a gun, fired the gun at one of the witnesses who was injured and then was seen running away with other people including the appellant, towards another village never to be found again. The appellant was seen in the company of that dead person, shoulder to shoulder, armed with a gun and triggering it to keep pace with the activities of his companion, the dead.
3. The prosecution unfolds its story by ushering us into an era when Punjab was writhing in pain of militancy.
4. Village Pipaltha, P.S. Garhi, District Jind, where Om Prakash (deceased) lived with his three sons, Dharam Pal (PW 10), Surinder (PW 11) and Suresh (PW 12) (fourth is not material) was targetted by terrorists resulting in the death of Om Prakash and gunshot injuries to his son, Suresh.
5. The appellant was prosecuted and tried by the Additional Judge (Designated Court, Rohtak at Jind) and convicted for offences under Sections 302/34 IPC read with Section 3(2) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short "the Act") with a fine of Rs. 200 or else further rigorous imprisonment for one year; under Sections 452/34 IPC (Sentence : 3 years' RI with a fine of Rs. 100 or else 3 months' further RI); under Sections 307/34 IPC (Sentence : 7 years' RI); and under Sections 394/34 IPC (Sentence : 10 years' RI with a fine of Rs. 200 or else RI for one year).

.....

12. The statement of three eyewitnesses, one of whom was an injured witness, as also the appellant's confessional statement recorded by the police under Section 15 of the Act, constitutes the basis of his conviction for the offences in question.

.....

38. The confessional statement of the appellant with which we intend to deal now is the other basis for his conviction. Before looking into the contents of the confessional statement, we may first consider the relevant provisions of the Evidence Act around which certain principles have been built by judicial pronouncements including those of this Court.

39. The Evidence Act contains a separate part dealing with "Admission". This part comprises Sections 17 to 31. "Confession" which is known as a species of "Admission" is to be found contained in Sections 24 to 30.

40. "Confession" has not been defined in the Evidence Act. Mr. Justice Stephen in his Digest of the Law of Evidence, defined it thus :

"A confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed the crime."

This definition was adopted by various High Courts here. (See : Queen Empress v. Babu Lal [ILR (1884) 6 All 509 : 4 AWN 229], ILR at p. 539; Queen Empress v. Nana [ILR (1890) 14 Bom 260], ILR at p. 263; Queen Empress v. Meher Ali Mullick [ILR (1888) 15 Cal 589]; Emperor v. Cunna [(1920) 22 Bom LR 1247 : 22 Cri LJ 68]; Imperatrix v. Pandharinath [ILR (1882) 6 Bom 34]; Muthukumaraswami Pillai v. King Emperor [ILR (1912) 35 Mad 397 : 13 Cri LJ 352]). Straight, J., however, in Queen Empress v. Jagrup [ILR (1885) 7 All 646 : 5 AWN 131] did not adopt this definition and held that only those statements which are direct acknowledgement of guilt could be regarded as "confession" and not mere inculpatory admission which may fall short of an admission of guilt. Similar view was taken in Emperor v. Santya Bandu [(1909) 11 Bom LR 633 : 3 IC 742]. The judicial opinion was thus not unanimous as to the exact meaning of "confession". The Privy Council, however, by its authoritative pronouncement in Pakala Narayana Swami v. King Emperor [(1939) 66 IA 66 : AIR 1939 PC 47] clarified the position and laid down that "a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence". This was followed by this Court in many cases, including Palvinder Kaur v. State of Punjab [AIR 1952 SC 354 : 1953 SCR 94]; Om Prakash v. State of U.P. [AIR 1960 SC 409 : 1960 Cri LJ 544] AIR at p. 412; State of U.P.

- v. Deoman Upadhyaya [AIR 1960 SC 1125 : (1961) 1 SCR 14] and Veera Ibrahim v. State of Maharashtra [(1976) 2 SCC 302 : 1976 SCC (Cri) 278 : AIR 1976 SC 1167 : (1976) 3 SCR 672).
41. In view of these decisions, it is now certain that a "confession" must either be an express acknowledgement of guilt of the offence charged, certain and complete in itself, or it must admit substantially all the facts which constitute the offence.
42. Section 24 provides, though in the negative form, that "confession" can be treated as relevant against the person making the confession unless it appears to the court that it is rendered irrelevant on account of any of the factors, namely, threat, inducements, promises etc. mentioned therein. Whether the "confession" attracts the frown of Section 24 has to be considered from the point of view of the confessing accused as to how the inducement, threat or promise from a person in authority would operate in his mind. (See : Satbir Singh v. State of Punjab [(1977) 2 SCC 263 : 1977 SCC (Cri) 333 : (1977) 3 SCR 195]). The "confession" has to be affirmatively proved to be free and voluntary. (See : Hem Raj Devilal v. State of Ajmer [AIR 1954 SC 462 : 1954 SCR 1133]). Before a conviction can be based on "confession", it has to be shown that it was truthful.
43. Section 25 which provides that a "confession" made to a police officer shall not be proved against the person accused of an offence, places a complete ban on the making of such confession by that person whether he is in custody or not. Section 26 lays down that a confession made by a person while he is in the custody of a police officer shall not be proved against him unless it is made in the immediate presence of a Magistrate. Section 27 provides that when any fact is discovered in consequence of information received from a person accused of any offence who is in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates to the fact thereby discovered, may be proved. Section 27 is thus in the form of a proviso to Sections 24, 25 and 26. Sections 164, 281 and 463 of the Code of Criminal Procedure are the other provisions dealing with "confession" and the manner in which it is to be recorded.
44. Section 15 of the TADA Act, however, makes a special provision as to the admissibility of confession and signals a departure from the normal rule contained in Sections 25 and 26 of the Evidence Act. It provides that a confession made by an accused to a police officer of a particular rank or higher would be admissible in evidence and can be proved against that person subject to the fulfilment of other requirements indicated in that section.

45. According to these requirements, confession has to be made before a police officer not below the rank of a Superintendent of Police. Before recording the confession, the police officer has to explain to the person concerned that he is not bound to make the confession and that if he makes the confession, it may be used as evidence against him. The police officer has also to satisfy himself, after questioning the person concerned, that he is making the confession voluntarily. The officer recording the confession has also to record a certificate of having observed the requirements of law.
46. The Act, like the Evidence Act, does not define "confession" and, therefore, the principles enunciated by this Court with regard to the meaning of "confession" under the Evidence Act shall also apply to a "confession" made under this Act. Under this Act also, "confession" has either to be an express acknowledgment of guilt of the offence charged or it must admit substantially all the facts which constitute the offence. Conviction on "confession" is based on the maxim "habemus optimum testem, confitentem reum" which means that confession of an accused is the best evidence against him. The rationale behind this rule is that an ordinary, normal and sane person would not make a statement which would incriminate him unless urged by the promptings of truth and conscience.
47. Under this Act, although a confession recorded by a police officer, not below the rank of Superintendent of Police, is admissible in evidence, such confessional statement, if challenged, has to be shown, before a conviction can be based upon it, to have been made voluntarily and that it was truthful.
48. In the instant case, confession of the appellant was recorded by the Superintendent of Police, Jind, on 14-12-1991, which was accompanied by a certificate by the SP Jind, in compliance of the requirement of Section 15 of the Act. The confessional statement has been proved and has been marked as Exh. PW 14/A. The relevant portion of the confessional statement is as under :

"My father Sucha Singh and Om Parkash Mahajan, r/o Pipaltha purchased some agricultural land in Village Pipaltha long ago. After that there was dispute between them. Om Parkash was a rich man. Om Parkash got my father implicated in false cases and got challaned through police on the basis of which the grudge increased.

There is one Kala Singh @ Rukha in our village who has committed two murders in our village and he is entangled in the group of terrorists and is residing in Punjab. Kala Singh was on visiting terms with us. 3-4 days before committing the murder of Om Parkash, Kala Singh @ Rukha had come to us. I had asked Kala Singh @ Rukha to commit the murder of Om Parkash Mahajan, r/o Pipaltha. Kala Singh @ Rukha told me that he has no need of money but he had to pay Rs. 15,000 to the other terrorists

for committing the murder. I promised to pay Rs. 15,000 and Kala Singh had asked me to hand over Rs. 15,000 to him in Makrod Gurdwara. On 18-11-1991 Kala Singh @ Rukha, r/o Pipaltha accompanied by six terrorists, one of them was Nachhatar Singh, names of the others not known, came to my house. Kala Singh @ Rukha had asked me to see as to whether Om Parkash Mahajan was present at the house or not. On this asking I went to the house of Om Parkash. Om Parkash was present at his shop. I told Kala Singh @ Rukha that Om Parkash was present at his shop. Kala Singh @ Rukha along with his companion terrorists committed the murder of Om Parkash Mahajan by firing shots while he was going to his house. After firing in the street they ran away on the Hero Honda motor cycle No. HR-32-0218 after taking the same from the shop of Om Parkash Mahajan. I went to my home after giving information of Om Parkash Mahajan to Kala Singh @ Rukha and started drinks. On hearing the noise of firing I ran away from my house due to fear. That the sons of Om Parkash may not name me for the murder of Om Parkash, I had promised to pay Rs. 15,000 for the murder of Om Parkash Mahajan."

49. A perusal of the confessional statement would indicate that three or four days prior to the date of the incident, which incidentally is 18-11-1991, Kala Singh had come to the appellant and the appellant had requested Kala Singh to commit the murder of Om Prakash, for which Kala Singh wanted Rs. 15,000 to be paid to other terrorists who would be hired for that job. It was on the basis of this arrangement that Kala Singh came along with six other terrorists, including Nachhatar Singh, on 18-11-1991 and committed the murder of Om Prakash. The terrorists, including Kala Singh, went away on the Hero Honda motor cycle.
50. It has been held above that Kala Singh had already been killed in a police encounter on 31-10-1991. There was, therefore, no occasion of his coming to the appellant and the appellant asking Kala Singh to commit the murder of Om Prakash on Rs. 15,000 being paid to him.
51. The story of hallucination is repeated in the so-called confessional statement by saying that a dead person came to the appellant, talked to the appellant, asked the appellant to pay Rs. 15,000 so that that "dead person" may pay it to other terrorists through whom the job of killing Om Prakash would be performed; the dead person came to the spot along with other terrorists on 18-11-1991 and committed the murder of Om Prakash. The confessional statement further makes that dead person to ride on a motor cycle and drive away along with other terrorists on the same motor cycle. The dead also drive !

52. The confessional statement does not admit even substantially the basic facts of the prosecution story, inasmuch as in the confessional statement, no role is assigned to the appellant while in the prosecution story an active role has been assigned to him by showing that he too was armed with a gun and had gone to the spot and participated in the commission of the crime by firing his gun specially at the injured witness. The confessional statement is not truthful and is part of the hallucination with which the prosecution and its witnesses were suffering. It is accordingly discarded and cannot be acted upon.
53. A little effort on the part of the trial court would have revealed to it the falsity of the prosecution case, but it proceeded in a mechanical manner and ultimately convicted the appellant ignoring that there was a deliberately delayed FIR and the case set out therein was sought to be proved through highly interested witnesses, instead of independent witnesses, and also by bringing on record a confessional statement which contained false facts. This leads to the conclusion that the trial Judge was sitting only to convict forgetting that the judiciary holds the scales even, not tilted.

**Supreme Court of India
1998 (7) SCC 337**

**Suresh Budharmal Kalani Alias Pappu Kalani
vs
State of Maharashtra**

M.K.Mukherjee, S.S.Mohammed Quadri, JJ

.....

2. Suresh Budharmal Kalani @ Pappu Kalani and Dr. Aken Kumar Gajendra Rai Desai, the appellants in these two appeals, figure as the accused (besides others) in TADA Special Case No. 31 of 1993, pending before the Designated Court, Brihan, Mumbai constituted under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA for short). The case arises out of an incident of rioting, murder and other cognate offences that took place on 12-9-1992 at J.J. Hospital, Bombay. According to the prosecution case, on that day at or about 3.45 p.m., a group of persons armed with automatic firearms, such as pistols, AK-47 assault rifles, stormed into Ward No. 18 of the Hospital and opened fire upon Shailesh Haldankar, who was an accused in Crime No. 452 of 1992 of V.P. Road Police Station and admitted there due to injuries earlier sustained. The indiscriminate firing by the miscreants resulted in the death of Haldankar and two policemen on guard duty and injuries to five others. Shri K. G. Thakur, Sub-Inspector of Police attached to V.P. Road Police Station, who was then on duty at the Hospital returned the fire causing injuries to some of the miscreants including one Shrikant Rai @ Pradhan. The miscreants, however, managed to escape carrying with them the injured associates in a car. It is the further prosecution case that the incident was the outcome of a conspiracy hatched by Dawood Ibrahim, a notorious gangster, and his men to avenge the murder of his brother-in-law, Ibrahim Ismail Parkar, who was eliminated by the members of his rival gang led by Arun Gawli of which Haldankar was a member.

.....
4. The gravamen of the charges to be framed against Kalani is that he hatched a criminal conspiracy to murder Haldankar and thereby abetted the commission of his murder. The above accusation is based on the following facts and circumstances :

- i) a meeting was held on 2-9-1992 in a holiday resort belonging to Kalani where the decision to kill Haldankar was taken;
- ii) soon after the murder, Kalani had a telephonic talk with one of the accused persons regarding the arrangement to be made to remove injured Shrikant Rai in his car; and
- iii) on 13-9-1992, Kalani threatened Jayawant Suryarao, (one of the accused) that in case he disclosed the removal of Shrikant Rai in his (Kalani's) car, he and his family members would be liquidated.

.....

6. Thus said, we may turn our attention to the confession made by Dr. Bansal and Jayawant Suryarao. Under Section 30 of the Evidence Act, 1872, a confession of an accused is relevant and admissible against a co-accused if both are jointly facing trial for the same offence. Since, admittedly, Dr. Bansal has been discharged from the case and would not be facing trial with Kalani, his confession cannot be used against Kalani. The impugned order shows that the Designated Court was fully aware of the above legal position but, surprisingly enough, it still decided to rely upon the confession on the specious ground that the prosecution was not in any way precluded from examining Dr. Bansal as a witness in the trial for establishing the facts disclosed in his confession. This again was a perverse approach of the Designated Court while dealing with the question of framing charges. At that stage, the court is required to confine its attention to only those materials collected during investigation which can be legally translated into evidence and not upon further evidence (dehors those materials) that the prosecution may adduce in the trial which would commence only after the charges are framed and the accused denies the charges. The Designated Court was, therefore, not at all justified in taking into consideration the confessional statement of Dr. Bansal for framing charges against Kalani.
7. So far as the confession of Jayawant Suryarao is concerned, the same (if voluntary and true) can undoubtedly be brought on record under Section 30 of the Evidence Act to use it also against Kalani but then the question is : what would be its evidentiary value against the latter ? the question was succinctly answered by this Court in Kashmira Singh v. State of M.P. (AIR 1952 SC 159 : 1952 SCR 526) with the following words :
"The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief

independently of confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

The view so expressed has been consistently followed by this Court. Judged in the light of the above principle, the confession of Suryarao cannot be called in aid to frame charges against Kalani in the absence of any other evidence to do so.

8. That brings us to the case of Dr. Desai, the other appellant. According to the prosecution case, the injured accused Shrikant Rai was taken to the house of Dr. Desai by Shanti Lal Patil, Jagdish Chand and Hasmukh Bhai, three of the accused persons, for treatment. They told Dr. Desai that he (Shrikant) had sustained bullet injury in the stomach due to accidental firing from the licensed revolver of Shanti Lal. Dr. Desai told them that the injured could not be admitted in a government hospital as it was a medico-legal case. They, however, insisted that Shrikant should be treated in a private hospital and all expenses thereof would be paid by them. Dr. Desai then contacted one Dr. Kamble over phone and requested him to operate upon the patient. Accordingly, Shrikant was taken by the above three accused persons to Dr. Kamble who operated upon him. The prosecution alleges that knowing full well that it was a medico-legal case, Dr. Desai entertained Shrikant and arranged for his operation by Dr. Kamble at his private hospital and thereby helped Shrikant to abscond after he recuperated.
9. To prove the above accusation and, for that matter, to substantiate the charges under Sections 3(4) of TADA and 212 IPC to be framed against Dr. Desai, the prosecution intends to rely upon the alleged confessional statement of Dr. Desai himself and three of the co-accused, namely Dr. Kamble, Jagdish Chand and Hasmukh Bhai. The relevant portion of the statement of Dr. Desai reads as under :

"On 12-9-1992 at about 11 p.m., Jagdish along with one person, whom he introduced to me as Hasmukh Patel, Sarpanch of Dumas, called at my residence. Jagdish informed me that Hasmukh's elder brother owns a farm at Silvasa and he is also a building contractor. Jagdish further informed me that on the same evening they had a party at the farmhouse, when accidentally a shot was fired from the weapon and one of them was injured and he may require an operation. He further told me that they tried to contact a surgeon at Silvasa but he was not available and they were bringing the injured to Surat for treatment and requested me to help them. I suggested to them to get the injured admitted in Government Hospital, Surat, when Jagdish told me that those people wanted the injured to be treated in a private hospital and were willing

to pay any charges for the treatment. Jagdish also told me that they were prepared for the worst. I also came to know through Jagdish that the injured had an injury over the abdomen. At about 12 midnight on 12-9-1992, I contacted Dr. Kamble on phone and narrated to him the above-mentioned facts as told to me by Jagdish. I also told Dr. Kamble that the party was ready to pay any charges, as he thought fit, for the operation. I also told Dr. Kamble that the patient was not before me and enquired whether he was ready to operate such a case. For a while Dr. Kamble thought about it and asked me to send the patient to his hospital at Gopipura. Dr. Kamble then informed me that he would intimate his staff at the hospital about the arrival of the injured and ask them to be ready. I then informed Jagdish to take the injured to Dr. Kamble's hospital. Thereafter, Jagdish and Hasmukh went away."

10. A bare perusal of the above statement makes it abundantly clear that it is self-exculpatory and hence inadmissible in evidence as "confession". Once it is left out of consideration - as it should be - the confessional statements of the other three accused, for what they are worth, cannot be made - in the absence of any other material to connect Dr. Desai with the accusation levelled against him - a basis for impugned charges in view of the law laid down in Kashmira Singh (AIR 1952 SC 159 : 1952 SCR 526).
11. On the conclusions as above, we allow these appeals and quash the charges framed against the two appellants.

**Supreme Court of India
2000 (2) SCC 254**

S.N. Dube
vs
N.B. Bhoir and Others

G.T. Nanavati, S.P. Kurdukar, JJ

.....

7. The trial court found many faults with the confessions and also held them inadmissible in evidence. It also held that they were not voluntarily made. The trial court disbelieved the witnesses examined to prove the terrorist acts on the ground that their evidence was too general and vague and they were not independent and responsible members of the locality. The evidence of the two eyewitnesses was disbelieved on the ground that there were material improvements and contradictions in their evidence and their version was also not believable. Identification of the accused in the Court by these two eyewitnesses was not believed because it was after a long time and no previous test identification parade was held. For all these reasons it further held that the prosecution case against A-1 to A-13 was not proved. As regards A-14 to A-17 the trial court held that the sanction given for their prosecution under Section 3(1) of the TADA Act was vitiated on account of non-application of mind. It also held that the reinvestigation was done with an oblique motive as most of the terrorist activities fell outside the jurisdiction of the railway police and yet they were investigated by them and the regular police having jurisdiction over the areas was not associated with it. Thus the case against A-14 to A-17 was also held not proved.

.....

26. The next important piece of evidence relied upon by the prosecution is the confessions made by some of the accused. It was urged by the learned counsel appearing for the appellants that the learned trial Judge has committed a grave error in holding them inadmissible and not voluntary. During the course of reinvestigation the confessions of A-1 to A-8 and A-11 were recorded by Shinde (PW 76), who was then working as the Superintendent of Police (Railways)' Mumbai. The said confessions were recorded between 29-9-1992 and 1-3-1993. A-9 and A-10 had also shown their willingness to

make confessions to PI Deshmukh (PW 71), but after they were taken to Shinde they declined to make any confession. The confessions were recorded by Shinde under Section 15 of the TADA Act. All those accused were forwarded by PI Deshmukh with his reports to Shinde as they had expressed willingness to make confessions before him. All those forwarding reports have been brought on record and have been proved by these two witnesses. The fact that these witnesses were taken to Shinde for recording their confessions was not disputed. What was stated by these accused while retracting their confessions was that they were obtained by giving threats or under undue influence. It was generally suggested to Shinde in his cross-examination that he had obtained the signatures of the accused on those confessions under undue influence, coercion, fraud and mental and physical torture. It was not stated by the accused nor even suggested in the cross-examination of Shinde that a particular type of physical or mental torture or coercion was caused to the accused or in which manner they were defrauded or what undue influence was exercised upon them. The only suggestion that was made to the witnesses was that while recording the confessions he told them that he was the Superintendent of Police and he had stated so in order to impress the accused. In our opinion Shinde had done nothing wrong in disclosing his identity as he was really required to do so before recording the confessions. At this stage we will refer to some of the admissions and statements made by Shinde in his cross-examination. He admitted that he had felt that it was unfair on his part to record the confessions as he was supervising the investigation. He also admitted that he was not aware of the statutory requirements of Section 15 of the TADA Act and Rule 15 of the TADA Rules till he recorded the first confession. He also admitted that he had inadvertently committed a breach of the TADA Rules while recording those confessions. He also admitted that while recording the confessions he was not aware of the procedure prescribed under Section 164 of the Criminal Procedure Code for recording confessions and also the provisions made by the Bombay High Court in its Criminal Manual. He also admitted that he had put some more questions to the accused before recording their confessions in order to find out that they were willingly making those confessions, but all those questions have not been recorded by him in the confessions. It was really on the basis of these admissions and some other reasons to be dealt with hereinafter that the trial court held the confessions not admissible, not voluntary and not reliable.

.....

28. The confessions have been held inadmissible mainly on two grounds. The first ground given by the learned trial Judge is that the power under Section 15 of the TADA Act was exercised either mala fide or without proper application of mind. The second ground on which they are held inadmissible is that they were recorded in breach of Rules 15(2) and 15(3) of the TADA Rules and also in breach of the requirements of Section 164 and the High Court Criminal Manual. The learned trial Judge held that the TADA Act was applied in this case without any justification. The permission was granted in that behalf without any application of mind. According to the trial court there was no material on the basis of which the TADA Act could have been invoked at that stage and that most probably the said Act was invoked in order to defeat the bail application filed by two accused in the High Court. In our opinion the trial court was wrong in taking this view. We have already pointed out earlier that Deshmukh had collected enough material on the basis of which reasonable satisfaction could have been arrived at that the acts committed by the two gangs were terrorist acts. It is no doubt true that it was wrongly reported by Deshmukh that Section 5 was also applicable in this case and that without proper verification sanction was granted to proceed under that section also. The applicability of Section 5 depended upon the existence of a requisite notification by the State Government. It was wrongly reported by PI Deshmukh in his report that such a notification was issued and relying upon his statement the higher officer had given the sanction. Merely on this ground it cannot be said that Shinde has exercised the power under Section 15 of the TADA Act mala fide. The learned trial Judge has also held that it was not fair on the part of Shinde to record the confessions as he was also supervising the investigation. Shinde has clearly stated in his evidence that he had made attempts to find out if any other Superintendent of Police was available for recording the confessions and as others had declined to oblige him he had no other option but to record them. We see no illegality or impropriety in Shinde recording the confessions even though he was supervising the investigation. One more flimsy reason given by the trial court for holding that the power under Section 15 was exercised mala fide is that the accused making the confessions were not told that they had been recorded under the TADA Act. No such grievance was made by the accused in their statement under Section 313. On the other hand, it appears from the confessions themselves that the accused were made aware of the fact that those confessions were recorded under the TADA Act.
29. The learned trial Judge has held the confessions inadmissible on the ground that they had been recorded in breach of Rules 15(2) and 15(3) of the TADA Rules. The rules

read as under :

"15. (2) The confession so recorded shall be shown, read or played back to the person concerned and if he does not understand the language in which it is recorded, it shall be interpreted to him in a language which he understands and he shall be at liberty to explain or add to his confession.

(3) The confession shall, if it is in writing, be -

(a) signed by the person who makes the confession; and

(b) by the police officer who shall also certify under his own hand that such confession was taken in his presence and recorded by him and that the record contains a full and true account of the confession made by the person and such police officer shall make a memorandum at the end of the confession to the following effect -

'I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and recorded by me and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.'

sd/-
police officer."

Relying on sub-rule (2) of Rule 15 it was contended on behalf of the respondents that the police officer is required to explain to the person making the confession that he is not bound to make it and that if he makes it it can be used against him as evidence. The said provision also requires that he should question the person making it in order to assure him that he is making it voluntarily. It was submitted by Mr. Kotwal, learned counsel appearing for some of the respondents that both these things are required to be done "before recording" any confession. When a confession is recorded in two parts - the preliminary part containing the record of how and for what the person was forwarded and the questions and answers put to him for ascertaining his voluntary willingness to make a confession even after being told that the confession may be used against him as evidence and the second part which contains the actual confessional statement - it is the second part which has to be regarded as the confessional statement and not the preliminary part. Therefore, the obligation to explain and ascertain is to be performed while recording the real confessional part and doing so earlier when the preliminary part is recorded cannot be regarded as proper compliance with the requirement of Rule 15(2). The police officer, must explain and give the statutory warning before recording the actual confessional part and it is at that point of time

that he has to ascertain by questioning the person making it that he is making the confession voluntarily. He submitted that the confessional statements were recorded in this case in two parts and while recording the second part no questions were put to the accused to ascertain whether he was making the confession voluntarily. He also submitted that while recording the second part no warning was given to the accused that he was not bound to make the confession and that if he made it, then it could be used against him.

30. Neither Section 15 nor Rule 15 contemplates recording of a confessional statement in two parts or giving time to the person making a confession to think over and reconsider whether he still wants to make it in spite of being told that he is not bound to make it and that it can be used against him. If in order to be assured that the person concerned makes the confession willingly and voluntarily the recording officer gives him some time to think over and for that reason records the confessional statement in two parts, then they cannot be regarded as two independent and separate statements. The second part being in continuation of the first part, both the parts have to be treated as one confessional statement. If the recording police officer feels assured after giving the statutory warning that the person who wants to make a confession is doing so voluntarily he may not give any time for reconsideration and in that case there would be only one continuous statement. Therefore, the contention that when the confession is recorded in two parts, only the second part can be regarded as the confession and while recording the second part the police officer should give the statutory warning and then ascertain if the person concerned is making it voluntarily, cannot be accepted. The requirement of law is that before recording the confess on the police officer should ascertain by putting questions to the maker of it that he is making the confession voluntarily and he should also explain to him that he is not bound to make the confession and that if he makes it that can be used against him as evidence. In this case DSP Shinde had put questions to each of the accused who was brought before him to ascertain if he was willing to make a confession voluntarily and had also given the statutory warning to him on that day. Even after the accused had shown his willingness to make a confession Shinde had given him time not exceeding 48 hours to think over his readiness to make the confession. When the accused was brought to him again he had again ascertained if he was still ready and willing to give a statement. He had also asked him if he was making it under any pressure or coercion or threat. Only after the accused had replied in the negative he had told the accused to say whatever he wanted to state about Suresh Dube's murder. In view of these facts

and circumstances it is not possible to uphold the finding recorded by the trial court and to accept the contention raised on behalf of the respondents that while recording the confessions of the accused Shinde had committed a breach of Rule 15(2).

31. As regards the breach of Rule 15(3) it has been held that Shinde did not write the certificates and the memorandums in the same form and terms as are prescribed by that rule. It was submitted by the learned counsel for the respondents that the certificates and memorandums have not been recorded by Shinde in identical terms and as Rule 15 is held mandatory the trial court was right in holding them inadmissible for non-compliance with that mandatory requirement. Therefore, the question to be considered is whether the certificate and the memorandum are required to be written by that rule in the same form and terms. What Rule 15(3)(b) requires is that the police officer should certify under his own hand that "such confession was taken in his presence and recorded by him and that the record contains a full and true account of the confession made by the person".

According to that rule the memorandum should be to the following effect :

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and recorded by me and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him."

Writing the certificate and making the memorandum are thus made mandatory to prove that the accused was explained that he was not bound to make a confession and that if he made it it could be used against him as evidence, that the confession was voluntary and that it was taken down by the police officer fully and correctly. These matters are not left to be proved by oral evidence alone. The requirement of the rule is preparation of contemporaneous record regarding the manner of recording the confession in the presence of the person making it. Though giving of the statutory warning, ascertaining the voluntariness of the confession and preparation of a contemporaneous record in the presence of the person making the confession are mandatory requirements of that rule, we see no good reason why the form and the words of the certificate and memorandum should also be held mandatory. What the mandatory requirements of a provision are cannot be decided by overlooking the object of that provision. They need not go beyond the purpose sought to be achieved. The purpose of the provision is to see that all formalities are performed

by the recording officer himself and by others to ensure full compliance with the procedure and seriousness of recording a confession. We fail to appreciate how any departure from the form or the words can adversely affect the object of the provision or the person making the confession so long as the court is able to conclude that the requirements have been substantially complied with. No public purpose is likely to be achieved by holding that the certificate and memorandum should be in the same form and also in the same terms as are to be found in Rule 15(3)(b). We fail to appreciate how the sanctity of the confession would get adversely affected merely because the certificate and the memorandum are not separately written but are mixed up or because different words conveying the same thing as is required are used by the recording officer. We hold that the trial court committed an error of law in holding that because the certificates and memorandums are not in the same form and words they must be regarded as inadmissible. Having gone through the certificates and the memorandums made by Shinde at the end of the confessions what we find is that he had mixed up what is required to be stated in the certificate and what is required to be stated in the memorandum. He has stated in each of the certificates and the memorandums that he had ascertained that the accused was making the confession willingly and voluntarily and that he was under no pressure or enticement. It is further stated therein that he had recorded the confession in his own handwriting (except in case of A-7 whose confession was recorded with the help of a writer). He has also stated that it was recorded as per the say of the accused, that it was read over to the accused completely, that the accused had personally read it, that he had ascertained thereafter that it was recorded as per his say and that the confession was taken in his presence and recorded by him. It is true that he has not specifically stated therein that the record contains "a full and true account of the confession made". The very fact that he had recorded the confession in his own handwriting would imply that it was recorded in his presence and was recorded by him. So also when he stated in the certificates and memorandums that the confession was recorded as per the say of the accused, that it was read over to him fully, that the accused himself personally read it and that he had ascertained that it was recorded as per his say, that would mean that it contains "a full and true account of the confession" and that the contents were admitted by the accused. Thus, while writing the certificate and the memorandum what Shinde has done is to mix up the two and use his own words to state what he had done. The only thing that we find missing therein is a statement to the effect that he had explained to the accused that he was not bound to make a confession and that if he did so the confession might be used as evidence against him. Such a statement

instead of appearing at the end of the confession in the memorandum appears in the earlier part of the confession in the question and answer form. Each of the accused making the confession was explained about his right not to make the confession and the danger of its being used against him as evidence. That statement appears in the body of the confession but not at the end of it can the confession be regarded as not in conformity with Rule 15(3)(b) only for that reason ? We find no good reason to hold like that. We hold that the trial court was wrong in holding that there was a breach of Rule 15(3) and, therefore, the confessions were inadmissible and bad.

32. It was next submitted that though Section 164 CrPC does not strictly apply to confessions recorded under Section 15 of the TADA Act, the provisions contained in Section 15(2) of the TADA Act and Sections 162(2) and 164(4) CrPC are similar and that would imply that the requirements of law regarding the procedure for recording a confession are the same. Both the provisions require that before recording the confession the accused must be told that he is not bound to make a confession and that if he makes it then it can be used as evidence against him. Both these provisions require that before recording the confession the recording officer has to question the accused in order to satisfy himself that he is making the confession voluntarily and after recording it to issue a certificate and memorandum to the effect that the accused was explained about his right to be informed that he was not bound to make the confession and that it could be used against him, that he believed that the confession was made voluntarily, that it was taken down in his presence and was read over to him, that it was admitted as correct by him and that it contains a full and true account of the statement made by him. It was, therefore, submitted that the guidelines issued by the High Court for recording a confession under Section 164 CrPC are also required to be followed by the police officer recording a confession under the TADA Act. Otherwise a situation may arise where in the same trial there may be a confession of an accused recorded by a Magistrate without following the guidelines contained in the High Court Manual and a confession made by another accused and recorded by a police officer under the TADA Act who has not followed those guidelines while the one recorded by the Magistrate may not be recorded as evidence, the other one will be treated as evidence and can be used against him. In the alternative, it was submitted that even if it is held that the guidelines issued under Section 164 CrPC by the High Court are not required to be followed while recording a confession under Section 15 of the TADA Act at least the well-recognised principles pointed out by this Court in Kartar Singh case(Kartar Singh V. State of Punjab, (1994) 3 SCC 569 : 1994 SCC (Cri) 899) are

required to be followed. The said guidelines have been suggested by this Court as well-recognised principles of fairness to be followed to ensure that the confession obtained in the pre-indictment interrogation by a police officer not lower in rank than a Superintendent of Police is not tainted with any vice. What is missed by the learned counsel is that while recommending those guidelines it was made clear by this Court that it is really for the court trying the offence to decide the question of admissibility or reliability of confession by using its judicial wisdom. From what has been observed in the said decision it does not follow that if the suggested guidelines are not followed then the confession must be discarded as inadmissible or bad on that score or on the ground that it is not in conformity with Section 15(2) of !the TADA Act and Rule 15 of the TADA Rules. The police officer recording a confession under Section 15 is really not bound to follow any other procedure. The rules or the guidelines framed by the Bombay High Court for recording a confession by a Magistrate under Section 164 CrPC do not by themselves apply to recording of a confession under Section 15 of the TADA Act. Therefore, merely because some of those guidelines were not followed while recording the confessions it cannot for that reason be held that the said confessions have lost their evidentiary value. If while recording the confessions Shinde had followed all those guidelines also then that would have been a circumstance helpful in inferring that the confessions were made after full understanding and voluntarily. In this case there is nothing on record to show, except that the confessions were recorded by Shinde in the police station, that they were not recorded in a free atmosphere. No other person was allowed to remain present at that time and all the accused were given time to reconsider their willingness. After they were produced again Shinde had ascertained whether they were still willing to make confessions. All the accused we 're previously told that they were not bound to make a confession. Each one, of them was warned that if he made a confession then it could be used against him.

33. Shinde had tried to ascertain if any threat or inducement was given to them or whether they were ill-treated or pressurised. All the accused had categorically stated that no such thing had happened. From the answers given by the accused it can be said that Shinde had good reason to believe that the accused were making confessional statements voluntarily. In his evidence also - he has stated so and nothing has been brought out in his cross-examination from which it can be said that he was not so satisfied or that he did not really believe that the confessions were made by the accused voluntarily. The learned trial Judge held the confessions not voluntary as he was of the view that A-1 to A-8 and A-11 were hardened criminals and it was not

believable that they would have one after the other shown their willingness to make confessions. It was not even the case of the accused that they were not taken to Shinde for recording their confessions. The only suggestion that was made in his cross-examination was that he had obtained those confessions after exerting influence, coercion and physical and mental torture. We have already pointed out earlier that in the absence of any specific act suggested by the defence it is not possible to accept the belated allegation made by those accused that their confessions were obtained in that manner. On careful consideration of the evidence of PI Deshmukh and DSP Shinde, we find that all those accused had made their confessions voluntarily. The confessions also receive independent corroboration on material points from the evidence of the two eyewitnesses and also from the evidence of PWs 1 to 5. We have, therefore, no hesitation in holding that they are true and reliable and can form a safe basis for conviction of those respondent-accused who have admitted to have taken part in the murder of Suresh and in commission of terrorist acts.

34. A-1 in his confession (Exts. 571 and 571-A) has admitted that he was a member of the gang of Manik Patil. He has further admitted therein that Manik Patil and his men were entrusted by Bhai Thakur the job of finishing Suresh and because they had not done their work quickly, Bhai Thakur was angry with them. So they were keeping a watch on Suresh Dube and on the day of the incident he was informed by one Kalidas Patil that Suresh was on Platform 2. He immediately loaded his pistol and along with A-2 to A-5 and Narayan Gauda went to the railway station. Suresh was seen reading a newspaper and another person with him was standing nearby and getting his shoes polished. He crossed him and went ahead and also did namaskar. As there were many persons near the book-stall at that Point of time he went ahead on the platform and again returned near that book-stall. He then took out the pistol from his pocket and fired seven shots at Suresh. He has also stated in his confession how he and others thereafter ran away and what he and others did thereafter. A-2, A-3 and A-4 in their confessional statements (Exts. 578 and 578-A, 563 and 563-A and 584 and 584-A respectively) have also stated that Manik Seth had given instructions to Narendra (A-1) to finish Suresh and they were told to accompany Narendra whenever Narendra called them for help. They have admitted that on being told by A-1 that "Suresh Dube has come at Nalasopara Railway Station, let us all go", they went to the railway platform along with A-1. They have all stated that Narendra fired shots and after Suresh had collapsed on the platform they had run away. A-5 has also admitted in his confession that he had gone to the railway platform running along with A-1 to help him as decided earlier.

All of them have clearly admitted that the murder of Suresh was committed on the instructions of Manik Patil (A-6) and Bhai Thakur. A-6 also confessed that he was the leader of the gang and that as decided by Bhai Thakur, Don (Pendhari) was to be finished by the men of Bhai Thakur and they were to finish Dube. Therefore, A-1 and his boys were keeping a watch upon the movements of Suresh and he had instructed A-1 and his boys to finish Suresh as soon as possible. So far as the participation of A-1 to A-4 in the murder of Suresh is concerned the confessions stand corroborated by the evidence of the two eyewitnesses. The confessions of A-5 and A-6 being substantive evidence are sufficient for considering them and they also receive corroboration from the confessions of A-1 to A-4 and also receive general corroboration as regards the other illegal activities committed by them from the evidence of PWs 1 to 5 and those witnesses examined by the prosecution to prove that they were the victims of some of the terrorist acts committed by the gangs of Bhai Thakur and Manik Patil. Therefore, relying upon the confession of A-1 to A-6 and the evidence of the two eyewitnesses, Amarnath and Om Prakash, we hold that Suresh was killed by A-1 by firing shots from his pistol and that was done in prosecution of the object of the larger conspiracy hatched by Bhai Thakur, Manik Patil and some members of their gangs and the unlawful assembly consisting of A-1 to A-6 and some others. We, therefore, hold A-1 guilty under Section 302 IPC and A-2 to A-6 under Section 302 read with Sections 120-B and 149 IPC. We may state that the finding recorded by the trial court that the death of Suresh was homicidal and that he died of the injuries caused to him by the bullets with which he was hit has not been questioned before us.

35. To prove the terrorist acts committed by the gangs of Bhai Thakur and Manik Patil, the prosecution had examined some police officers and some others who were the victims of the terrorist acts. The police officers examined by the prosecution were PI Tadavi (PW 68), ASI Paradkar (PW 69), PSI Ramkishan (PW 70), SDPO Deshmukh (PW 71), DIG Suradkar (PW 75), DGP Baraokar (PW 77) and ACP Vasant Pagare (PW 90). PI Tadavi (PW 68) was attached to Virar Police Station between 9-4-1985 and 24-1-1986. He has deposed that during that period he had found the three gangs operating in the area under the police station. They were the gangs of Bhal Thakur, Nizam and Karu. Bhal Thakur's gang was a strong one and had established supremacy over others. He has further stated that the modus operandi of Bhai Thakur's gang was to create a pre-planned alibi while committing an offence. In his cross-examination he admitted that he had not made any report to any of his superior officers regarding the activities of these three gangs. He, however, stated that he had gathered all that information

through the inquiries made by him. ASI Paradkar (PW 69) was attached to Virar Police Station as Police Havaldar between 8-8-1988 and 31-7-1989. PI Kukdolkar (A-15) was Police Inspector of the police station at that time. He has deposed that Gajanan Patil and Manik Patil were residing in Nilemore Village and had created fear in that locality by beating people and the people used to be afraid of them. He has further stated that from the police record he had come to know that the three gangs of Bhai Thakur, Karu and Nizam were operating in that area and that those three gangs used to fight with one another for establishing supremacy. Manik Patil (A-6) and Gajanan Patil were members of the gang of Bhai Thakur. He has also deposed that he had seen Bhai Thakur, Hitendra Thakur (A-9) and Prashant Tandel (A-8) coming to the police station to meet PI Kukdolkar. He has further deposed that PI Nimbalkar, who was attached to LCB, Thane then, often used to come to Virar and stay with PI Kukdolkar and both of them used to call Prashant Tandel (A-8) to see them. He admitted that he had not taken any action against any of these gangs nor had he suspected anything wrong or improper because of those meetings. He denied that he was deposing falsely against the accused at the instance of Deshmukh. Ramkishan Rengunthawar (PW 70) was a senior PSI of Virar Police Station from 17-5-1981 to 15-8-1982. He has deposed that during that period he had registered three offences against Bhai Thakur. In 1984 he was attached to CID Crime. Out of those three cases two cases were transferred to CID Branch and in the third case the accused were acquitted. He stated that the said two cases were compounded out of fear. But he admitted in his cross-examination that he had not made any report to any higher officer in that behalf. Deshmukh (PW 71) Was the SDPO of Western Railway between 1-3-1992 and 30-6-1993. He had no personal knowledge with respect to the illegal activities of the two gangs of Bhai Thakur and Manik Patil. But during the investigation made between 18-5-1992 and 23-9-1992 and also thereafter he had come to know about their illegal activities and the terror created by them in the area. He admitted that he had not received any complaint against those two gangs for forcibly taking away any land or collection of "haftas" or beating any member of the public. DIG Suradkar (PW 75) has deposed that though he had come to know about the existence of the gangs of Bhai Thakur and Manik Patil and acts of violence committed by them and creation of an atmosphere of terror in that area, he had no personal knowledge about the same. PI Pagare (PW 90) was examined to prove the involvement of Bhai Thakur's gang in CR No. 43 of 1984 under Sections 302, 147, 148 and 149 IPC and Section 25(c) of the Arms Act at Virar Police Station. He had investigated that offence and submitted his report (Ext. 618). In his cross-examination he admitted that he did not know if A-9 Hitendra Thakur was

discharged in that case. He also stated that the said case was still pending in the Thane Court. As rightly held by the learned trial Judge, the evidence of the police officers as regards the terrorist acts stated to have been committed by, the gangs of Bhai Thakur and Manik Patil is of a general nature and vague. They have referred to some cases filed against Bhai Thakur and members of his gang. Even if the allegations made in those cases are believed as correct they fall short of establishing "terrorist acts" as contemplated by the TADA Act.

36. The prosecution also examined Pushpa Pendhari (PW 19), Balaram (PW 34), Kanhiya (PW 35), Jafar (PW 40), Waman (PW 41), Sakharam (PW 42), Jagannath (PW 45), Subhash (PW 67) and Naaz (PW 97) to prove that the gangs of Bhai Thakur and Manik Patil were engaged in committing terrorist acts. Out of these witnesses PWs 34, 41, 42 and 45 have not referred to any specific terrorist act committed by those two gangs. PW 97 has deposed about an incident which is beyond the charge period and, therefore, her evidence was rightly not considered by the trial court. PW 19 has deposed about some acts of the gangs of Bhai Thakur and Manik Patil, the rivalry between Bharat Pendhari and those two gangs and the murder of Bharat Pendhari on 14-9-1989 but they at the most suggest that there were gang wars. PW 25 has deposed that his property was demanded and threats were given to him by Bhai Thakur and therefore he had to leave Virar. PW 26 has also stated that he was required to sell his land because of threats and terror of Bhai Thakur. PW 35 was staying in Virar since 1966. He has deposed that he was assaulted by the men of Bhai Thakur in 1984 and, therefore, he shifted to Vasai in January 1985 and for some time had gone to his native place in U.P. What was submitted by the learned counsel for the respondents was that the evidence of these witnesses even if it is believed it proves commission of illegal acts involving violence but falls short of constituting "terrorist acts" as contemplated by Section 3 of the TADA Act. It is no doubt true that the evidence of these witnesses, except that of PW 19, is not specific and by itself may not be regarded as sufficient to prove terrorist acts but they provide sufficient corroboration to the admissions made by A-1 to A-6 in their confessional statements that the gangs of Bhai Thakur and Manik Patil had created terror in the areas of their operation. We, therefore, see no reason why relying upon those confessions and the evidence of these witnesses a finding that A-1 to A-6 were engaged in committing terrorist acts, cannot be recorded. A-7 has not confessed in clear terms his involvement in the commission of terrorist acts or in the murder of Suresh. A-8 and A-11 have also not admitted to have played any role in the murder of Suresh or in the commission of terrorist acts by Bhai Thakur and

Manik Patil, though both these accused have generally stated in their confessional statements about the illegal activities committed by those two gangs. We, therefore, hold A-1 to A-6 guilty under Section 3(3) of the TADA Act also.

37. The charge against the police officers A-14 to A-17 was that as a part of the criminal conspiracy with Bhai Thakur and his men, they had caused evidence of the commission of the offence to disappear and by that dishonest investigation have tried to screen the real offenders from legal punishment and thereby they have committed offences punishable under Sections 201, 217 and 218 read with Section 120-B IPC. They are also charged with the offences punishable under Sections 3(3) and 3(4) of the TADA Act read with Section 120-B IPC. Except the confessional statements of the co-accused there is no other independent evidence to show the involvement of A-14 to A-17 as alleged. The confessions no doubt create a strong suspicion that A-14 to A-17 were maintaining good relations with Bhai Thakur and A-8 (Prashant) and that they had possibly helped Bhai Thakur and Manik Patil in screening the real offenders. The role which they played creates a strong suspicion regarding their connection with the gangs of Bhai Thakur and Manik Patil. However, we do not think it safe to convict them only on the basis of the confessions of the co-accused.

Supreme Court of India
AIR 2004 SC 588

Jameel Ahmed & Another
vs
State of Rajasthan

N. Santosh Hegde, B.P. Singh, JJ

2. Prosecution case involving these appellants, stated briefly, is as follows:

On 20.12.1990, a Police party headed by Sukhpal Singh, PW-9, Inspector, Narcotics Control Bureau, Bhilwara(Rajasthan) intercepted truck No. PAT 1933 at Octoroi Post No. 2, Bhilwara at about 10.30 a.m. The truck was loaded with bananas and there were 3 occupants in the truck. They were Beant Singh, A-7; Jagjeet Singh, A-8, and Sulakshan Singh, A-9. On a search of the truck, PW-9 and his party found 1.25 kg of opium and one briefcase containing 8 bundles of detonators. Said PW-9 sent a written report to SHO, PS Sadar, Bhilwara, who along with his staff reached the spot and conducted further search of the said truck. Said SHO, Satya Narayan, PW-12 found one "ENCOR" briefcase which had 8 bundles of electric detonators, and hidden with the load of bananas, he also found 13 cartons of gelatine and 2 bags of Calcium Ammonia Nitrate. On each carton "Noble Explochem Ltd. 595/2, Gripet Nagpur, Noble Brand Class-III, Division-I, CAT.ZZ" was written in English. On opening the cartons, the officers found 200 gelatinous masses in each of the carton. On questioning the three occupants of the said truck, namely, A-7 to A-9, told the investigating officers that they had no licence to possess these explosives. Thus on the ground that these accused persons had committed an offence under section 9-B of the Explosives Act, sections 4 and 5 of the Explosive Substances Act and section 286 of the IPC, they were arrested. The Investigating Officer, PW-12, took out the samples of gelatine from each carton and electric detonators from each bundle, as also 1 kg of Calcium Ammonia Nitrate from each of the bags which were seized, for the purpose of chemical examination. A case under section 8/18 of the N.D.P.S. Act was also registered against the said 3 accused persons for possessing 1.25 kg of opium. The investigating Officer also seized the truck and registered an FIR against these accused persons. It is seen from records that during the course of investigation, section 6 of the TADA was also invoked as against these accused.

3. The Ministry of Personnel, Govt. of India, under a notification dated 1.2.1991 and after obtaining the consent of the State of Rajasthan handed over the investigation to the CBI which continued the further investigation. Based on the information received by the CBI and on further investigation, it was found that in the month of June, 1990, Madha Singh, A-10 along with Sukhwant Singh A-4, Kulwant Singh A-3, Gyani Pratap Singh A-1 and Didar Singh A-2 had entered into a criminal conspiracy to procure explosives from Maharashtra and to transport the same to Punjab to indulge in terrorist activities. On further investigation, based on this information, it was found that Beant Singh A-7, Jagjit Singh A-8 and Sulakshan Singh A-9, the persons who were found in the truck seized earlier, along with Ismail Bhai A-6, Jameel Ahmed A-5, Dinesh Kumar A-11 and A. Srinivas A-12 had also joined in the said conspiracy. Further case of the prosecution is that in the months of May-June, 1990, A-1 summoned A-2 in the presence of A-10 and asked A-2 to arrange 2 cartons of gelatine and 100 detonators which A-2 arranged and supplied the same to A-1, A-4 and A-10 at Dunlop Hotel, Latoor Road, Nanded.
4. It is also the case of the prosecution that similar procurement of explosives was also made in the month of July, 1990 by accused A-1 to A-4 from one Dinesh Kumar of M/s Sushil Explosives. Since this transaction is not relevant for the purpose of these appeals, we need not dilate on the facts of this transaction any further.

.....
7. On 14.12.1990 at about 10/11 a.m. A-2 was informed by A-1 that a truck loaded with oil-seed cakes had come from Punjab for carrying the explosives back to Punjab. On receipt of the said information, A-2 arranged for a Maruti Gypsy No. BLL-4750 and went to his kholi at Nanded and collected the explosives and proceeded to the place where the said truck was parked and the explosives were transferred to the truck by A-7 to A-9 who had brought the truck from Punjab. The said truck was then driven to Malegaon where a consignment of bananas was loaded in the truck to be transported to Amritsar and the said truck left for Bhusawal where some more bananas were loaded and on 18.12.1990 the said truck proceeded further towards Punjab. On the way at Mangalwara, Beant Singh A-7 purchased 1.25 kg of opium. It is during this journey on 22.12.1990 the said truck when it reached checkpost no. 2 at Bhilwara was intercepted by the staff of the Narcotics Control Bureau as stated above and the contraband articles both opium and explosives were seized.

.....

10. The prosecution also alleges that Gyani Pratap Singh A-1 also made a confessional statement on 21.2.1991 which was recorded by PW-42, D.R. Meena, Superintendent of Police and was marked as exhibit P-124 during the trial. According to the prosecution in this confession A-1 voluntarily admitted his involvement in the charges framed against him.

.....

16. Though on behalf of the appellants individually separate arguments were addressed, they also had a common attack against the confessional statement allegedly given by the accused as per exhibit P-109, P-124, P-126, P-128 and P-129. The common line of attack in this regard is that these statements are not made at all and/or were incorporated in the blank paper or their signatures were obtained on pre-prepared statements by coercion in language unknown to them. They also contended that recording of the statements by the concerned officer was in contravention of the mandatory requirements of section 15 of the TADA Act as also Rule 15 of the TADA Rules, therefore, the same cannot be looked into. They also contended that the confessional statements even if held to be as admissible, they being weak type of evidence, the same can only be used for corroboration and not as substantive evidence.

17. On the behalf of the first accused it is further argued that a careful reading of alleged confessional statement does not show any involvement of this accused in the alleged criminal activities and whatever statement found in the said exhibit P-124 only reflects his innocent act as a granthi of a Gurudwara in providing certain accommodation and medical assistance to the concerned accused persons, which was done without knowing the object of the visit of these accused to Nanded and when he came to know of their involvement in illegal activities, he had dispossessed himself from them. He submitted that in view of the non-inculpatory nature of exhibit P-124 same cannot be treated as a confession. It is also contended *de hors* exhibit P-124, there is absolutely no evidence to implicate this accused.

18. On behalf of A-2 it is contended that he did not make the confessional statement as per exhibit P-126 and his signature was obtained on a blank paper, and that he does know Hindi or English and knows only Gurmukhi and from the manner in which his signature was obtained on exhibit P-126 it is clear that the same was obtained on a blank paper therefore his confessional statement not being voluntary and truthful cannot be looked into.

.....

22. Since the prosecution case in these appeals is primarily founded on various confessions of the accused involving themselves as well as other co-accused, we will first consider the argument of the appellants that assuming that the confessional statement have been proved to have been made in accordance with law and voluntary and truthful, even then can such confessions be relied upon solely to base a conviction on the maker of the confession, and if so, can it also be used against a co-accused and if so whether such confession requires corroboration or not, and if so required whether such corroboration need be general or should be of all material facts in the confession. The argument of learned counsel in this regard is that the prosecution should prove the involvement of the accused by other evidence first and the confession of an accused can only be used as a corroborative piece of evidence and not as a substantive piece of evidence, that too against the maker only. This argument is basically founded on an assumption that sections 25 and 30 of the Evidence Act also apply to the confessions recorded under section 15 of the TADA Act. In support of this argument, the learned counsel relies on the line of judgements of this Court which considered the scope of sections 25 to 30 of the Evidence Act and the probative value of such a confession; one of such judgements in *Mohd. Khalid v. State of West Bengal* [(2002) 7 S.C.C. 334]. The passage relied upon by the appellants in support of this contention of theirs in the said judgement runs thus:

"It is only when the other evidence tendered against the co-accused points to his guilt then the confession duly proved could be used against such co-accused if it appears to affect him as lending support or assurance to such other evidence.(emphasis supplied)

.....

34. The next legal argument of the appellants is that the confessional statements must always be sent to the CMM or the CJM as required under Rule 15(5)of the Rules, and the non compliance of the said statutory provision makes the confessions inadmissible. It is true that Rule 15(5) of the TADA Rules states that any statement recorded under section 15 should be sent forthwith to the Chief Metropolitan Magistrate or the CJM having jurisdiction over the area in which such confession has been recorded and such Magistrate shall, in turn, have to forward the recorded confession so received to the Designated Court which may take cognizance of the offence. A perusal of the scheme of Rule 15 shows that the object of this Rule is to safeguard the interest of the maker of the confession by directing the confessional statement to be taken out of the hands of the Police so that there could be no subsequent interpolation. Rule

15(5) does not ascribe any role to the CMM or the CJM of either perusing the said statement or making any endorsement or applying his mind to these statements. It merely converts the said court into a post office for further transmission to the concerned designated court, therefore, the object of the Rule is to see that the statement recorded under section 15 of the Act leaves the custody of the recorder of the statement at the earliest so that the statement has a safer probative value. In our opinion transmission of the recorded confessional statement under section 15 of the Act to the CMM or the CJM under Rule 15(5) is only directory and not mandatory. It has been so held by this Court in Wariyam Singh & Ors. V. State of U.P. [(1995)6 S.C.C. 458]. This judgement of Wariyam Singh (supra) was subsequently followed in a later judgement of this Court in Devender Pal Singh's case(supra). Learned counsel for the appellants, however, contended that this Court in the case of Bihari Manjhi (supra) has held that non compliance of Rule 15(5) would vitiate the probative value of such confessional statement. We have carefully perused the said judgements and we do not think this Court in the case of Bihari Manjhi (supra) has said that the requirement of Rule 15 of the Rules is in any way mandatory. In the said case, this Court proceeded on the basis that Rule 15 of the Rules is directory but on the facts of that case it held that it does not mean that the Investigating Officer is not required to follow the said procedure, that because of the facts of that case the Court held that the investigating agency had adopted unjustified methods. Therefore, there is no substance in the argument of the appellants that in the case of Bihari Manjhi(supra) this Court had taken a different view than the one taken in Wariyam Singh's case(supra). However, in the case of non-compliance of such procedure, the concerned court should examine on facts of that case whether the delay if any, in sending the confessional statement to the concerned Designated Court has given rise to any doubt as to the genuineness of the confessional statement.

35. To sum up, our findings in regard to the legal arguments addressed in these appeals we find:

- i) If the confessional statement is properly recorded, satisfying the mandatory provision section 15 of the TADA Act and the Rules made thereunder, and if the same is found by the court as having been made voluntarily and truthful then the said confession is sufficient to base a conviction on the maker of the confession.
- ii) Whether such confession requires corroboration or not, is a matter for the court considering such confession on facts of each case.

- iii) In regard to the use of such confession against a co-accused, it has to be held that as a matter of caution, a general corroboration should be sought for but in cases where the court is satisfied that the probative value of such confession is such that it does not require corroboration then it may base a conviction on the basis of such confession of the co-accused without corroboration. But this is an exception to the general rule of requiring corroboration when such confession is to be used against a co-accused.
 - iv) The nature of corroboration required both in regard to the use of confession against the maker as also in regard to the use of the same against a co-accused is of general nature, unless the court comes to the conclusion that such corroboration should be on material facts also because of the facts of a particular case. The degree of corroboration so required is that which is necessary for a prudent man to believe in the existence of facts mentioned in the confessional statement.
 - v) The requirement of sub-rule 5 of Rule 15 of the TADA Rules which contemplates a confessional statement being sent to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate who in turn, will have to send the same to the Designated Court is not mandatory and is only directory. However, the court considering the case of direct transmission of the confessional statement in the facts of the case creates any doubt as to the genuineness of the said confessional statement.
-

43. As noticed earlier, so far as A-2's confession is concerned, it is the confessional statement of a co-accused, and on facts and circumstances of this case we think it is not safe to base a conviction on A-1 unless we are able to find some corroboration of general nature at least from the other evidence led by the prosecution in this case. Though the learned additional solicitor general has contended that there is sufficient corroboration for the confession of A-2 in the other evidence led by the prosecution, we are unable to find any such corroboration in the other evidence led by the prosecution to support the confessional statement of PW-2 as per exhibit P-126. We are also unable to find any corroborative piece of evidence of even general nature in the confessions of other accused persons to implicate this accused. All that the other evidence produced by the prosecution including the confessions of A-7 to A-9 shows is that A-1 provided accommodation, financial and medical help. This by itself will not help the prosecution because as contended on behalf of A-1, there is no material to show that A-1 had the knowledge of the motive of other accused. No other material

on record except exhibit P-126 connects A-1 with A-5, A-6 or for that matter with other accused in regard to the procurement and transport of the explosives. Thus what remains is only the confession of A-2, a co-accused, which as observed by us hereinabove requires corroboration and having found none even generally, we think it not safe to base the conviction of A-1 solely on the basis of exhibit P-126.

.....

54. We have already considered the probative value of the confession of Didar Singh, A-2 made as per exhibit P-126 and have held that the same is made voluntarily and the contents are truthful. We have not accepted the contents of the said confession as against A-1 not because the contents are not truthful but because we felt it is prudent to seek some corroboration generally in the evidence led by the prosecution to support the contents of the confession of A-2 against his co-accused (A-1). In this background, if we discuss the confession of A-2 we find that he has stated that Jameel Ahmed A-5 owned a shop in Akola in the name of Asian Explosives and in July, 1989, A-5 met him and said that he would provide him with explosives for this work and requested him to buy explosives from him. It is thereafter, Jameel Ahmed A-5 and his servant started delivering the explosives to him. It is further statement in the said confession that A-5 used to come to Nanded once a month to collect the cost of explosives supplied and would find out the future requirement for the purpose of such future delivery. A-2 also states in the said statement that A-5 was normally being paid in cash or when required A-5 used to sell him explosives on credit basis. It is the further statement of A-2 that around 28/29.11.1990 Jameel Ahmed A-5 came to his house when he told Jameel that terrorists of Punjab required 2-1/2 to 3 Qtls. of gelatine and 400 detonators and were ready to pay a sum of Rs.1,000 per carton. A-5 agreed to sell the said quantity of explosives but told him that he did not have ready stock therefore he will make arrangement for the same. It is the further statement in exhibit P-126 that on 2/3.12.1990 A-2 made a telephonic call from Akola to telephone no. 4878 from a PCO to A-5 but he could speak only to Ismail Bhai A-6 father of A-5. He was told by said Ismail that A-5 had told him about A-2 but he had not received the goods then therefore they were not able to send the goods to Nanded. It is the further statement of A-2 that thereafter on or about 9/10.12.1990 he again telephoned to A-5 but again could not talk to him but Ismail Bhai A-6 told him certain goods, detonators and Calcium Ammonia Nitrate bags will be sent to A-2 soon and that subsequently the said goods were delivered and stored in a room rented by A-2 at Uman Road. From the above confessional statement of A-2 it is seen that A-5 was known to A-2 and was

supplying explosives knowing very well that A-2 had no licence for using the same. It can also be noticed that sometime around September, 1990 on a request being made by A-2 for supply of certain quantities of gelatine and detonators for use of terrorists in Punjab, A-5 knowing the object of purchase, agreed to supply the same. It is also to be noticed since it has come in evidence that the prevailing price of gelatine at the point of time was Rs. 650 per carton. A-5 had agreed to accept the enhanced amount of Rs.1,000 per carton which is also indicative of the fact that A-5 knew that these explosives were being used for some more serious offences, rather than illegal blasting of rocks, because the price which he collected from A-2 for this supply was more than the price he used to get from A-2 for his normal purchase. It is further seen that whenever it was not possible for A-5 to be present at the time of delivery of explosives, he used to instruct his father Ismail Bhai A-6 to supply the explosives as agreed by him with A-2. Whether A-6 actually knew about the purpose of the sale is a different matter which we will consider separately when his case is taken up, but suffice it to notice at this stage that from the confession of A-2, it is established that A-5 knowingly that the explosives will be used by the terrorists of Punjab, supplied explosives to A-2.

55. The next question of our consideration then will be: has the prosecution adduced any corroborative evidence in support of the confession of A-2 even generally, to persuade us to accept that part of the confessional statement which implicates A-5. In this process, it is seen that apart from the confessional statement there is the evidence of PW-1 Sanjay Gaware which shows that at the time mentioned in the confessional statement, he had travelled to the shop of A-5 at Deepak Chowk along with A-2 and he was also present as stated in the confessional statement when A-2 gave money to Ismail Bhai A-6 as also while collecting the explosives from the magazine belonging to A-5. Evidence of this witness corroborates the statement found in exhibit P-126 to the extent that certain explosives were collected from the magazine belonging to A-5 and the costs of the said explosives were paid in the shop of A-5 to A-6 though A-5 was not present at the shop. The agreed price of the explosive of Rs.1000 was known to A-6 because he was told so by A-5 therefore this fact corroborates the statement in the confession of A-2 that Rs.1,000 per carton was agreed to be paid because the explosives were going to be used by the terrorists of Punjab. This apart, PW-14 in his evidence stated for the period between January, 1990 and December, 1990(the relevant period) Asian Explosives of which A-5 was a partner, had not sent their statement/returns. This witness being Joint Chief Controller of Explosives was

aware of that fact because he had examined the register of the firm of A-5. Evidence of PW-14 is further supported by evidence of PW-23 K.T. Lokhade who was Controller of Explosives at Nagpur at the relevant time who has also stated that Asian Explosives in its registers had kept the relevant columns blank, contrary to the requirements of law which in the normal course would have recorded the batch No. and date of consignment received by it, which failure also indicates Asian Explosives of which A-5 was In-charge Partner was concealing the fact of receipt of explosives and the sale thereof to prevent the identification of the explosives sold by him to A-2. This omission in the register which pertains to the date when he sold the explosives to A-2 also indicates the guilty mind of A-5. Further the evidence of PW-30 who had rented 2 rooms to A-2 as also evidence of PW-24 Gurusewak Pritam Singh (G.P.S. Dhaliwal) shows that A-5 was visiting A-2 at the relevant point of time. The fact that the prosecution has established that A-5 had supplied two bags of Calcium Ammonia Nitrate to A-2 also supports the prosecution case that the supply of explosives made by A-5 to A-2 was not for use by A-2 in rock blasting because the said Calcium Ammonia Nitrate is not an explosive which can be used for the said purpose of rock blasting as is evident from the report of chemical examiner.

56. From the above material we are satisfied that the prosecution has produced material which could be treated as evidence generally corroborating exhibit P-126 which in our opinion is sufficient to establish the guilt of A-5.

.....

58. For the reasons stated above, we allow Crl. A. No. 215 of 2003 filed by Gyani Pratap Singh and Crl. A. No. 1308 of 2002 filed by Ismail Bhai (A-6). If the appellants are in custody, they shall be released forthwith, if not required in any other case. If they are on bail, their bail bonds shall stand discharged.
59. We confirm the conviction and sentence imposed on Jameel Ahmed (A-5) in Crl. A. No. 1308 of 2002 as also on Didar Singh Saini in Crl. A. No. 1361 of 2002 and the said appeals stand dismissed. If these appellants are on bail, their bail bonds shall stand discharged, and they shall be taken into custody to serve out the remainder of their sentence.

Supreme Court of India
2004 (9) SCC 580

People's Union for Civil Liberties & Another
vs
Union of India

S. Rajendra Babu and G.P. Mathur, JJ.

1. In this batch of Writ Petitions before us the Constitutional validity of various provisions of the Prevention of Terrorism Act, 2002 (hereinafter POTA) is in challenge.
2. The Petitioners' contended before us that since the provisions of POTA, in pith and substance, fall under the Entry 1 (Public Order) of List II Parliament lacks legislative competence. To authenticate this contention, the decision in *Rehman Sagoo & Others v. State of Jammu Kashmir*, 1960 (1) SCR 680, is relied upon. According to them, the menace of terrorism is covered by the Entry "Public Order" and to explain the meaning thereof, our attention is invited to decisions in *Romesh Thaper v. State of Madras*, 1950 SCR 594, *Dr. Ram Manohar Lohia v. State of Bihar*, 1966 (1) SCR 709, and *Madhu Limaye v. SDM, Monghyr*, (1970) 3 SCC.

746. The Petitioners thus submitted that terrorist activity is confined only to State(s) and therefore State(s) only have the competence to enact a legislation.

The learned Attorney General refuting this contention submitted that acts of terrorism, which are aimed at weakening the sovereignty and integrity of the country cannot be equated with mere breaches of law and order and disturbances of public order or public safety. He argued that the concept of "sovereignty and integrity of India" is distinct and separate from the concepts of "public order" or "security of State" which fall under List II enabling States to enact legislation relating to public order or safety affecting or relating to a particular State. Therefore, the legislative competence of a State to enact laws for its security cannot denude Parliament of its competence under List I to enact laws to safeguard national security and sovereignty of India by preventing and punishing acts of terrorism. Learned Attorney General distinguished the decision in Rehman Shagoo and submitted that the legislation dealt with therein is fundamentally and qualitatively different from POTA. He also argued before us that Rehman Shagoo cannot mitigate the binding ratio and unanimous conclusion reached by this Court on the point of legislative

competence in *Kartar Singh v. State of Punjab*, 1994 (3) SCC 569 : 1994 (2) SCR 375, that Parliament can enact such law.

In deciding the point of legislative competence, it is necessary to understand the contextual backdrop that led to the enactment of POTA, which aims to combat terrorism. Terrorism has become the most worrying feature of the contemporary life. Though violent behavior is not new, the present day 'terrorism' in its full incarnation has obtained a different character and poses extraordinary challenges to the civilized world. The basic edifices of a modern State, like - democracy, state security, rule of law, sovereignty and integrity, basic human rights etc are under the attack of terrorism. Though the phenomenon of terrorism is complex, a 'terrorist act' is easily identifiable when it does occur. The core meaning of the term is clear even if its exact frontiers are not. That is why the anti-terrorist statutes - the earlier Terrorism and Disruptive Activities (Prevention) Act, 1987 (TADA) and now POTA do not define 'terrorism' but only 'terrorist acts.' (See : *Hitendra Vishnu Thakur v. State of Maharashtra*, (1994) 4 SCC 602).

Paul Wilkinson, an authority on terrorism related works, culled out five major characteristics of terrorism. They are:

1. It is premeditated and aims to create a climate of extreme fear or terror.
2. It is directed at a wider audience or target than the immediate victims of violence.
3. It inherently involves attacks on random and symbolic targets, including civilians.
4. The acts of violence committed are seen by the society in which they occur as extra-normal, in literal sense that they breach the social norms, thus causing a sense of outrage; and
5. Terrorism is used to influence political behavior in some way - for example to force opponents into conceding some or all of the perpetrators demands, to provoke an over-reaction, to serve as a catalysis for more general conflict, or to publicize a political cause.

In all acts of terrorism, it is mainly the psychological element that distinguishes it from other political offences, which are invariably accompanied with violence and disorder. Fear is induced not merely by making civilians the direct target of violence but also by exposing them to a sense of insecurity. It is in this context that this Court held in *Mohd. Iqbal M. Shaikh v. State of Maharashtra*, (1998) 4 SCC 494, that:

...it is not possible to give a precise definition of terrorism or to lay down what constitutes terrorism. But... it may be possible to describe it as a use of violence when

its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. ... if the object of the activity is to disturb harmony of the society or to terrorize people and the society, with a view to disturb even tempo, tranquility of the society, and a sense of fear and insecurity is created in the minds of a section of society at large, then it will, undoubtedly be held to be terrorist act..."

Our country has been the victim of an undeclared war by the epicenters of terrorism with the aid of well-knit and resourceful terrorist organizations engaged in terrorist activities in different States such as Jammu & Kashmir, North- East States, Delhi, West Bengal, Maharashtra, Gujarat, Tamilnadu, Andhra Pradesh. The learned Attorney General placed material to point out that the year 2002 witnessed 4038 terrorist related violent incidents in J&K in which 1008 civilians and 453 security personnel were killed. The number of terrorist killed in 2002 was 1707 out of which 508 were foreigners. In the year 2001 there were as many as 28 suicide attacks while there were over 10 suicide attacks in 2002 in which innocent persons and a large number of women and children were killed. The major terrorist incidents in the recent past includes attack on Indian Parliament on 13th December 2001, attack on Jammu & Kashmir Assembly on 1st October, 2001, attack on Akshardham temple on 24th September 2002, attack on US Information Center at Kolkatta on 22nd January 2002, Srinagar CRPF Camp attack on 22nd November 2002, IED blast near Jawahar Tunnel on 23rd November 2002, attack on Raghunath Mandir on 24th November 2002, bus bomb blast at Ghatkopar in Mumbai on 2nd December 2002, attack on villagers in Nadimarg in Pulwama District in Jammu Kashmir on the night of 23rd-24th March 2003 etc. There were attacks in Red Fort and on several Government Installations, security forces' camps and in public places. Gujarat witnessed gruesome carnage of innocent people by unleashing unprecedented orgy of terror. People in Bihar, Andhra Pradesh, and Maharashtra etc have also experienced the terror trauma. The latest addition to this long list of terror is the recent twin blast at Mumbai that claimed about 50 lives. It is not necessary to swell this opinion by narrating all the sad episodes of terrorist activities that the country has witnessed. All these terrorist strikes have certain common features. It could be very broadly grouped into three.

1. Attack on the institution of democracy, which is the very basis of our country. (By attacking Parliament, Legislative Assembly etc). And the attack on economic system by targeting economic nerve centers.
2. Attack on symbols of national pride and on security / strategic installations. (eg. Red Fort, Military installations and camps, Radio stations etc.)

3. Attack on civilians to generate terror and fear psychosis among the general populace. The attack at worshipping places to injure sentiments and to whip communal passions. These are designed to position the people against the government by creating a feeling of insecurity.

Terrorist acts are meant to destabilize the nation by challenging its sovereignty and integrity, to raze the constitutional principles that we hold dear, to create a psyche of fear and anarchism among common people, to tear apart the secular fabric, to overthrow democratically elected government, to promote prejudice and bigotry, to demoralize the security forces, to thwart the economic progress and development and so on. This cannot be equated with a usual law and order problem within a State. On the other hand, it is inter-state, inter-national or cross-border in character. Fight against the overt and covert acts of terrorism is not a regular criminal justice endeavor. Rather it is defence of our nation and its citizens. It is a challenge to the whole nation and invisible force of Indianness that binds this great nation together. Therefore, terrorism is a new challenge for law enforcement. By indulging in terrorist activities organized groups or individuals, trained, inspired and supported by fundamentalists and anti-Indian elements were trying to destabilize the country. This new breed of menace was hitherto unheard of. Terrorism is definitely a criminal act, but it is much more than mere criminality. Today, the government is charged with the duty of protecting the unity, integrity, secularism and sovereignty of India from terrorists, both from outside and within borders. To face terrorism we need new approaches, techniques, weapons, expertise and of course new laws. In the above said circumstances Parliament felt that a new anti-terrorism law is necessary for a better future. This parliamentary resolve is epitomized in POTA.

The terrorist threat that we are facing is now on an unprecedented global scale. Terrorism has become a global threat with global effects. It has become a challenge to the whole community of civilized nations. Terrorist activities in one country may take on a transnational character, carrying out attacks across one border, receiving funding from private parties or a government across another, and procuring arms from multiple sources. Terrorism in a single country can readily become a threat to regional peace and security owing to its spillover effects. It is therefore difficult in the present context to draw sharp distinctions between domestic and international terrorism. Many happenings in the recent past caused the international community to focus on the issue of terrorism with renewed intensity. The Security Council unanimously passed resolutions 1368 (2001) and 1373 (2001); the General Assembly adopted resolution 56/1 by consensus, and convened a special session. All these resolutions and declarations inter alia call upon

Member States to take necessary steps to 'prevent and suppress terrorist acts' and also to 'prevent and suppress the financing of terrorist acts.' India is a party to all these resolues. Anti-terrorism activities in the global level are mainly carried out through bilateral and multilateral cooperation among nations. It has thus become our international obligation also to pass necessary laws to fight terrorism.

The attempts by the State to prevent terrorism should be based on well-established legal principles. The 'Report of the Policy Working Group of the United Nations and Terrorism' urged the global community to concentrate on a triple strategy to fight against terrorism. They are:

- a) Dissuade disaffected groups from embracing terrorism;
- b) Deny groups or individuals the means to carry out acts of terrorism; and
- c) Sustain broad-based international cooperation in the struggle against terrorism.

Therefore, the anti-terrorism laws should be capable of dissuading individuals or groups from resorting to terrorism, denying the opportunities for the commission of acts of terrorism by creating inhospitable environments for terrorism and also leading the struggle against terrorism. Anti - terrorism law is not only a penal statue but also focuses on pre-emptive rather than defensive State action. At the same time in the light of global terrorist threats, collective global action is necessary. Lord Woolf CJ in *A, X and Y, and another V. Secretary of the State for the Home Department* (Neutral Citation Number: [2002] EWCA Civ. 1502) has pointed out that "...Where international terrorists are operating globally and committing acts designed to terrorize the population in one country, that can have implications which threaten the life of another. This is why a collective approach to terrorism is important."

Parliament has passed POTA by taking all these aspects into account. The terrorism is not confined to the borders of the country. Cross- border terrorism is also threatening the country. To meet such a situation, a law can be enacted only by Parliament and not by a State Legislature. Piloting the Prevention of Terrorism Bill in the joint session of Parliament on March 26, 2002 Hon'ble Home Minister said:

"...The Government of India has been convinced for the last four years that we have been here and I am sure even the earlier Governments held that terrorism and more particularly, State-sponsored cross border terrorism is a kind of war. It is not just a law and order problem. This is the first factor, which has been responsible for Government thinking in terms of an extraordinary law like POTO.

...So, first of all, the question that I would like to pose to all of you and which we have posed to the nation is: 'Is it just in Jammu and Kashmir an aggravated law and order situation that we are facing or is it really when we say it a proxy war, do we really believe that it is a proxy war?'...But when you have terrorist organizations being trained, financed by a State and it becomes State-sponsored terrorism and all of them are enabled to infiltrate into our country, it becomes a challenge of a qualitatively different nature..." (Emphasis supplied)

From this it could be gathered that Parliament has explored the possibility of employing the existing laws to tackle terrorism and arrived at the conclusion that the existing laws are not capable. It is also clear to Parliament that terrorism is not a usual law and order problem.

The protection and promotion of human rights under the rule of law is essential in the prevention of terrorism. Here comes the role of law and Court's responsibility. If human rights are violated in the process of combating terrorism, it will be self-defeating. Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. The lack of hope for justice provides breeding grounds for terrorism. Terrorism itself should also be understood as an assault on basic rights. In all cases, the fight against terrorism must be respectful to the human rights. Our Constitution laid down clear limitations on the State actions within the context of the fight against terrorism. To maintain this delicate balance by protecting 'core' Human Rights is the responsibility of Court in a matter like this. Constitutional soundness of POTA needs to be judged by keeping these aspects in mind. Now, we will revert to the issue of legislative competence. Relying on *Rehman Shagoo* Petitioners argued that Parliament lacks competence since the 'terrorism' in pith and substance covered under the Entry 1 (Public Order) of List II. Conclusion of this contention depends upon the true meaning of the Entry - 'Public Order'.

A constitution Bench of this Court in *Rehman Shagoo* examined the constitutionality of the Enemy Agents (Ordinance), No. VIII of S. 2005 promulgated by His Highness the Maharaja under Section 5 of Jammu Kashmir Constitution Act, S. 1996. For a proper understanding of the ratio in *Rehman Shagoo*, it is necessary to understand the background in which the impugned Ordinance was promulgated. (See : *Prem Nath Kaul v. The State of Jammu & Kashmir*, 1959 Supp. (2) SCR 270, to understand the background that prevailed in the then Kashmir). Because any interpretation divorced from the context and purpose will lead to bad conclusions. It is a well-established canon of interpretation that the meaning of a word should be understood and applied in accordance with the context of time, social and conditional needs. *Rehman Shagoo* was concerned with the interpretation of Instrument

of Accession and the power of Maharaja to issue the impugned Ordinance therein. The same was promulgated to protect the state of Kashmir from external raiders and to punish them and those who assist them. The situation that prevailed during the latter half of 1940s is fundamentally different form today. The circumstances of independence, partition, state re-organization, and the peculiar situation prevailing in the then Kashmir etc. need to be taken into account. It is only in that context this Court said in *Rehman Shagoo* that the impugned Ordinance:

"...In pith and substance deals with public order and criminal law procedure; the mere fact that there is an indirect impact on armed forces in s. 3 of the Ordinance will not make it in pith and substance a law covered by item (1) under the head 'Defence' in the Schedule."

Therefore, *Rehman Shagoo* is distinguishable and cannot be used as an authority to challenge the competence of Parliament to pass POTA. The problems that prevailed in India immediately after independence cannot be compared with the menace of terrorism that we are facing in the twenty first century. As we have already discussed above, the present day problem of terrorism is affecting the security and sovereignty of the nation. It is not State specific but trans-national. Only Parliament can make a legislation to meet its challenge. Moreover, the entry 'Public Order' in the State List only empowers the States to enact a legislation relating to public order or security in so far as it affects or relates to a particular State. How so ever wide a meaning is assigned to the Entry 'Public Order', the present day problem of terrorism cannot be brought under the same by any stretch of imagination. Thus, Romesh Thaper, Dr. Ram Manohar Lohia and Madhu Limaye (all cited earlier) cannot be resorted to read 'terrorism' into 'Public Order'. Since the Entry Public Order or any other Entries in List II do not cover the situation dealt with in POTA, the legislative competence of Parliament cannot be challenged.

Earlier a Constitution Bench of this Court, while dealing with the very same argument, held in *Kartar Singh's* case (*supra*) as follows:

"Having regard to the limitation placed by Article 245 (1) on the legislative power of the Legislature of the State in the matter of enactment of laws having application within the territorial limits of the State only, the ambit of the field of legislation with respect to 'public order' under Entry 1 in the State List has to be confined to disorders of lesser gravity having an impact within the boundaries of the State. Activities of a more serious nature which threaten the security and integrity of the country as a whole would not be within the legislative field assigned to the States under Entry 1 of the State List but would fall within the ambit of Entry 1 of the Union List relating to defence of India and in any event under the residuary power conferred on Parliament under Article 248 read with Entry 97 of the Union List."

...
The terrorism, the Act (TADA) contemplates, cannot be classified as mere disturbances of 'public order' disturbing the 'even tempo of the life of community of any specified locality' - in the words of Hidayathulla, C J in *Arun Ghosh v. State of West Bengal* (1970) 1 SCC 98 but it is much more, rather a grave emergent situation created either by external forces particularly at the frontiers of this country or by anti-nationals throwing a challenge to the very existence and sovereignty of the country in its democratic polity.

...
In our view, the impugned legislation does not fall under Entry 1 of List II, namely, Public Order. No other Entry in List II has been invoked. The impugned Act, therefore, falls within the legislative competence of Parliament in view of Article 248 read with Entry 97 of List I and it is not necessary to consider whether it falls under any of the entries in List I or List III. We are, however, of the opinion that the impugned Act could fall within the ambit of Entry 1 of List I, namely, 'Defence of India'." [pp. 633, 634, 635]

While this is the view of the majority of Judges in *Kartar Singh's* case (supra), K. Ramaswamy, J. held that Parliament does possess power under Article 248 and Entry 97 of List I of the Seventh Schedule and could also come within the ambit of Entry 1 of List III. Sahai, J. held that the legislation could be upheld under Entry 1 of List III. Thus, all the Judges are of the unanimous opinion that Parliament had legislative competence though for different reasons.

Considering all the above said aspects, the challenge advanced by Petitioners of want of legislative competence of Parliament to enact POTA is not tenable.

Another issue that the Petitioner has raised at the threshold is the alleged misuse of TADA and the large number of acquittals of the accused charged under TADA. Here we would like to point out that this Court cannot go into and examine the 'need' of POTA. It is a matter of policy. Once legislation is passed the Government has an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution. Moreover, we would like to point out that this Court has repeatedly held that mere possibility of abuse cannot be counted as a ground for denying the vesting of powers or for declaring a statute unconstitutional. (See: *State of Rajasthan V. Union of India*, (1978) 1 SCR 1, *Collector of Customs v. Nathella Sampathu Chetty*, AIR 1962 SC 316, *Keshavananda Bharati v. State of Kerala*, 1973 (4) SCC 225; *Mafatlal Industries v. Union of India*, (1997) 5 SCC 536 etc).

Meaning of the word ‘abets’ in the context of POTA:

Pertaining to the validity of individual sections, petitioners primarily contended that Section 3(3) of POTA provides that whoever ‘abets’ a terrorist act or any preparatory act to a terrorist act shall be punishable and this provision, fails to address the requirement of ‘mens rea’ element. They added that this provision has been incorporated in POTA in spite of the contrary observation of this Court in *Kartar Singh*, wherein it was held that the word ‘abets’ need to have the requisites of intention or knowledge. Consequently, they want us to strike down Section 3(3) as the same is prone to misuse. In *Kartar Singh*, this Court was concerned with the expression “abet” as defined under Section 2(1)(a) of TADA and hence considered the effect of different provisions of the TADA to ascertain true meaning thereof. As the meaning of the word “abet” as defined therein is vague and in precise, actual knowledge or reason to believe on the part of the person to be brought within the definition should be brought into that provision instead of reading down that provision. That kind of exercise is not necessary in POTA.

Under POTA the word “abets” is not defined at all. Section 2(1)(i) of POTA says “words and expressions used but not defined in this Act and defined in the Code shall have the meaning respectively assigned to them in the Code.” According to Section 2(1)(a) of POTA “Code” means ‘Code of Criminal Procedure, 1973 (2 of 1974).’ Whereas, Section 2(y) Cr.P.C. refers to Indian Penal Code for meaning of the word ‘abets’. Therefore, the definition of ‘abets’ as appears in the IPC will apply in a case under POTA. In order to bring a person abetting the commission of an offence, under the provisions of IPC it is necessary to prove that such person has been connected with those steps of the transactions that are criminal. ‘Mens rea’ element is sine qua non for offences under IPC. Learned Attorney General does not dispute this position. Therefore, the argument advanced pertaining to the validity of Section 3(3) citing the reason of the absence of mens rea element stands rejected.

Section 4:

Section 4 provides for punishing a person who is in ‘unauthorised possession’ of arms or other weapons. The petitioners argued that since the knowledge element is absent the provision is bad in law. A similar issue was raised before a Constitution Bench of this Court in *Sanjay Dutt V. State (II)*, (1994) 5 SCC 410. Here this Court in Para 19 observed that:

“... Even though the word ‘possession’ is not preceded by any adjective like ‘knowingly’, yet it is common ground that in the context the word ‘possession’ must mean possession with the requisite mental element, that is, conscious possession and not mere custody

without the awareness of the nature of such possession. There is a mental element in the concept of possession. Accordingly, the ingredient of 'possession' in Section 5 of the TADA Act means conscious possession. This is how the ingredient of possession in similar context of statutory offence importing strict liability on account of mere possession of an unauthorised substance has been understood."

The finding of this Court squarely to the effect that there exists a mental element in the word possession itself answers the Petitioners argument. The learned Attorney General also maintains the stand that Section 4 presupposes conscious possession. Another aspect pointed out by the petitioners is about the 'unauthorized' possession of arms and argued that unauthorized possession could even happen; for example, by non-renewal of license etc. In the light of Sanjay Dutt's case (*supra*) this Section presupposes knowledge of terrorist act for possession. There is no question of innocent persons getting punished. Therefore, we hold that there is no infirmity in Section 4.

Sections 6, 7, 8, 10, 11, 15, 16 and 17:

Contentions have been raised in regard to provisions relating to seizure, attachment and forfeiture of proceeds of terrorism. Provisions relating to seizure, attachment and forfeiture have to be read together. Section 2(c) of POTA sets out the meaning of 'proceeds of terrorism' and reads as follows:

"'proceeds of terrorism' shall mean all kinds of properties which have been derived or obtained from commission of any terrorist act or have been acquired through funds traceable to a terrorist act, and shall include cash irrespective of person in whose name such proceeds are standing or in whose possession they are found."

Explanation to Section 3 gives the meaning of 'a terrorist act' in the context of sub-section (1) of Section 3 so as to include the act of raising funds intended for the purpose of terrorism. Section 6 debars a person from holding or possessing any proceeds of terrorism and also makes it clear that it is liable to be forfeited. Section 7 authorises an investigating officer, not below the rank of Superintendent of Police with the prior approval in writing of the Director General of Police of the State, to seize such property or attach the same and serve a copy of such an order on the person concerned, if he has reason to believe that any property in relation to which an investigation is being conducted represents proceeds of terrorism. Section 8 provides for forfeiture of the proceeds of terrorism by a court irrespective of the fact whether or not the person from whose possession it is seized or attached is prosecuted in a Special Court for an offence under POTA. Section 9 provides for issue of show cause notice before forfeiture of proceeds of terrorism and an order for forfeiture cannot be made if such person establishes that he is a bona fide transferee of such proceeds for value without knowing that they represent proceeds of

terrorism. Under Section 10, an appeal lies against an order made under Section 8 of POTA. Sub-section (2) thereof states that where an order made under Section 8 is modified or annulled by the High Court, the person against whom an order of forfeiture has been made under Section 8 is acquitted, such property shall be returned to him and in either case if it is not possible for any reason to return the forfeited property, adequate compensation should be paid to him, which will be equivalent to the price and interest from the date of seizure of the property. Although the petitioners have challenged the various provisions of POTA relating to seizure, forfeiture and attachment of the property, ultimately they did not pursue with that argument and submitted that the various facets of challenge to the aforesaid provisions can only be examined in the context of an actual fact situation and for the present they wanted an interpretation of the expressions used in Section 10(2) to apply even to a case of forfeiture of the proceeds of terrorism against a person who is prosecuted under POTA. Even that aspect can only be considered when an actual situation arises and not in the abstract. Therefore, we need not examine in detail these provisions except to notice the background in which these provisions have been enacted.

The order of forfeiture, by reason of Section 11, has been made independent of imposition of other punishments to which a person may be liable. Under Section 12, Designated Authority has been permitted to investigate the claims made by a third party. These provisions have to be seen as against Section 16, which provides for forfeiture of property of any person prosecuted and ultimately convicted. Here only on conviction, forfeiture of property can take place. In this connection, it is relevant to take note of the provisions of Sections 15, 16 and 17. Section 15 renders certain transfers to be null and void in cases where after the issue of an order under Section 7 or notice under Section 9 any property is transferred by any mode whatsoever, such transfer shall for the purpose of the Act be ignored and if such property is subsequently forfeited, the transfer of such property shall be deemed to be null and void. Section 16 enables a special court trying a person for an offence under the Act to pass an order that all or any of the properties, movable or immovable or both belonging to him, during the period of such trial, be attached, if not already attached under the Act. On conviction of such person, the special court may, by an order, declare that any property, movable or immovable or both belonging to the accused and specified in the order, shall stand forfeited to the Central Government or the State Government, as the case may be. Section 17 provides that in cases where any share of a company shall stand forfeited, then, the company shall, on receipt of the order of the special court, notwithstanding anything contained in the Companies Act, 1956 or the articles of association of the company, forthwith register the Central Government or the State Government, as the case may be, as the transferee of such shares.

Funding and financing play a vital role in fostering and promoting terrorism and it is only with such funds terrorists are able to recruit persons for their activities and make payments to them and their family to obtain arms and ammunition for furthering terrorist activities and to sustain the campaign of terrorism. Therefore, seizure, forfeiture and attachment of properties are essential in order to contain terrorism and is not unrelated to the same. Indeed, it is relevant to notice a resolution passed by the United Nations Security Council [Resolution No.1373 dated 28.9.2001] which emphasized the need to curb terrorist activities by freezing and forfeiture of funds and financial assets employed to further terrorist activities. It will also be interesting to notice the United Nations International Convention for the Suppression of the Financing of Terrorism but at the same time it is not necessary to go into those details in the present context. The scheme of the provisions indicate that the principles of natural justice are duly observed and they do not confer any arbitrary power and forfeiture can only be made by an order of the court against which an appeal is also provided to the High Court and the rights of bona fide transferee are not affected. Therefore, for the present, it is not necessary to pronounce the constitutional validity of these provisions and we proceed on the basis that they are valid.

Number of changes have been made in the provisions which existed in TADA and which exist in POTA. The relevant discussion in the challenge to Section 8 of TADA by majority in Kartar Singh is contained in paras 149-157 and para 452 by Justice Sahai who has concurred with the majority. The validity of Section 8 of TADA was upheld, only if it was applied in the manner indicated in Para 156 of the judgment which is as under :-

"The discretionary power given to the Designated Court under Section 8(1) and (2) is to be exercised under strict contingencies, namely, that (1) there must be an order of forfeiture and that order must be in writing; (2) the property either movable or immovable or both must belong to the accused convicted of any offence of TADA Act or rule thereunder; (3) the property should be specified in the order; (4) even though attachment can be made under Section 8(2) during the trial of the case, the forfeiture can be ordered only in case of conviction and not otherwise."

However, ultimately, they do not press these contentions to be considered in these proceedings by stating that the various facets as set above can really be seen in actual fact situation and for the present, they call upon the Court to clarify that the expression "modified" or "annulled" used in Section 10(2) shall apply even in a case of forfeiture of the proceeds of terrorism against a person who is not prosecuted under POTA.

It is not necessary to interpret these expressions and as and when an appropriate case arises, appropriate interpretation can be given on the said expressions. There is a scheme

for forfeiture of the proceeds of terrorism followed by a show cause notice to be issued and thereafter on a decision being made, an appeal lies thereto and the order of forfeiture, by itself, will not prevent the court from inflicting any other punishment for which the person may be liable under the Act. The effect of modification and annulment of an order made by court under Section 8 of the Act is set out in sub-section (2) of Section 10. Therefore, as rightly submitted on behalf of the petitioners, these aspects can appropriately be dealt with depending upon the fact situation arising in a given case. Therefore, it is not necessary to express any opinion on these aspects of the matter.

Section 14:

The constitutional validity of Section 14 is challenged by advancing the argument that it gives unbridled powers to the investigating officer to compel any person to furnish information if the investigating officer has reason to believe that such information will be useful or relevant to the purpose of the Act. It is pointed out that the provision is without any checks and is amenable to misuse by the investigating officers. It is also argued that it does not exclude lawyers or journalists who are bound by their professional ethics to keep the information rendered by their clients as privileged communication. Therefore, the Petitioners submitted that Section 14 is violative of Articles 14, 19, 20(3) and 21 of the Constitution. Learned Attorney General maintained that the Act does not confer any arbitrary or unguided powers; that such power is restricted to furnish information in one's possession in relation to terrorist offence 'on points or matters where the investigating officer has reason to believe (not suspect) that such information would be useful for or relevant to the purposes of the Act'; that this provision is essential for the detection and prosecution of terrorist offences; and that the underlying rationale of the obligation to furnish information is the salutary duty of every citizen.

Section 39 of the Code of Criminal Procedure, 1973 casts a duty upon every person to furnish information regarding offences. Criminal justice system cannot function without the cooperation of people. Rather it is the duty of every body to assist the State in detection of the crime and bringing criminal to justice. Withholding such information cannot be traced to right to privacy, which itself is not an absolute right (See : *Sharda v. Dharmpal*, 2003 (4) SCC 493). Right to privacy is subservient to that of security of State. Highlighting the necessity of people's assistance in detection of crime this Court observed in *State of Gujarat v. Anirudhsingh*, 1997 (6) SCC 514, that:

“...It is the salutary duty of every witness who has the knowledge of the commission of the crime, to assist the State in giving evidence...”

Section 14 confers power to the investigating officer to ask for furnishing information that will be useful for or relevant to the purpose of the Act. Further more such information could be asked only after obtaining a written approval from an officer not below the rank of a Superintendent of Police. Such power to the investigating officers is quiet necessary in the detection of terrorist activities or terrorist.

It is settled position of law that a journalist or lawyer does not have a sacrosanct right to withhold information regarding crime under the guise of professional ethics. A lawyer cannot claim a right over professional communication beyond what is permitted under Section 126 of the Evidence Act. There is also no law that permits a newspaper or journalist to withhold relevant information from Courts though they have been given such power by virtue of Section 15(2) of the Press Council Act, 1978 as against Press Council. (See also : *Pandit M.S.M. Sharma v. Shri Sri Krishan Sinha*, 1959 Supp (1) SCR 806, and *Sewakram Sobhani v. R.K. Karanjia*, 1981 (3) SCC 208, which quoted *Arnold v. King Emperor* 1913-14 (41) IA 149, with approval and also *B.S.C v. Granada Television*, 1981 (1) All E.R 417 (HL) and *Branzburg v. Hayes*, 1972 (408) US 665). Of course the investigating officers will be circumspect and cautious in requiring them to disclose information. In the process of obtaining information, if any right of citizen is violated, nothing prevents him from resorting to other legal remedies.

In as much as the main purpose of Section 14 of POTA is only to allow the investigating officers to procure certain information that is necessary to proceed with the further investigation we find there is no merit in the argument of the petitioners and we uphold the validity of Section 14.

Sections 18 & 19:

Sections 18 and 19 deals with the notification and de-notification of terrorist organizations. Petitioners submitted that under Section 18(1) of POTA a schedule has been provided giving the names of terrorist organization without any legislative declaration; that there is nothing provided in the Act for declaring organizations as terrorist organization; that this provision is therefore, unconstitutional as it takes away the fundamental rights of an organization under Articles 14, 19(1)(a) and 19(1)(c) of the Constitution; that under Section 18(2) of the Act, the Central Government has been given unchecked and arbitrary powers to 'add' or 'remove' or 'amend' the Schedule pertaining to terrorist organizations; that under the Unlawful Activities (Prevention) Act, 1967 an organization could have been declared unlawful only after the Central Government has sufficient material to form an opinion and such declaration has to be made by a Notification wherein grounds have to

be specified for making such declaration: that therefore such arbitrary power is violative of Articles 14, 19 and 21 of the Constitution. Pertaining to Section 19 the main allegation is that it excessively delegates power to Central Government in the appointment of members to the Review Committee and they also pointed out that the inadequate representation of judicial members will affect the decision-making and consequently it may affect the fair judicial scrutiny; that therefore Section 19 is not constitutionally valid.

The Learned Attorney General contended that there is no requirement of natural justice which mandates that before a statutory declaration is made in respect of an organization which is listed in the schedule a prior opportunity of hearing or representation should be given to the affected organization or its members: that the rule of audi alteram partem is not absolute and is subject to modification; that in light of post-decisional hearing remedy provided under Section 19 and since the aggrieved persons could approach the Review Committee there is nothing illegal in the Section; that furthermore the constitutional remedy under Articles 226 and 227 is also available; that therefore, having regard to the nature of the legislation and the magnitude and prevalence of the evil of terrorism cannot be said to impose unreasonable restrictions on the Fundamental Rights under Article 19(1)(c) of the Constitution.

The right of citizens to form association or union that is guaranteed by Article 19(1)(c) of the Constitution is subject to the restriction provided under Article 19(4) of the Constitution. Under Article 19(4) of the Constitution the State can impose reasonable restrictions, inter alia, in the interest of sovereignty and integrity of the country. POTA is enacted to protect sovereignty and integrity of India from the menace of terrorism. Imposing restriction under Article 19(4) of the Constitution also includes declaring an organization as a terrorist organization as provided under POTA. Hence Section 18 is not unconstitutional.

It is contended that before making the notification whereby an organization is declared as a terrorist organization there is no provision for pre-decisional hearing. But this cannot be considered as a violation of audi alteram partem principle, which itself is not absolute. Because in the peculiar background of terrorism it may be necessary for the Central Government to declare an organization as terrorist organization even without hearing that organization. At the same time under Section 19 of POTA the aggrieved persons can approach the Central Government itself for reviewing its decision. If they are not satisfied by the decision of the Central Government they can subsequently approach Review Committee and they are also free to exercise their Constitutional remedies. The post-decisional remedy provided under POTA satisfies the audi alteram partem requirement in

the matter of declaring an organization as a terrorist organization. (See: *Mohinder Singh Gill V. Chief Election Commissioner*, 1978 (1) SCC 405; *Swadeshi Cotton Mills v. Union of India*, 1981 (1) SCC 664; *Olga Tellis v. Bombay Municipal Corporation*, 1985 (3) SCC 545; *Union of India v. Tulsiram Patel*, 1985 (3) SCC 398). Therefore, the absence of pre-decisional hearing cannot be treated as a ground for declaring Section 18 as invalid.

It is urged that Section 18 or 19 is invalid based on the inadequacy of judicial members, in the Review Committee. As per Section 60, Chairperson of the Review Committee will be a person who is or has been a Judge of High Court. The mere presence of non-judicial members by itself cannot be treated as a ground to invalidate Section 19. (See: *Kartar Singh's case (supra)* at page 683, para 265 of SCC).

As regards the reasonableness of the restriction provided under Section 18, it has to be noted that the factum of declaration of an organization as a terrorist organization depends upon the 'belief' of Central Government. The reasonableness of the Central Government's action has to be justified based on material facts upon which it formed the opinion. Moreover the Central Government is bound by the order of the Review Committee. Considering the nature of legislation and magnitude or presence of terrorism, it cannot be said that Section 18 of POTA imposes unreasonable restrictions on fundamental right guaranteed under Article 19(1)(c) of the Constitution. We uphold the validity of Sections 18 and 19.

Sections 20, 21 & 22:

Petitioners assailed Sections 20, 21 and 22 mainly on the ground that no requirement of mens rea for offences is provided in these Sections and the same is liable to misuse therefore it has to be declared unconstitutional. The Learned Attorney General argued that Section 21 and its various sub-sections are penal provisions and should be strictly construed both in their interpretation and application; that on a true interpretation of the Act having regard to the well settled principles of interpretation Section 21 would not cover any expression or activity which does not have the element or consequence of furthering or encouraging terrorist activity or facilitating its commission; that support per se or mere expression of sympathy or arrangement of a meeting which is not intended or designed and which does not have the effect to further the activities of any terrorist organization or the commission of terrorist acts are not within the mischief of Section 21 and hence is valid.

Here the only point to be considered is whether these Sections exclude mens rea element for constituting offences or not. At the outset it has to be noted that Sections 20, 21

and 22 of POTA is similar to that of Sections 11, 12 and 15 of the Terrorism Act, 2000 of United Kingdom. Such provisions are found to be quite necessary all over the world in anti-terrorism efforts. Sections 20, 21 and 22 are penal in nature that demand strict construction. These provisions are a departure from the ordinary law since the said law was found to be inadequate and not sufficiently effective to deal with the threat of terrorism. Moreover, the crime referred to herein under POTA is aggravated in nature. Hence special provisions are contemplated to combat the new threat of terrorism. Support either verbal or monetary, with a view to nurture terrorism and terrorist activities is causing new challenges. Therefore Parliament finds that such support to terrorist organizations or terrorist activities need to be made punishable. Viewing the legislation in its totality it cannot be said that these provisions are obnoxious.

But the Petitioners apprehension regarding the absence of mens rea in these Sections and the possibility of consequent misuse needs our elucidation. It is the cardinal principle of criminal jurisprudence that mens rea element is necessary to constitute a crime. It is the general rule that a penal statute presupposes mens rea element. It will be excluded only if the legislature expressly postulate otherwise. It is in this context that this Court said in *Kartar Singh's* case (supra) (at page 645 para 115 of SCC) that:

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

Mens rea by necessary implication could be excluded from a statue only where it is absolutely clear that the implementation of the object of the Statue would otherwise be defeated. Here we need to find out whether there are sufficient grounds for inferring that Parliament intended to exclude the general rule regarding mens rea element. (See: *State of Maharashtra v. M.H. George*, AIR 1965 SC 722, *Nathulal V. State of MP*, AIR 1966 SC 43, *Inder Sain v. State of Punjab*, (1973) 2 SCC 372, for the general principles concerning the exclusion or inclusion of mens rea element vis-a-vis a given statute). The prominent method of understanding the legislative intention, in a matter of this nature, is to see whether the substantive provisions of the Act requires mens rea element as a constituent ingredient for an offence. Offence under Section 3(1) of POTA will be constituted only if it is done with an '-intent'. If Parliament stipulates that the 'terrorist act' itself has to be committed with the criminal intention, can it be said that a person who 'profess' (as under Section 20) or 'invites support' or 'arranges, manages, or assist in arranging or managing a meeting' or 'addresses a meeting' (as under Section 21) has committed the offence if he does not have an intention or design to further the activities of any terrorist organization

or the commission of terrorist acts? We are clear that it is not. Therefore, it is obvious that the offence under Section 20 or 21 or 22 needs positive inference that a person has acted with intent of furthering or encouraging terrorist activity or facilitating its commission. In other words, these Sections are limited only to those activities that have the intent of encouraging or furthering or promoting or facilitating the commission of terrorist activities. If these Sections are understood in this way, there cannot be any misuse. With this clarification we uphold the constitutional validity of Sections 20, 21 and 22.

Section 27:

Under Section 27, a police officer investigating a case can seek a direction through the Court of Chief Judicial Magistrate or the Court of a Chief Metropolitan Magistrate for obtaining samples of handwriting, finger prints, foot-prints, photographs, blood, saliva, semen, hair, voice of any accused person reasonably suspected to be involved in the commission of an offence under the Act. The Court can also draw adverse inference if an accused refuses to do so. Petitioners argued that this Section falls foul of Articles 14, 20(3) and 21 of the Constitution for the reason: that no power has been left with the Court to decide whether the request for samples from a suspect person sought for by investigating office is reasonable or not; that no power has been given to the Court to refuse the request of the investigating officer; that it is not obligatory for the Court to record any reason while allowing the request; and that the Section is a gross violation of Article 20(3) because it amounts to compel a person to give evidence against himself. Relying mainly on *State of Bombay v. Kathi Kalu Oghad*, 1962 (3) SCR 10, learned Attorney General submitted that the argument pertaining to the violation of Article 20(3) is not sustainable. We do not think, as feared by the Petitioner, that this Section fixes a blanket responsibility upon the Court to grant permission immediately upon the receipt of a request. Upon a close reading of the Section it will become clear that upon a 'request' by an investigating police officer it shall only 'be lawful' for the Court to grant permission. Nowhere it is stated that the Court will have to positively grant permission upon a request. It is very well within the ambit of Court's discretion. If the request is based on wrong premise, the Court is free to refuse the request. This discretionary power granted to the Court presupposes that the Court will have to record its reasoning for allowing or refusing a request. Pertaining to the argument that the Section per se violates Article 20(3), it has to be noted that a bench consisting of 11 judges in *Kathi Kalu Oghad*'s case (supra) have looked into a similar situation and it is ruled therein (at pages 30 -32) that:

"...The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not 'to be a witness'...when an accused person is called upon by the

Court or any other authority holding an investigation to give his finger impression or signature or any specimen of his handwriting, he is not giving any testimony to the nature of a personal testimony. The giving of a personal testimony must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus the giving of finger impression or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness'...

...They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable..." (Emphasis Supplied)

This being the position in law, the argument of the Petitioners pertaining to the violation of Article 20(3) is not sustainable. It is meaningful to look into Section 91 of Cr. PC that empowers a criminal court as also a police officer to order any person to produce a document or other thing in his possession for the purpose of any inquiry or trial. (See: *Shyamlal Mohanlal v. State of Gujarat*, AIR 1961 SC 1808, in this regard). Moreover, this Section is only a step in aid for further investigation and the samples so obtained can never be considered as conclusive proof for conviction. Consequently we uphold the constitutional validity of Section 27.

Section 30:

Section 30 contains provision for the protection of witness. It gives powers to the Special Court to hold proceedings in camera and to taking measures for keeping the identity of witness secret.

Petitioners challenged the constitutional validity of this Section by leveling the argument; that the right to cross-examine is an important part of fair trial and principles of natural justice which is guaranteed under Article 21; that even during emergency fundamental rights under Article 20 and 21 cannot be taken away; that Section 30 is in violation of the dictum in *Kartar Singh's* case (supra) because it does not contain the provision of disclosure of names and identities of the witness before commencement of trial; that fair trial includes the right for the defence to ascertain the true identity of an accuser; that therefore the same has to be declared unconstitutional. Learned Attorney General submitted that such provisions or exercise of such powers are enacted to protect the life and liberty of a person who is able and willing to give evidence in prosecution of grave criminal offences; that the Section is not only in the interest of witness whose life is in danger but also in the interest of community which lies in ensuring that heinous

offences like terrorist acts are effectively prosecuted and punished; that if the witnesses are not given immunity they would not come forward to give evidence and there would be no effective prosecution of terrorist offences and the entire object of the Act would be frustrated; that cross- examination is not a universal or indispensable requirement of natural justice and fair trial; that under compelling circumstances it can be dispensed with natural justice and fair trial can be evolved; that the Section requires the Court to be satisfied that the life of witness is in danger and the reasons for keeping the identity of the witness secret are required to be recorded in writing; that, therefore, it is reasonable to hold that the Section is necessary for the operation of the Act. Section 30 of POTA is similar to Section 16 of TADA, the constitutional validity of which was upheld by this Court in *Kartar Singh's* case (*supra*) (see pages 683 - 689 of SCC). In order to decide the constitutional validity of Section 30 we don't think it is necessary to go into the larger debate, which learned Counsel for both sides have argued, that whether right to cross-examine is central to fair trial or not. Because right to cross- examination per se is not taken away by Section

30. This Section only confers discretion to the concerned Court to keep the identity of witness secret if the life of such witness is in danger. We cannot shy away from the unpleasant reality that often witnesses do not come forward to depose before Court even in serious cases. This precarious situation creates challenges to our criminal justice administration in general and terrorism related cases in particular. Witnesses do not volunteer to give evidence mainly due to the fear of their life. Ultimately, the non-conviction affects the larger interest of community, which lies in ensuring that the executors of heinous offences like terrorist acts are effectively prosecuted and punished. Legislature drafted Section 30 by taking all these factors into account. In our view a fair balance between the rights and interest of witness, rights of accused and larger public interest has been maintained under Section 30. It is also aimed to assist the State in justice administration and encourage others to do the same under the given circumstances. Anonymity of witness is not general rule under Section 30. Identity will be withheld only in exceptional circumstance when the Special Court is satisfied that the life of witness is in jeopardy. Earlier this Court has endorsed similar procedure. (See: *Gurbachan Singh v. State of Bombay*, 1952 SCR 737, *Hira Nath Mishra v. Principal, Rajendra Medical College*, 1973 (1) SCC 805, *A. K. Roy V. Union of India*, 1982 (1) SCC 271). While deciding the validity of Section 16 of TADA, this Court quoted all these cases with approval. (See also the subsequent decision in *Jamaat-e-Islami Hind v. Union of India*, 1995 (1) SCC 428.

The need for the existence and exercise of power to grant protection to a witness and preserve his or her anonymity in a criminal trial has been universally recognised. Provisions of such nature have been enacted to protect the life and liberty of the person who is able and willing to give evidence in support of the prosecution in grave criminal cases. A provision of this nature should not be looked at merely from the angle of protection of the witness whose life may be in danger if his or her identity is disclosed but also in the interest of the community to ensure that heinous offences like terrorist acts are effectively prosecuted and punished. It is a notorious fact that a witness who gives evidence which is unfavourable to an accused in a trial for terrorist offence would expose himself to severe reprisals which could result in death or severe bodily injury or that of his family members. If such witnesses are not given appropriate protection, they would not come forward to give evidence and there would be no effective prosecution of terrorist offences and the entire object of the enactment may possibly be frustrated. Under compelling circumstances this can be dispensed with by evolving such other mechanism, which complies with natural justice and thus ensures a fair trial.

The observations made in this regard by this Court in the decisions to which we have adverted to earlier have been noticed by this Court in *Kartar Singh's* case (*supra*) and has upheld the validity of a similar provision subject, of course, to certain conditions which form part of Section 30 now. The present position is that Section 30(2) requires the court to be satisfied that the life of a witness is in danger to invoke a provision of this nature. Furthermore, reasons for keeping the identity and address of a witness secret are required to be recorded in writing and such reasons should be weighty. In order to safeguard the right of an accused to a fair trial and basic requirements of the due process a mechanism can be evolved whereby the special court is obligated to satisfy itself about the truthfulness and reliability of the statement or disposition of the witness whose identity is sought to be protected.

Our attention has been drawn to legal position in USA, Canada, New Zealand, Australia and UK as well as the view expressed in the European Court of Human Rights in various decisions. However, it is not necessary to refer any of them because the legal position has been fully set out and explained in *Kartar Singh* and provision of POTA in Section 30 clause (2) has been modelled on the guidelines set out therein. We may further notice that the effort of the court has been to balance the right of the witness as to his life and liberty and the right of community in effective prosecution of heinous criminal offences with the right of the accused to a fair trial. This is done by devising a mechanism or arrangement to preserve anonymity of the witness when there is an identifiable threat to the life or

physical safety of the witness or others whereby the court satisfies itself about the weight to be attached to the evidence of the witness. In some jurisdictions an independent counsel has been appointed for the purpose to act as amicus curie and after going through the deposition evidence assist the court in forming an opinion about the weight of the evidence in a given case or in appropriate cases to be cross-examined on the basis of the questions formulated and given to him by either of the parties. Useful reference may be made in this context to the recommendations of the Law Commission of New Zealand.

The necessity to protect the identity of the witness is not a factor that can be determined by a general principle. It is dependent on several factors and circumstances arising in a case and, therefore, the Act has left the determination of such question to an appropriate case.

Keeping secret the identity of witness, though in the larger interest of public, is a deviation from the usual mode of trial. In extraordinary circumstances we are bound to take this path, which is less travelled. Here the Special Courts will have to exercise utmost care and caution to ensure fair trial. The reason for keeping identity of the witness has to be well substantiated. It is not feasible for us to suggest the procedure that has to be adopted by the Special Courts for keeping the identity of witness secret. It shall be appropriate for the concerned Courts to take into account all the factual circumstances of individual cases and to forge appropriate methods to ensure the safety of individual witness. With these observations we uphold the validity of Section 30.

Section 32:

This Section made it lawful of certain confessions made to police officers to be taken into consideration.

Concerning the validity and procedural difficulties that could arise during the process of recording confessions the Petitioners submitted that there is no need to empower the police to record confession since the accused has to be produced before the Magistrate within forty-eight hours, in that case magistrate himself could record the confession; that there is no justification for extended time limit of forty eight hours for producing the person before Magistrate; that it is not clear in the Section whether the confession recorded by the police officer will have the validity after Magistrate has recorded the fact of torture and has sent the accused for medical examination; that it is not clear as to whether both the confession before the police officer as well as confession statement before the Magistrate shall be used in evidence; that the Magistrates cannot be used for mechanically putting seal of approval on the confessional statements by the police; that,

therefore, the Section has to be nullified. Validity of this Section was defended by the learned Attorney General by forwarding the arguments that the provisions relating to the admissibility of confessional statements, which is similar to that of Section 32 in POTA was upheld in *Kartar Singh's* case (*supra*); that the provisions of POTA are an improvement of TADA by virtue of enactment of Section 32(3) to 32(5); that the general principles of law regarding the admissibility of a confessional statement is applicable under POTA; that the provision which entails the Magistrate to test and examine the voluntariness of a confession and complaint of torture is an additional safeguard and does not in any manner inject any constitutional infirmity; that there cannot be perennial distrust of the police; that Parliament has taken into account all the relevant factors in its totality and same is not unjust or unreasonable.

At the outset it has to be noted that the Section 15 of TADA that was similar to this Section was upheld in *Kartar Singh's* case (*supra*) (pages 664-683 of SCC). While enacting this Section Parliament has taken into account of all the guidelines, which were suggested by this Court in *Kartar Singh's* case (*supra*). Main allegation of the Petitioners is that there is no need to empower the police to record confession since the accused has to be produced before the Magistrate within forty-eight hours in which case the Magistrate himself could record the statement or confession. In the context of terrorism the need for making such a provision so as to enable Police officers to record the confession was explained and upheld by this Court in *Kartar Singh's* case (*supra*) (page 680 para 253 of SCC). We need not go into that question at this stage. If the recording of confession by police is found to be necessary by Parliament and if it is in tune with the scheme of law, then an additional safeguard under Section 32 (4) and (5) is a *fortiori* legal. In our considered opinion the provision that requires producing such a person before the Magistrate is an additional safeguard. It gives that person an opportunity to rethink over his confession. Moreover, the Magistrate's responsibility to record the statement and the enquiry about the torture and provision for subsequent medical treatment makes the provision safer. It will deter the police officers from obtaining a confession from an accused by subjecting him to torture. It is also worthwhile to note that an officer who is below the rank of a Superintendent of Police cannot record the confession statement. It is a settled position that if a confession was forcibly extracted, it is a nullity in law. Non-inclusion of this obvious and settled principle does not make the Section invalid. (See : *Kartar Singh's* case (*supra*) page 678, para 248 - 249 of SCC). Ultimately, it is for the concerned Court to decide the admissibility of the confession statement. (See : *Kartar Singh's* case (*supra*) page 683, para 264 of SCC). Judicial wisdom will surely prevail over irregularity, if any in the process of

recording confessional statement. Therefore we are satisfied that the safeguards provided by the Act and under the law is adequate in the given circumstances and we don't think it is necessary to look more into this matter. Consequently we uphold the validity of Section 32.

Section 49:

Section 49 mainly deals with procedure for obtaining bail for an accused under POTA. Petitioners' main grievance about this Section is that under Section 49(7) a Court could grant bail only if it is satisfied that there are grounds for believing that an accused 'is not guilty of committing such offence', since such a satisfaction could be attained only after recording of evidence there is every chance that the accused will be granted bail only after minimum one year of detention; that the proviso to Section 49(7), which is not there under TADA, makes it clear that for one year from the date of detention no bail could be granted; that this Section has not incorporated the principles laid down by this Court in Sanjay Dutt's case (*supra*) (at page 439 para 43-48 of SCC) wherein it is held that if a challan is not filed after expiry of 180 days or extended period, the indefeasible right of an accused to be released on bail is ensured, provided that the same is exercised before filing of challan; that the prosecution is curtailing even this right under POTA. Therefore, the petitioners want us to make the Section less stringent according to the settled principles of law. Learned Attorney General submitted that the provisions regarding bail are not onerous nor do they impose any excessive burden or restriction on the right of the accused; that similar provisions are found in Section 37 of the NDPS Act 1985 and in Section 10 of the UP Dacoity Affected Areas Act; that on a true construction of Section 49(6) and (7) it is not correct to conclude that the accused cannot apply for bail at all for a period of one year; that the right of the accused to apply for bail during the period of one year is not completely taken away; that the stringent provision of bail under Section 49(7) would apply only for the first one year of detention and after its expiry the normal bail provisions under Cr.P.C. would apply; that there is no dispute that the principle laid down by this Court in *D.K. Basu v. State of West Bengal*, 1997 (1) SCC 416, will apply; that in the light of effective safeguards provided in the Act and effective remedies against adverse orders there is no frailty in Section 49.

Section 49 of the Act is similar to that of Section 20 of TADA, constitutional validity of which has been upheld by this Court in *Kartar Singh's* case (*supra*) (pages 691-710 of SCC). Challenge before us is limited to the interpretation of Section 49(6) and (7). By virtue of Section 49(8), the powers under Section 49 (6) and (7) pertaining to bail is in addition to and not in derogation to the powers under the Code or any other law for the time

being in force on granting of bail. The offences under POTA are more complex than that of ordinary offences. Usually the overt and covert acts of terrorism are executed in a chillingly efficient manner as a result of high conspiracy, which is invariably linked with anti-national elements both inside and outside the country. So an expanded period of detention is required to complete the investigation. Such a comparatively long period for solving the case is quite justifiable. Therefore, the investigating agencies may need the custody of accused for a longer period. Consequently, Section 49 (6) and (7) are not unreasonable. In spite of this, bail could be obtained for an accused booked under POTA if the 'court is satisfied that there are grounds for believing that he is not guilty of committing such offence' after hearing the Public Prosecutor. It is the general law that before granting the bail the conduct of accused seeking bail has to be taken into account and evaluated in the background of nature of crime said to have committed by him. That evaluation shall be based on the possibility of his likelihood of either tampering with the evidence or committing the offence again or creating threat to the society. Since the satisfaction of the Court under Section 49(7) has to be arrived based on the particular facts and after considering the abovementioned aspects, we do not think the unreasonableness attributed to Section 49(7) is fair. (See: Kartar Singh's case (*supra*) page 707, para 349-352 of SCC).

Proviso to Section 49(7) reads as under:

"Provided that after the expiry of a period of one year from the date of detention of the accused for an offence under this Act, the provisions of sub-section (6) of this Section shall apply."

It is contended that this proviso to Section 49(7) of POTA is read by some of the courts as a restriction on exercise of power for grant of bail under Section 49(6) of POTA and such power could be exercised only after the expiry of the period of one year from the date of detention of the accused for offences under POTA. If the intention of the legislature is that an application for bail cannot be made prior to expiry of one year after detention for offences under POTA, it would have been clearly spelt out in that manner in Section 49(6) itself. Sections 49(6) and 49(7) of POTA have to be read together and the combined reading of these two sections is to the effect that Public Prosecutor has to be given an opportunity of being heard before releasing the accused on bail and if he opposes the application, the court will have to be satisfied that there are grounds for believing that he is not guilty of having committed such offence. It is by way of exception to Section 49(7) that proviso is added which means that after the expiry of one year after the detention of the accused for offences under POTA, the accused can be released on bail after hearing

the Public Prosecutor under ordinary law without applying the rigour of Section 49(7) of POTA. It also means that the accused can approach the court for bail subject to conditions of Section 49(7) of POTA within a period of one year after the detention for offences under POTA.

Proviso to Section 49(7) provides that the condition enumerated in sub-section (6) will apply after the expiry of one-year. There appears to be an accidental omission or mistake of not including the word 'not' after the word 'shall' and before the word 'apply'. Unless such a word is included, the provision will lead to an absurdity or become meaningless. Even otherwise, read appropriately, the meaning of the proviso to Section 49(7) is that an accused can resort to ordinary bail procedure under the Code after that period of one year. At the same time, proviso does not prevent such an accused to approach the Court for bail in accordance with the provisions of POTA under Section 49(6) and (7) thereof. This interpretation is not disputed by the learned Attorney General. Taking into account of the complexities of the terrorism related offences and intention of Parliament in enacting a special law for its prevention, we do not think that the additional conditions regarding bail under POTA are unreasonable. We uphold the validity of Section 49.

There is no challenge to any other provisions of the Act.

**Supreme Court of India
1998 (2) SCC 109**

**Naga People's Movement of Human Rights and Others
vs
Union of India**

J.S. Verma, M.M. Punchhi, S.C. Agarwal, Dr. A.S. Anand, S.P. Bharucha, JJ.

1. These writ petitions and appeals raise common questions relating to the validity of the Armed Forces (Special Powers) Act, 1958 (as amended) enacted by Parliament (hereinafter referred to as 'the Central Act') and the Assam Disturbed Areas Act, 1955 enacted by the State Legislature of Assam. (hereinafter referred to as 'the State Act'). The Central Act was enacted in 1958 to enable certain special powers to be conferred upon the members of the armed forces in the disturbed areas in the State of Assam and the Union Territory of Manipur. By Act 7 of 1972 and Act 69 of 1986 the Central Act was amended and it extends to the whole of the State of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura. The expression "disturbed area" has been defined in Section 12(b) to mean an area which is for the time being declared by notification under section 3 to be a disturbed area. Section 3 makes provision for issuance of a notification declaring the whole or any part of State or Union Territory to which the Act is applicable to be a disturbed area. In the said provision, as originally enacted, the power to issue the notification was only conferred on the Governor of the State or the Administrator of the Union Territory. By the Amendment Act of 1972 power to issue a notification under the said provision can also be exercised by the Central Government. Under Section 4 a commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces has been conferred special powers in the disturbed areas in respect of matters specified in clauses (a) to (d) of the said section. Section 5 imposes requirement that a person arrested in exercise of the powers conferred under the Act must be handed over to the officer incharge of the nearest police station together with a report of the circumstances occasioning the arrest. Section 6 confers protection to persons acting under the Act and provides that no prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by the act.

....

3. The State Act was enacted with a view to make better provision for the suppression of disorder and for restoration and maintenance of public order in the disturbed areas in Assam. Section 2 of the State Act also defines disturbed area to mean an area which is for the time being declared by notification under Section 3 to be a disturbed area. Section 3 lays down that the State Government may, by notification in the official gazette of Assam, declare the whole or any part of any district of Assam, as may be specified in the notification, to be a disturbed area. Sections 4 and 5 confer on a Magistrate or police officer not below the rank of sub-Inspector or Havildar in case of Armed Branch of the police or any officer of the Assam Rifles not below the rank of Havildar/Jamadar powers similar to those conferred under clauses (a) and (b) of Section 4 of the Central Act. Section 6 confers protection similar to that conferred by Section 5 of the Central Act.
4. In the Writ petitions filed under Article 32 of the Constitution the validity of the Central Act and the State Act as well as the notifications issued the said enactments declaring disturbed areas in the States of Assam, Manipur and Tripura have been challenged. In these writ petitions allegations have been made regarding infringement of human rights by personnel of armed forces in exercise of the powers conferred by the Central Act. The notifications regarding declaration of disturbed areas have ceased to operate. The allegations involving infringement of rights by personnel of armed forces have been inquired into and action has been taken against the persons found to be responsible for such infringements. The only question that survives for consideration in these Writ petitions is about the validity of the provisions of the Central Act and State Act. We have heard Shri Shanti Bhushan, Ms. Indira Jaisingh, Shri Kapil Sabil on behalf of the petitioners in the writ petitions and in the civil appeals we have heard Shri P.K. Goswami on behalf of the petitioners in the writ petitions filed in the High Court. The learned Attorney General has addressed the Court on behalf of the Union of India. The National Human Rights Commission has been permitted to intervene and Shri Rajiv Dhavan has addressed the Court on its behalf.
5. As noticed earlier, the provisions contained in the State Act are also found in the Central Act which contains certain additional provisions. The Submissions on the validity of the provisions of the Central Act would cover the challenge to the validity of the State Act. We would, therefore, first deal with the questions relating to the validity of the Central Act. But before we do so we will briefly take note of the earlier legislation in the field. The Police Act of 1861, in sub-section (1) of 15, empowers

the state Government to issue a proclamation declaring that any area subject to its authority has been found in a disturbed or in a dangerous state and thereupon in exercise of the power conferred under sub-section (2) the Inspector General of Police or other officer authorised by the State Government in that behalf can employ any police force in addition to the ordinary fixed complement, to be quartered in the area specified in such proclamation. Sub-section(6) of Section 15 prescribes that every such proclamation issued under sub-section (1) shall indicate the period for which it is to remain in force, but it may be withdrawn at any time or continued from time to time for a further period or periods as the State Government may in each case think fit to direct. The police Act makes no provision for deployment of armed forces. To deal with the situation arising in certain provinces on account of the partition of the country in 1947 the Governor General issued four Ordinances, namely, (1) The Bengal Disturbed Areas (Special Powers of Armed forces) Ordinance, 1947 (11 of 1947); (2) The Assam Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947 (14 of 1947); (3) The East Punjab and Delhi Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947 (22 of 1947). These Ordinances were replaced by the Armed Forces (Special Powers) Act, 1948 (Act No. 3 of 1948).

6. Sections 2 and 3 of the said Act provided as follows:-

"Section 2. Special powers of officers of military or air forces.- Any commissioned officer, warrant officer or non-commissioned officer of His Majesty's Military or air forces may, in any area in respect of which a proclamation under Sub-section (1) of Section 15 of the Police Act, 1861 (V of 1861) is for the time being in force or which is for the time being by any form of words declared by the provincial Government under any other law to be disturbed or dangerous areas,-

- (a) *If in his opinion it is necessary so to do for the maintenance of public order, after giving such warning, if any, as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the said area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons;*
- (b) *arrest without warrant any person who has committed a cognizable offence, or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence;*
- (c) *enter and search, without warrant, any premises to make any such arrest as aforesaid, or to recover any person believed to be wrongfully restrained or confined, or any property reasonably suspected to be stolen property, or any arms believed to be unlawfully kept, in such premises.*

Section 3. Protection of persons acting under this Act,- No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purporting to be done in exercise of the powers conferred by Section 2."

This Act was a temporary statute enacted for a period of one year. It was, however, continued till it was repealed by Act 36 of 197.

7. Thereafter the Central Act was enacted by Parliament. It was known as the Armed Forces [Assam and Manipur] Special powers Act, 1958 and it extended to the whole of the State of Assam and the Union Territory of Manipur. As a result of the amendments made therein it is now described as the Armed Forces [Special Powers] Act, 1958 and it extends to the whole of the State of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura. Under Section 3 of the Act as originally enacted the power to declare an area to be a disturbed area was conferred on the Governor of Assam and the Chief Commissioner of Manipur. Section 3 was amended by Act 7 of 1972 and power to declare an area to be a 'disturbed area' has also been conferred on the Central Government. In the Statement of Objects and Reasons of the Bill which was enacted as Act 7 of 1972 the following reason is given for conferring on the Central Government the power to make a declaration under Section 3:-

"The Armed Forces [Assam and Manipur] Special Powers Act, 1958, empowers only the Governors of the States and the Administrators of the Union Territories to declare areas in the concerned State or Union Territory as "disturbed".

Keeping in view the duty of the Union under article 355 of the Constitution, inter alia, to protect every State against internal disturbance, it is considered desirable that the Central Government should also have power to declare areas as "disturbed", to enable its armed forces to exercise the special powers."

8. The relevant provisions of the Central Act are as under:-

2. *Definitions.- In this Act, unless the context otherwise requires,-*

xxxxx xxxx xxxxx

(b) "disturbed area" means an area which is for the time being declared by notification under Section 3 to be a disturbed area;

xxxx xxxx xxxxxxx

3. *Power to declare areas to be disturbed areas.-*

If, in relation to any State or Union Territory to which this Act extends, the Governor of that State or the Administrator of that Union Territory or the Central Government, in either case, is of the opinion that the whole or any part of such State or Union Territory, as the case maybe, is in such a disturbed or dangerous

condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the official Gazette, declare the whole or such part of such state or Union Territory to be a disturbed area.

4. *Special powers of the armed forces.- Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,-*
 - (a) *If he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of firearms, ammunition or explosive substances;*
 - (b) *If he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as training camp for armed volunteers or utilised as a hide-out by armed gangs or absconders wanted for any offence;*
 - (c) *arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest;*
 - (d) *enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises, and may for that purpose use such force as may be necessary.*
5. *Arrested persons to be made over to the police.- Any person arrested and taken into custody under this Act shall be made over to the officer in charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.*
6. *Protection to persons acting under Act.- No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act."*
9. In addition to the powers conferred under the Act, provision is made for use of armed forces in the following provisions contained in Sections 130 and 131 of the Criminal Procedure Code, 1973 (for short Cr. P.C.):-

"Section 130. Use of armed forces to disperse assembly.-

- (1) *If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Executive Magistrate of the highest rank who is present may cause it to be dispersed by the armed forces.*
- (2) *Such Magistrate may require any officer in command of any group of persons belonging to the armed forces to disperse the assembly with the help of the armed forces under his command, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.*
- (3) *Every such officer of the armed forces shall obey such requisition in such manner, as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.*

Section 131. Power to certain armed force officers to disperse assembly.- When the public security is manifestly endangered by any such assembly and no Executive Magistrate can be communicated with, any commissioned or gazetted officer of the armed forces may disperse such assembly with the help of the armed forces under his command, and may arrest and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law, but if, while he is acting under this section, it becomes practicable for him to communicate with an Executive Magistrate, he shall do so, and henceforward obey the instructions of the Magistrate, as to whether he shall or shall not continue such acting."

10. The learned counsel for the petitioners in the writ petitions filed in this Court as well as in the writ petitions filed in the High Court and the learned counsel for the intervener have assailed the validity of the Central Act on the ground that it is beyond the legislative competence of parliament. They have also challenged the validity of the various provisions of the Act on the ground that the same are violative of the provisions of Articles 14, 19 and 21 of the constitution. We would first examine the submissions of the learned counsel regarding legislative competence of parliament to enact the Central Act. For that purpose it is necessary to take note of the relevant entries in the Union List (List I) and the State List (List II) in the Seventh Schedule to the Constitution. Prior to the Constitution (Forty-Second Amendment) Act, 1976, the relevant entries were as follows:-

"List I-Union List, Entry 2. Naval, Military and air forces, any other armed forces of Union.

List II-State List, Entry 1. Public order (but not including the use of naval, military or air force or any other armed force of the Union in aid of the Civil power)."

11. By the Constitution (Forty-Second Amendment) Act, 1976, Entry 2A was inserted in the Union List. The said entry reads as follows :-

"2A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any state in aid of the civil power, powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment."

Entry 1 of the State List was amended to read as under:-

"Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of civil power."

12. By the said amendment Article 257A was also inserted which was in the following terms:-

"Article 257-A. Assistance to States by deployment of armed forces or other forces of the Union. -

- (1) *the Government of India may deploy any armed force of the Union or any other force subject to the control of the Union for dealing with any grave situation of law and order in any State.*
- (2) *Any armed force or other force of any contingent or unit thereof deployed under clause (1) in any State shall act in accordance with such directions as the Government of India may issue and shall not, save as otherwise provided in such directions, be subject to the superintendence or control of the State Government or any officer or authority subordinate to the State Government.*
- (3) *Parliament may, by law, specify the powers, functions privileges and liabilities of the members of any force or any contingent or unit thereof deployed under clause (1) during the period of such deployment."*

13. Article 257A was deleted by the Constitution (Forty- Forth Amendment) Act, 1976 but no change was made in Entry 2A of the Union List.

14. While examining the legislative competence of parliament to make a law what is required to be seen is whether the subject matter falls in the State List which Parliament cannot enter. If the law does not fall in the State List, Parliament would have legislative competence to pass the law by virtue of the residuary powers under Article 248 read with Entry 97 of the Union List and it would not be necessary to go into the question whether it falls under any entry in the Union List or the Concurrent List. [See : *Union of India v. H.S. Dhillon*, 1972(2) SCR 33 at pp. 61 and 67- 68; *S.P. Mittal v. Union of India*, 1983(1) SCR 729 at p. 769-770; and *Kartar Singh v. State of Punjab*, 1994 (3) SCC 569 at pp. 569 at pp. 629-630]. What is, therefore, required

to be examined is whether the subject matter of the Central Act falls in any of the entries in the State List. The submission of the learned counsel for the petitioners and the Intervener is that the Central Act is a law with respect to "Public Order" and falls under Entry I of the State List. The learned Attorney General of India has on the other hand, submitted that the Central Act does not fall under any entry in the State list and, as originally enacted in 1958, it was a law made under Article 248 read with Entry 97 of the union List and after the Forty-Second Amendment of the Constitution it is a law falling under Entry 2A of the Union List.

15. Shri Shanti Bhushan has urged that under Entry 1 of the State list the State Legislature has been conferred the exclusive power to enact a law providing for maintenance of public order. This power does not, however, extend to the use of armed forces in aid of the civil power and that parliament has been empowered to make a law in that regard and this position has been made explicit by entry 2A of the Union List. The submission is that the use of the armed forces in aid of the Civil power contemplates the use of armed forces under the control, continuous supervision and direction of the executive power of the state and that parliament can only provide that whenever the executive authorities of a State desire, the use of armed forces in aid of the civil power would be permissible but the supervision and control over the use of armed forces has to be with the civil authorities of the State concerned. It has been urged that the Central Act does not make provision for use of armed forces in aid of the civil power in this sense and it envisages that as soon as the whole or any part of a State has been declared to be disturbed area under Section 3 of the Central Act members of armed forces get independent power to act under Section 4 of the Central Act and to exercise the said power for the maintenance of public order independent of the control or supervision of any executive authority of the state. The learned counsel has submitted that such a course is not permissible inasmuch as it amounts to handing over the maintenance of public order in a State to armed forces directly and it contravenes the constitutional restriction of permitting use of armed forces only in aid of civil power. It is further urged that the expression "civil power" in Entry 1 of the State List as well as in Entry 2A of the Union List refers to civil power of the State Government and not of the Central Government. Shri Dhavan has submitted that the power to deal with "public order" in the widest sense vests with the States and that the Union has the exclusive power to legislate and determine the nature of the use for which the armed forces may be deployed in aid of the civil power and to legislate on and determine the conditions of deployment of the armed forces and the

terms on which the forces would be so deployed but the State in whose aid the armed forces are so deployed shall have the exclusive power to determine the purposes, the time period and the areas in which the armed forces should be requested to act in aid of civil power and that the State retains a final directorial control to ensure that the armed forces act in aid of civil power and do not supplant or act in substitution of the Civil power. A perusal of Entry 1 of the State List Would show that while power to legislate in order to maintain public order has been assigned to the State Legislature, the field encompassing the use of armed forces in aid of the civil power has been carved out from the said Entry and legislative power in respect of that field has been expressly excluded. This means that the State Legislature does not have any legislative power with respect to the use of the armed forces of the Union in aid of the Civil power for the purpose of maintaining public order in the State and the Competence to make a law in that regard vests exclusively in parliament. Prior to the Forty-Second Amendment to the Constitution such power could be inferred from Entry 2 of the Union List relating to naval, military and air forces and any other armed forces of the Union as well as under Article 248 read with Entry 97 of the Union List. After the Forty-Second Amendment the legislative power of parliament in respect of deployment of armed forces of the Union or another force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil powers flows from Entry 2-A of the Union List. The expression "in aid of the civil power" in entry 1 of the State List and in Entry 2A of the Union List implies that deployment of the armed forces of the Union shall be for the purpose of enabling the civil power in the State to deal with the situation affecting maintenance of public order which has necessitated the deployment of the armed forces in the State. The word "aid" postulates the continued existence of the authority to be aided. This would mean that even after deployment of the armed forces the civil power will continue to function. The power to make a law providing for deployment of the armed forces of the Union in aid of the civil power in the State does not comprehend the power to enact a law which would enable the armed forces of the Union to supplant or act as a substitute for the civil power in the State. We are, however, unable to agree with the submission of the learned counsel for the petitioners that during the course of such deployment the supervision and control over the use of armed forces has to be with the civil authorities of the State concerned or that the State concerned will have the exclusive power to determine the purpose, the time period and the areas within which the armed forces should be requested to act in aid of civil power. In our opinion, what is contemplated by Entry 2-A of the Union List and Entry I of the State List is that in the event of deployment of

the armed forces of the Union in aid of the civil power in a State, the said forces shall operate in the State concerned in cooperation with the civil administration so that the situation which has necessitated the deployment of the armed forces is effectively dealt with and normalcy is restored.

16. Does the Central Act enable the armed forces to supplant or act as substitute for civil power after a declaration has been made under Section 3 of the Central Act? In view of the provisions contained in Sections 4 and 5 of the Central Act the question must be answered in the negative. The power conferred under clause (a) of Section 4 can be exercised only when any person is found acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire arms, ammunition or explosive substances. In other words, the said power conditional upon the existence of a prohibitory order issued under a law, e.g. Cr. P.C. or the Arms Act, 1959. Such prohibitory orders can be issued only by the civil authorities of the State. In the absence of such a prohibitory order the power conferred under clause (a) of Section 4 cannot be exercised. Similarly, under Section 5 of the Central Act there is a requirement that any person who is arrested and taken into custody in exercise of the power conferred by clause (c) of Section 4 of the Act shall be made over to the officer in charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest. Maintenance of public Order involves cognizance of offences, search, seizure and arrest followed by registration of reports of offences [FIRs], investigation, prosecution, trial and, in the event of conviction, execution of sentences. The powers conferred under the Central Act only provide for cognizance of offences, search, seizure and arrest and destruction of arms dumps and shelters and structures used as training camps or as hide-outs for armed gangs. The other functions have to be attended by the State Criminal Justice machinery, viz., the police, the magistrates, the prosecuting agency, the courts, the jails, etc. This would show that the powers that have been conferred under Section 4 of the Central Act do not enable the armed forces of the Union to supplant or act as substitute for the civil power of the State and the Central Act only enables the armed forces to assist the civil power of the State in dealing with the disturbed conditions affecting the maintenance of public order in the disturbed area.
17. Under Section 3, as amended by Act 7 of 1972, the Central Government has been empowered to declare an area to be a disturbed area. There is no requirement that it

shall consult the State Government before making the declaration. As a consequence of such a declaration the power under section 4 can be exercised by the armed forces and such a declaration can only be revoked by the Central Government. The conferment of the said power on the Central Government regarding declaration of areas to be disturbed areas does not, however, result in taking over of the state administration by the Army or by other armed forces of the Union because after such declaration by the Central Government the powers under Section 4 of the Central Act can be exercised by the personnel of the armed forces only with the cooperation of the authorities of the State Government concerned. It is, therefore, desirable that the State Government should be consulted and its co-operation sought while making a declaration. It would be useful to refer to the report of the Sarkaria Commission on Central-States Relation which has also dealt with this aspect. The Commission has observed:

"7.5.01 Clearly, the purpose of deployment which is to restore public order and ensure that effective follow up action is taken in order to prevent recurrence of disturbances, cannot be achieved without the active assistance and co-operation of the entire law enforcing machinery of the State Government. If the Union Government chooses to take unilateral steps to quell an internal disturbances without the assistance of the State Government, these can at best provide temporary relief State Government, these can at best provide temporary relief to the affected area and none at all where such disturbances are chronic.

7.5.02 Thus, practical considerations, as indicated above, make it imperative that the union Government should invariably consult and seek the cooperation of the State Government, if it proposes either to deploy suo motu its armed forces in that State or to declare an area as need hardly be emphasised that without the state Government's cooperation, the mere assertion of the of the Union Government's right to deploy its armed forces cannot solve public order problems.

7.5.03 We recommend that, before deploying Union armed and other forces in a State in aid of the civil power otherwise than on a request from the State Government, or before declaring an area within a State as a "disturbed area", it is desirable that the State Government should be consulted, wherever feasible, and its cooperation sought by the Union Government. However, prior consultation with the State Government is not obligatory."

[Part I, pp. 198, 199]

18. It is, therefore, not possible to accept the contentions urged by Shri Shanti Bhushan and Shri Dhavan that the Central Act is ultra vires the legislative power conferred on Parliament inasmuch as it s not an enactment providing for deployment of armed

forces in aid of the civil power, but is an enactment with respect to maintenance of public order which is a field assigned to the State legislature under Entry 1 of the State List.

-
19. Prior to the amendment of Article 352 by the Forty-fourth Amendment of the Constitution it was open to the president to issue a proclamation of Emergency if he was satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened whether by war or external aggression or 'internal disturbance'. By the Forty-fourth Amendment the Words 'internal disturbance' in Article 352 have been substituted by the words 'armed rebellion'. The expression 'internal disturbance' has a wider connotation than 'armed rebellion' in the sense that 'armed rebellion' is likely to pose a threat to the security of the country or a part thereof, while 'internal disturbance', though serious in nature, would not pose a threat to the security of the country or a part thereof. The intention underlying the substitution of the word 'internal disturbance' by the word 'armed rebellion' in Article 352 is to limit the invocation of the emergency powers under Article 352 only to more serious situations where there is a threat to the security of the country or a part thereof on account of war or external aggression or armed rebellion and to exclude the invocation of emergency powers in situations of internal disturbance which are of lesser gravity. This has been done because a proclamation of emergency under Article 352 has serious implications having effect on the executive as well as the legislative powers of the States as well as the Union. As a result of a proclamation under Article 352 parliament can make a law extending the duration of the House of the People [Article 83(2) Proviso]; Parliament gets the power to legislate with respect to any matter in the State List [Article 250]; the executive power of the Union is enlarged so as to extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised [Article 353(a)]; power of parliament to make laws with respect to any matter is enlarged to include power to make laws, conferring powers and imposing duties authorising the conferring of powers and the imposition of duties upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union List [Article 353(b)]; the president can pass an order directing that all or any of the provisions of Articles 268 to 279 relating to distribution of revenues shall have effect subject to such exceptions modifications as he thinks fit [Article 354]; the provisions of Article 19 are suspended (Article 358); and the enforcement

of other rights conferred by part III (except Articles 20 and 21) can be suspended by the President [Article 359]. The consequences of a proclamation of emergency under Article 352 are thus much more drastic and far reaching and, therefore, the Constitution takes care to provide for certain safeguards in Article 352 for invoking the said provision. There is no material on the record to show that the disturbed conditions in the States to which the Central Act has been extended are due to an armed rebellion. Even if the disturbance is as a result of armed rebellion by a section of the people in those States the disturbance may not be of such a magnitude as to pose a threat to the Security of the country or part thereof so as to call for invocation of the emergency powers under Article 352. If the disturbance caused by armed rebellion does not pose a threat to the security of the country and the situation can be handled by deployment of armed forces of the Union in the disturbed area, there appears to be no reason why the drastic power under Article 352 should be invoked. It is, therefore, not possible to hold that the Central Act, which is primarily enacted to confer certain powers on armed forces when deployed in aid of civil power to deal with the situation of internal disturbance in a disturbed area, has been enacted to deal with a situation which can only be dealt with by issuing a proclamation of emergency under Article 352.

20. The contention based on the provisions of Article 356 is also without substance. Reference in this context may be made to Article 355 of the Constitution whereunder a duty has been imposed on the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of the Constitution. In view of the said provision the Union Government is under an obligation to take steps to deal with a situation of internal disturbance in a State. There can be a situation arising out of internal disturbance which may justify the issuance of a proclamation under Article 356 of the Constitution enabling the President to assume to himself all or any of the functions of the Government of the State. That would depend on the gravity of the situation arising on account of such internal disturbance and on the President being satisfied that a situation has arisen where the Government of the State cannot be carried on in accordance with provisions of the Constitution. A proclamation under Article 356 has serious consequences affecting the executive as well as the legislative powers of the State concerned. By issuing such a proclamation the President assumes to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in

the State other than the Legislature of the State and declares that the powers of the Legislature of the State shall be exercisable by or under the authority of parliament. Having regard to the drastic nature of the consequences flowing from a proclamation under Article 356 it is required to be approved by both Houses of Parliament within a prescribed period and it can be continued only with the approval of both Houses of Parliament and it cannot remain in force for more than three years. The provisions of the Central Act have been enacted to enable the Central Government to discharge the obligation imposed on it under Article 355 of the Constitution and to prevent the situation arising due to internal disturbance assuming such seriousness as to require invoking the drastic provisions of Article 356 of the Constitution. The Central Act does not confer on the Union the executive and legislative powers of the States in respect of which a declaration has been made under Section 3. It only enables the personnel of armed forces of the Union to exercise the power conferred under Section 4 in the event of a notification declaring an area to be a disturbed area being issued under Section 3. Having regard to the powers that are conferred under Section 4, we are unable to appreciate how the enactment of the Central Act can be equated with the exercise of the power under Article 356 of the Constitution.

21. The use of the expression "colourable legislation" seeks to convey that by enacting the legislation in question the legislature is seeking to do indirectly what it cannot do directly. But ultimately the issue boils down to the question whether the legislature had the competence to enact the legislation because if the impugned legislation falls within the competence of the legislature the question of doing something indirectly which cannot be done directly does not arise.
22. As regards the competence of Parliament to enact the Central Act, we have already found that keeping in view Entry 1 of the State List and Article 248 read with Entry 97 and Entries 2 and 2A of the Union List Parliament was competent to enact the Central Act in 1958 in exercise of its legislative power under Entry 2 of the Union List and Article 248 read with Entry 97 of the Union List and, after the forty-second amendment of the Constitution, the legislative power to enact the said legislation is expressly conferred under Entry 2A of the Union list and that it cannot be regarded as a law falling under Entry 1 of the State List. Since Parliament is competent to enact the Central Act, it is not open to challenge on the ground of being a colourable legislation or a fraud on the legislative power conferred on Parliament.
23. Having dealt with the question of legislative competence of Parliament to enact the Central Act, we would now proceed to deal with the submissions of the learned

counsel assailing the provisions contained in the Act. The expression 'disturbed area' has been defined in Section 2(b) to mean an area which is for the time being declared by notification under Section 3 to be a disturbed area. Ms. Indira Jaising has assailed the validity of the said provision on the ground that it is vague inasmuch as it does not lay down any guidelines for declaring an area to be a 'disturbed area'. We do not find any substance in this contention. Section 2(b) has to be read with Section 3 which contains the power to declare an areas to be a 'disturbed area'. In the said section declaration about disturbed area can be made where the Governor of that State or the Administrator of that Union Territory of the Central Government is of the opinion that the whole or any part of such Stat or Union Territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the Civil power is necessary. Since the use of armed forces of the Union in aid of the civil power in a state would be in discharge of the obligation imposed on the Union under Article 355 to protect the State against internal disturbance, the disturbance in the area to be declared as 'disturbed area' has to be of such a nature that the Union would be obliged to protect the State against such disturbance. In this context, reference can also be made to Article 257A which was inserted by the Forty-Second Amendment along with Entry 2A of the Union List. Although Article 257A has been deleted by the Forty-Fourth Amendment, it can be looked in to since it gives an indication regarding the disturbance which would be required for deployment of armed forces of the union for use of the Civil power. The said article provided that the Government of India may deploy any armed forces of the Union for dealing with any grave situation of law and order in any State. It can, therefore, be said that for an area to be declared as 'disturbed area' there must exist a grave situation of law and order on the basis of which the Governor/Administrator of the State/Union Territory or the Central Government can form an opinion that area is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary. It cannot, therefore, be said for arbitrary and unguided power has been conferred in the matter of declared an area as disturbed area under Section 2(b) read with Section 3 of the Central Act. The provisions of Section 3 of the Central Act have been assailed by the learned counsel for the petitioners on the ground that there is no requirement of a periodic review of a declaration issued under Section 3 and that a declaration once issued can operate without any limit of time. We are unable to construe Section 3 as conferring a power to issue a declaration without any time limit. The definition of 'disturbed area' in Section 2(b) of the Central Act talks of "an areas which is for the time being declared by notification under Section 3 to be a disturbed area". (emphasis

supplied) The words "for the time being" imply that the declaration under Section 3 has to be for a limited duration and cannot be a declaration which will operate indefinitely. It is no doubt true that in Section 3 there is no requirement that the declaration should be reviewed periodically. But since the declaration is intended to be for a limited duration and a declaration can be issued only when there is grave situation law and order, the making of the declaration carries within it an obligation to review the gravity of the situation from time to time and the continuance of the declaration has to be decided on such a periodic assessment of the gravity of the situation. During the course of the arguments, the learned Attorney General has made the following statement indicating the stand of the Union of India in this regard:-

"It is stated on behalf of the Government of India that it keeps all notifications it has issued under the Armed Forces (Special Powers) Act, under constant review. It states that even in future while the notifications themselves may not mention the period it will review all future notifications within a period of at the most one year from the date of issue, and if continued, within a period of one year regularly thereafter. As far as the current notifications are concerned, their continuance will be reviewed within a period of three months from today. The Government may also review or revoke the notifications earlier depending on the prevailing situation."

24. The learned counsel for the petitioners have urged that the period of one year is unduly long and have invited our attention to the provisions contained in Articles 352 and 356 which postulate periodic review of a proclamation issued under the said provisions after every six months. It has been urged that there is no reason why a longer period should be required for review of a declaration under Section 3 of the Central Act. Keeping in view the fact that the declaration about an area being declared as a 'disturbed area' can be issued only in a grave situation of law and order as well as the extent of the powers that can be exercised under Section 4 of the Central Act in a disturbed area, we are of the view that a periodic review of the declaration made under Section 3 of the Central Act should be made by the Government/Administration that has issued such declaration before the expiry of a period of six months.
25. There is one other aspect which cannot be ignored. The primary task of the armed forces of the Union is to defend the country in the event of war or when it is face with external aggression. Their training and orientation defeat the hostile forces. A situation of internal disturbance involving the local population requires a different approach. Involvement of armed forces in handling such a situation brings them in confrontation with their countrymen. Prolonged or too frequent deployment of armed forces for handling such situations is likely to generate a feeling of alienation among the people

against the armed forces who by their sacrifices in the defence of their country have earned a place in the hearts of the people. It also has an adverse effect on the morale and discipline of the personnel of the armed forces. It is, therefore, necessary that the authority exercising the power under Section 3 to make a declaration so exercises the said power that the extent of the disturbed area is confined to the area in which the situation is such that it cannot be handled without seeking the aid of the armed forces and by making a periodic assessment of the situation after the deployment of the armed forces the said authority should decide whether the declaration should be continued and, in case the declaration is required to be continues, whether the extent of the disturbed area should be reduced. Shri Sibal has urged that the conferment of power to issue a declaration under Section 3 of the Central Act on the Governor of the State is invalid since it amounts to delegation of power of the Central Government and that for the purpose of issuing a declaration the application of mind must be that of the Central Government with respect to the circumstances in which such deployment of armed forces is to take place and that conferment of the power to make a declaration on the Governor of the State cannot be held to be valid. There is a basic infirmity in this contention. There is a distinction between delegation of power by a statutory authority and statutory conferment of power on a particular authority/authorities by the Legislature. Under Section 3 of the Central Act there is no delegation of power of the Central Government to the Governor of the State. What has been done is that the power to issue a declaration has been conferred by Parliament on three authorities, namely, (1) the Governor of the State;(2) the Administrator of the Union Territory, and (3) the Central Government. In view of the information available at the local level the Governor of the State or the Administrator of the Union Territory is in a position to assess the situation and form an opinion about the need for invoking the provisions of the Central Act for use of the armed forces of the Union in aid of the Civil power for the purpose of dealing with the situation that has arisen in the concerned State or the Union Territory. Moreover the issuance of a declaration, by itself, would not oblige the Central Government to deploy the armed forces of the Union. After such a declaration has been issued by the Governor/Administrator the Central Government would have to take a decision regarding deployment of the armed forces of the Union in the area that has been declared as a 'disturbed area'. The conferment of power on the Governor of the State to make the declaration under Section 3 cannot, therefore, be regarded as delegation of power of the Central Government.

26. As regards the provisions contained in Section 4 of the Central Act, Shri Shanti Bhushan has urged that adequate provisions are contained in Sections 130 and 131

of the Cr.P.C. to deal with a situation requiring the use of armed forces in aid of civil power and that there is no justification for having a special law, as the Central Act, unless it can be shown that the said provisions in sections 130 and 131 Cr. P.C. are not adequate to meet the situation. It has been submitted that Sections 130 and 131 Cr.P.C. contain several safeguards for the protection of the rights of the people and that the powers conferred under Section 4 of the Central Act are much more drastic in nature. The submission is that if there are adequate provisions to deal with the situation in the general law (Cr.P.C.) the enactment of more drastic provisions in Section 4 of the Central Act to deal with the same situation is discriminatory and unjustified. In our opinion, this contention is devoid of any force. Section 130 makes provisions for the armed forces being asked by the Executive magistrate to disperse an unlawful assembly which cannot be otherwise dispersed and such dispersal is necessary for the public security. The said provision has a very limited application inasmuch as it enables the Executive magistrate to deal with a particular incident involving breach of public security arising on account of an unlawful assembly and the use of the armed forces for dispersing such unlawful assembly. The Central Act makes provisions for dealing with a different type of situation where the whole or a part of a state is in a disturbed or dangerous condition and it has not been possible for the civil power of the State to deal with it and it has become necessary to seek the aid of the armed forces of the Union for dealing with disturbance. Similarly, under Section 131 Cr.P.C. a commissioned or gazetted officer of the armed forces has been empowered to deal with an isolated incident where the public security is manifestly endangered by any unlawful assembly. The provisions in Section 130 and 131 Cr.P.C. cannot thus be treated as comparable and adequate to deal with the situation requiring the continuous use of armed forces in aid of the civil power for certain period in a particular area as envisaged by the Central Act and it is not possible to hold that since adequate provisions to deal with the situation requiring the use of armed forces in aid of civil power are contained in Sections 130 and 131 CR.P.C. The conferment of the powers on officers of the armed forces under Section 4 of the Central Act to deal with a grave situation of law and order in a State is discriminatory in nature and is violative of Article 14 of the Constitution. The provisions of Section 4, in general, have been assailed by the learned counsel for the petitioners on the ground that the said powers can also be exercised by a non-commissioned officer who is much inferior in rank and that as a result of the conferment of these powers on a junior officer, there is likelihood of the powers being misused and abused. The learned Attorney General has, however, pointed out that an infantry battalion in the area is required to cover large areas

wherein it is deployed on grid pattern with special reference to sensitivity of certain areas and important installations/vital points. The deployment is either in sections or platoons which are commanded by Commissioned Officers and Junior Commissioned Officers respectively. Any operation in a counter insurgency environment is normally under a commissioned officer/junior Commissioned officer, depending on the nature of the operation. However, during an operation the group is required to be further subdivided into teams which are commanded by Non Commissioned Officers. As regards Non Commissioned Officers it has been pointed out that a Jawan is promoted to the rank of Naik after approximately 8 to 10 years of service and to the rank of Havildar after 12 to 15 years of service and that a Non Commissioned Officer exercising powers under Section 4 is a mature person with adequate experience and is reasonably well versed with the legal provisions.

27. Having regard to the status and experience of the Non-Commissioned Officers in the Army and the fact that when in command of a team in a counter insurgency operation they must operate on their own initiative, it cannot be said that conferment of powers under Section 4 on a Non-Commissioned Officer renders the provision invalid on the ground of arbitrariness.
28. We may now examine the submissions of the learned counsel for the petitioners assailing the validity of clauses (a) to (d) of Section 4 of the Central Act. A regards clause (a) of Section 4 the submission is that it empowers any commissioned officer, warrant officer or non-commissioned officer or any other person of equivalent rank in the armed forces to fire upon or otherwise use force even to the causing of death against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or things capable of being used as weapons or of fire arms, ammunition or explosive substances. It has been urged that the conferment of such a wide power is unreasonable and arbitrary. We are unable to agree. The powers under Section 4(a) can be exercised only when (a) a prohibitory order of the nature specified in that clause is in force in the disturbed area; (b) the officer exercising those powers forms the opinion that it is necessary to take action for maintenance of public order against the person/persons acting contravention of such prohibitory order; and (c) a due warning as the officer considers necessary is given before taking action. The laying down of these conditions gives an indication that while exercising the powers the officer shall use minimal force required for effective action against the person/persons acting in contravention of the prohibitory order. In the circumstances, it

cannot be said that clause (a) of Section 4 suffers from the vice of arbitrariness or is reasonable. Shri Dhavan has submitted that the power conferred under Section 4(a) must be so construed that it can be exercised only against armed persons and that the word "or" between the words "assembly or five or more persons" and the words "carrying of weapons" should be read as "and". The language of Section 4(a) does not support the said construction. Clause (a) of Section 4 empowers the use of force against any person who is acting in contravention of any law or order for the time being in force in the disturbed area. It contemplates two types of such orders, viz., (a)) an order prohibiting the assembly of five or more persons, and (b) an order prohibiting the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances. The two orders are different in nature in the sense that an order prohibiting the assembly of five or more persons can be issued under Section 144 Cr.P.C., while an order prohibiting the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances has to be passed under the Arms Act, 1959 or other similar enactment. The word "or" links the two prohibitory orders and if it is read as "and", as suggested by Shri Dhavan, the result would be that action could only be taken under clause (a) where both the prohibitory orders and if it is read as "and", as suggested by Shri Dhavan, the result would be that action could only be taken under clause (a) where both the prohibitory orders were contravened by a person/persons. Such a construction would defeat the purpose of the provision and cannot be accepted. Section 4(b) confers the power to destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made or any structure used as training camp for armed volunteers or utilised as a hide out by armed gangs or absconders wanted for any offence. It is urged that the said power is very wide in its scope and that apart from destruction of any arms dump, fortified positions, shelters and structures used by armed groups for attacks, it extends to destruction of a structure utilised as a hide-out by absconders wanted for any offence and that, to that extent, it is invalid. We do not find any merit in this contention. Absconders wanted for an offence are persons who are evading the legal process. In view of their past activities the possibility of their repeating such activities cannot be excluded and the conferment of the power to destroy the structure utilised as a hide-out by such absconders in order to control such activities cannot be held to be arbitrary or unreasonable. Under clause (c) of Section 4 power has been conferred to arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to

commit a cognizable offence and the concerned officer is empowered to use such force as may be necessary to effect the arrest. The said power is not very different from the power which has been conferred on a police officer under Section 41 Cr.P.C. Clause (c) has to be read with Section 5 of the Central Act which requires that any person arrested and taken into custody shall be made over to the officer in charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest. It has been urged that there is nothing in Section 5 to indicate that the officer exercising the power of arrest Under Section 4(c) is obliged to comply with the requirements of clauses (a) and (2) of Articles 22 of the Constitution. There is no basis for this contention. The power conferred under Section 4(c) read with Section 5 has to be exercised in consonance with the overriding requirements of clauses (1) and (2) of Article 22 of the Constitution which means that the person who is arrested by an officer specified in Section 4 has to be made over to the officer in charge of the nearest police station together with a report of the circumstances occasioning the arrest with the least possible delay so that the person arrested can be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person can be detained in custody beyond the said period without the authority of a magistrate.

29. In clause (d) of Section 4 power has been conferred to enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises, and the concerned officer may for that purpose use such force as may be necessary. Similar powers of search are conferred on a police officer under Section 47 Cr. P.C. It has been urged that in respect of property or arms, ammunition or explosive substances which are seized during the course of search under clause (d) there is no provision similar to Section 5 requiring the officer exercising the said power to hand over this property and arms, ammunition or explosive substances that are recovered in the search to the officer in charge of the nearest police station. It is no doubt true that there is no provision similar to Section 5 requiring the handing over of the property or arms, ammunitions etc. that are seized during the course of search under Section 4(c) but since such seized property or material will be required in the proceedings to be initiated against the culprits from whose possession the same was recovered. it is implicit in the power that has been conferred under Section 4(d) that it should be exercised in accordance with the provisions relating to search an seizure

contained in the Criminal Procedure Code and the Property or the arms ammunitions, etc. that is seized during the course of search under Section 4(d) must be handed over to the officer in charge of the nearest Police Station with the least possible delay together with a report of the circumstances occasioning the search and seizure.

-
30. The learned Attorney General has placed before us instructions in the form of a list of "Do's and Don'ts" that are issued by the Army Headquarters from time to time. The instructions contained in the said list which must be followed while acting under Armed Forces (Special Powers) Act, 1958 are in these terms :-

"List of Do's and Don'ts while acting under armed forces (Special Powers Act, 1958

Do's

1. *Action before Operation*

- (a) *Act only in the area declared 'Disturbed Area' under Section 3 of the Act.*
- (b) *Power to open fire using force or arrest is to be exercised under this Act only by an officer/JCO/WO and NCO.*
- (c) *Before launching any raid/search, definite information about the activity to be obtained from the local civil authorities.*
- (d) *As far as possible co-opt representative of local civil administration during the raid.*

2. *Action during Operation*

- (a) *In case of necessity of opening fire and using any force against the suspect or any person acting in contravention to law and order, ascertain first that it is essential for maintenance of public order. Open fire only after due warning.*
- (b) *Arrest only those who have committed cognizable offence or who are about to commit cognizable offence or against whom a reasonable ground exists to prove that they have committed or are about to commit cognizable offence or against whom a reasonable ground exists to prove that they have committed or are about to commit cognizable offence.*
- (c) *Ensure that troops under command do not harass innocent people, destroy property of the public or unnecessarily enter into the house/dwelling of people not connected with any unlawful activities.*
- (d) *Ensure that women are not searched/arrested without the presence of female police. In fact women should be searched by female police only.*

3. *Action after operation*

- (a) *After arrest prepare a list of the persons so arrested.*
- (b) *Handover the arrested persons to the nearest Police Station with least possible delay.*

- (c) While handing over to the police a report should accompany with detailed circumstances occasioning the arrest.
 - (d) Every delay in handing over the suspects to the police must be justified and should be reasonable depending upon the place, time of arrest and the terrain in which such person has been arrested. Least possible delay may be 2-3 hours extendable to 24 hours or so depending upon particular case .
 - (e) After raid make out a list of all arms, ammunition or any other incriminating material/document taken into possession.
 - (f) All such arms, ammunition, stores, etc. should be handed over to the police State alongwith the seizure memo.
 - (g) Obtain receipt of persons arms/ammunition, stores etc. so handed over to the police.
 - (h) Make record of the area where operation is launched having the date and time and the persons participating in such raid.
 - (i) Make a record of the commander and other officers/JCOs/NCOs forming part of such force.
 - (k) Ensure medical relief to any person injured during the encounter, if any person dies in the encounter his dead body be handed over immediately to the police alongwith the details leading to such death.
4. Dealing with Civil Court
- (a) Directions of the High Court/Supreme Court should be promptly attended to.
 - (b) Whenever summoned by the courts, decorum of the court must be maintained and proper respect paid.
 - (c) Answer questions of the court politely and with dignity.
 - (d) Maintain detailed record of the entire operation correctly and explicitly.

Don'ts

1. Do not keep a person under custody for any period longer than the bare necessity for handing over to the nearest Police Station.
2. Do not use any force after having arrested a person except when he is trying to escape.
3. Do not use third degree methods to extract information or to extract confession or other involvement in unlawful activities.
4. After arrest of a person by the member of the Armed forces, he shall not be interrogated by the member of the Armed force.
5. Do not release the person directly after apprehending on your own. If any person is to be released, he must be released through civil authorities.
6. Do not temper with official records.

7. *The Armed Forces shall not take back person after he is handed over to civil police."*
31. The instructions in the List of "Do's and Don'ts" which must be followed while providing aid to the civil authority are as under:-

"List of Do's and Don'ts while providing aid to civil authority

Do's

1. *Act in closest possible communication with civil authorities throughout.*
2. *Maintain inter-communication if possible by telephone/radio.*
3. *Get the permission/requisition from the Magistrate when present.*
4. *Use the little force and do as little injury to person and property as may be consistent with attainment of objective in view.*
5. *In case you decide to open fire:-*
 - (a) *Give warning in local language that fire will be effective.*
 - (b) *Attract attention before firing by bugle or other means.*
 - (c) *Distribute your men in fire units with specified Commanders.*
 - (d) *Control fire by issuing personal orders.*
 - (e) *Control fire by issuing personal orders.*
 - (f) *Note number of rounds fired.*
 - (g) *Aim at the front of crowd actually rioting or inciting to riot or at conspicuous ring leaders, i.e, do not fire into the thick of the crowd at the back.*
 - (h) *Aim low and shoot for effect.*
 - (i) *Keep Light Machine Gun and medium Gun in reserve.*
 - (j) *Cease firing immediately once the object has been attained.*
 - (k) *Take immediate steps to secure wounded.*
6. *Maintain cordial relations with civilian authorities and Para Military Forces.*
7. *Ensure high standard of discipline.*

Don'ts

8. *Do not use excessive force.*
9. *Do not get involved in hand to hand struggle with the mob.*
10. *Do not ill treat any one, in particular, women and children.*
11. *No harassment of civilians.*
12. *No torture.*
13. *No meddling in civilian administration affairs*
14. *No meddling in civilian administration affairs*

15. *No military disgrace by loss/surrender of weapons.*
16. *Do not accept presents, donations and rewards*
17. *Avoid indiscriminate firing."*
32. The learned Attorney General has submitted that these instructions provide an effective check against any misuse or abuse of the powers conferred under the Central Act on an officer in the armed forces inasmuch as contravention of these instructions is punishable under Sections 41, 42(e), 63 and 64(f) of the Army Act, 1950.
33. The instructions in the form of "Do's and Don'ts" to which reference has been made by the learned Attorney General have to be treated as binding instructions which are required to be followed by the members of the armed forces exercising powers under the Central Act and a serious note should be taken of violation of the instructions and the persons found responsible for such violation should be suitably punished under the Army Act, 1950. While considering the submissions assailing the validity of clauses (a) to (d) of Section 4 and Section 5, we have construed the said provisions as containing certain safeguards against arbitrary exercise of power. In this context, reference may also be made to the order dated July 4, 1991 passed by this Court in Civil Appeal No. 2551 of 1991 wherein, after taking note of the list of "Do's and Don'ts" referred-to-above, this Court gave the following direction :-

"The Army Officers while effecting the arrest of woman or making search of woman or in searching the place in the actual occupancy of a female shall follow the procedure meant for the police officers as contemplated under the various provisions of the Code of Criminal Procedure, namely, the proviso to sub-section (2) of Section 47, sub-section (2) of Section 51, Sub-section (3) of Section 100 and proviso to sub-section (1) of section 160 of the Code".
34. The safeguards against an arbitrary exercise of powers conferred under Section 4 and 5 as indicated above as well as the said direction should be incorporated in the instructions contained in the list of "Do's and Dont's" and the instructions should be suitably amended to bring them in conformity with the guidelines contained in the decisions of this Court in this regard.
35. In order that the people may feel assured that there is an effective check against misuse or abuse of powers by the members of the armed forces it is necessary that a complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act should be thoroughly inquired into and, if it is found that there is substance in the allegation, the victim should be suitably compensated by the state and the requisite sanction under Section 6 of the Central Act should be granted for

- institution of prosecution and/or a civil suit or other proceeding against the person/persons responsible for such violation.
36. Having dealt with the submissions on the validity of the Central Act, we would now proceed to deal with the submissions on the validity of the State Act. The challenge is confined to Section 3 to 6 of the State Act. Section 3 contains the power to declare an area is a "disturbed area" and is similar to Section 3 of the Central Act. Section 4 contains provisions similar to those contained in Section 4(a) of the Central Act, while Section 5 contains provisions similar to those contained in Section 4(b) of the Central Act. The only difference is that the powers under Section 4 and 5 of the State Act are not conferred on an officer of the armed forces but are conferred on any Magistrate or Police Officer not below the rank of Sub-Inspector or Havildar in case of the Armed Branch of the police or any officer of the Assam Rifles not below the rank of Havildar/Jamadar. The words "or any officer of the Assam Rifles not below the rank of Havildar/jamadar" have been struck down by the Delhi High Court in the judgment dated June 3, 1983 on the view that Assam Rifles are part of the armed forces of the Union and the State legislative is not competent to legislate in that regard. Since no appeal has been filed by the State of Assam against the said part of the judgment of the Delhi High Court it has become final. Section 6 contains protection regarding institution of prosecution and a suit or other civil proceeding in the same terms as Section 6 of the Central Act.
37. The construction placed by us on the provisions of Sections 3 and 6 of the Central Act and the reasons given for upholding the validity of the same equally apply to Sections 3 and 6 of the State Act and on the same basis the said provisions of the State Act must be upheld as valid. The reasons given by us for upholding the said provisions of the Central Act would equally apply in so far as the said challenge to the validity of Sections 4 and 5 of the State Act is concerned.
38. As regards the submission of Shri Goswami that the provisions of Section 4 and 5 of the State Act are repugnant to the provisions contained in Cr.P.C. and the Arms Act, it may be said that in pith and substance the State Act is a law enacted in exercise of powers under Entry 1 of List II relating to public order. It is not a law enacted under any of the entries in the Concurrent List (List III). The question of invalidity of the said provisions in the State Act on the ground of being repugnant to a central legislation, e.g., Cr.P.C. enacted under Entry 2 of List III under Article 254 of the Constitution does not, therefore, arise and Section 4 and 5 of the State Act cannot be assailed on the ground that the same being repugnant to the provisions of Cr.P.C. are unconstitutional

in view of Article 254 of the Constitution. The contention of Shri Goswami that the provisions of Sections 4 and 5 of the State Act are inconsistent with the provisions of Arms Act enacted by Parliament also cannot be accepted because the said provisions only provide for effective enforcement of the provisions of the Arms Act in the disturbed areas and it cannot be said that they, in any way, encroach upon the field covered by the Arms Act. The challenge to the validity of Sections 4 and 5 of the State Act is, therefore, negated.

39. The learned Attorney General has submitted that the High Court was in error in striking down the notification date November 27, 1990 in its application to rest of the districts placing reliance on the decision of special Bench of this Court in *S.R. Bommai v. Union of India*, 1994 (3) SCC 1, the learned Attorney General has urged that in exercise of the power of judicial review in respect of a notification issued under Section 3 of the Central Act it was not open to the High Court to assess the material on the basis of which the Central Government formed the opinion for the purpose of making declaration under Section 3 of the Central At. All that the High Court could see is whether the material on the basis of which the opinion is formed is relevant but the Court could not go into the sufficiency of that material. We find merit in the aforesaid submission of the learned Attorney General. We have carefully perused the Report sent by the Governor of Assam. On the basis of the said Report it cannot be said that the districts which have been excluded from the notification by the High Court could not be declared as "disturbed areas" inasmuch as in his Report the Governor has referred to the entire State of Assam and has said:-

"Apart from killings, according to reports received, many people were kidnapped and released after the ransom was paid. The extortion, to begin with, was on a limited scale. Magnitude of loot and plunder, however, became colossal in due course of time, presumably in view of the State Government's failure to act."

40. The Governor has mentioned that the districts of Tinsukia, Dibrugarh, Sibsagar, Jorhat and Nagaon on the South Bank of Brahmaputra dn those of Dhemaji, Lakhimpur, Sonitpur, Darrang, Nalbari and Barpeda on the North Bank of Brahmaputra are the worst sufferers. But that does not mean that other areas were not affected. In the concluding part of his Report the Governor has said:-

"The Cumulative consequence of all this is that the entire State is gripped by fear psychosis. The holders of public offices have been rendered totally ineffective. The statutory authorities are in a state of panic incapable of discharging their function. The holders of constitutional offices stand totally emasculated so much so that the State Cabinet cannot even discuss the situation."

"The loss of faith in the efficacy and the credibility of the Government apparatus is so great that the thin distinction between ULFA, AASU and AGP which existed at some stage, stands totally obliterated. Gloom hangs over the whole state. By the fall of the dusk, the people are huddled in their homes. Nobody's life, property or honour is safe. The basic attributes of a civilised and orderly society stand annihilated."

41. It cannot, therefore, be said that there was no material before the Central Government on the basis of which it could form the requisite opinion of the purpose of making a declaration under Section 3 of the Central Act covering the entire State of Assam. The impugned direction given by the High Court that the notifications dated November 27, 1990 issued under Section 3 of the Central Act shall not apply to the districts aforementioned cannot, therefore, be sustained and has to be set aside.
42. In support of the notification dated December 7, 1990 issued under Section 3 of the State Act the State Government had relied upon the intelligence reports that were received by the State Government with regard to prevailing conditions. The High Court has, however, struck down the said notification in relation to the districts aforementioned for the reason that the notification issued by the Central Government under the Central Act was being struck down in respect of those districts and the notification of the State Government could not also be sustained in respect of those districts. In the circumstances we are unable to uphold the direction of the High Court [direction No. (i)] that notification dated November 27, 1990 issued under the Central Act and notification dated December 7, 1990 issued under the State Act shall apply not in the districts of Golaghat, Morigaon, Dhubri, Kakrojhar, Bongaigaon, Goalpara, Kamrup (except the city of Gauhati), Karbi Anglong, North Cachar Hills, Cachar, Karimganj and Hailakandi and the said direction is , therefore, set aside.
43. The High Court has also directed [direction No. (ii)] that the Central Government, under the Central Act, and the State Government, under the State Act should review every calendar month whether the two notifications are necessary to be continued. In the context of Section 3 of the Central Act we have considered this question and have expressed the view that such periodic review should take place before the expiry of six months. The said requirement for a periodic review would also apply to a notification issued under Section 3 of the State Act. In the circumstances, we are unable to uphold this direction given by the High Court.
44. The other direction [direction No. (iii)] given by the High Court is that the Central Government and the State Government should issue following instructions to the officers who have been conferred the powers under the Central Act and State Act :-

- (a) any person arrested by the armed forces or other armed forces of the union shall be handed over to the nearest police station with least possible delay and be produced before the nearest magistrate within 24 hours from the time of arrest.
 - (b) a person who either had committed a cognizable or against whom reasonable suspicion exists such persons alone are to be arrested, innocent persons are not to be arrested and later to give a clean chit to them as is being ‘white’.
45. The said direction is in consonance with the construction placed by us on the provisions of Sections 4(c) and 5 of the Central Act and the same is, therefore, upheld. Civil Appeals Nos. 2173-76 of 1991 have, therefore, to be allowed to the extent that the directions Nos. (i) and (ii) given by the High Court in the impugned judgment are set aside.

46. In the light of the above discussion we arrive at the following conclusions:-

- (1) Parliament was competent to enact the Central Act in exercise of the legislative power conferred on it under Entry 2 of List I and Article 248 read with Entry 97 of List I. After the insertion of Entry 2A in List I by the Forty-Second Amendment to the Constitution, the legislative power of Parliament to enact the Central Act flows from Entry 2A of List I. It is not a law in respect of maintenance of public order falling under Entry I of list II.
- (2) The expression “in aid of the civil power” in Entry 2A of List I and in Entry 1 of List II implies that deployment of the armed forces of the Union shall be for the purpose of enabling the civil power in the State to deal with the situation affecting maintenance of public order which has necessitated the deployment of the armed forces in the State.
- (3) The word “aid” postulates the continued existence of the authority to be aided. This would mean that even after deployment of the armed forces the civil power will continue to function.
- (4) the power to make a law providing for deployment of the armed forces of the Union in aid of the civil power of a State does not include within its ambit the power to enact a law which would enable the armed forces of the Union to supplant or act as a substitute for the civil power in the State. The armed forces of the Union would operate in the State concerned in co-operation with the civil administration so that the situation which has necessitated the deployment of armed forces is effectively dealt with and normalcy is restored.

- (5) The Central Act does not displace the civil power of the state by the armed forces of the Union and it only provides for deployment of armed forces of the Union in aid of the Civil Power.
- (6) The Central Act cannot be regarded as a colourable legislation or a fraud on the Constitution. It is not a measure intended to achieve the same result as contemplated by a Proclamation of Emergency under Article 352 or a proclamation under Article 356 of the Constitution.
- (7) Section 3 of the Central Act does not confer an arbitrary or unguided power to declare an area as a “disturbed area” for declaring an area as a “disturbed area” under Section 3 there must exist a grave situation of law and order on the basis of which the Governor/Administrator of the State/Union Territory of the Central Government can form an opinion that the area is in such a disturbed or dangerous condition that the use of the armed forces in aid of the civil power is necessary.
- (8) A declaration under Section 3 has to be for a limited duration and there should be periodic review of the declaration before the expiry of six months.
- (9) Although a declaration under Section 3 can be made by the Central Government suo moto without consulting the concerned State Government, but it is desirable that the State Government should be consulted by the Central Government while making the declaration.
- (10) The conferment of the power to make a declaration under Section 3 of the Central Act on the Governor of the State cannot be regarded as delegation of the power of the Central Government.
- (11) The conferment of the power to make a declaration under Section 3 of the Central Act on the Central Government is not violative of the federal scheme as envisaged by the Constitution.
- (12) The provisions contained in Sections 130 and 131 Cr.P.C. cannot be treated as comparable and adequate to deal with the situation requiring the use of armed forces in aid of civil power as envisaged by the Central Act.
- (13) The Powers conferred under clauses (a) to (d) of Section 4 and Section 5 of the Central Act on the officers of the armed forces, including a Non-Commissioned Officer are not arbitrary and unreasonable and are not violative of the provisions of Articles 14, 19 or 21 of the Constitution.
- (14) While exercising the powers conferred under Section 4(a) of the Central Act, the officer in the armed forces shall use minimal force required for effective action

against the person/persons acting in contravention of the prohibitory order.

- (15) A person arrested and taken into custody in exercise of the powers under Section 4(c) of the Central Act should be handed over to the officer-in-charge of the nearest police station with least possible delay so that he can be produced before nearest magistrate within 24 hours of such arrest excluding the time taken for journey from the place of arrest to the court of magistrate.
- (16) The property or the arms, ammunitions, etc. seized during the course of search conducted under Section 4(d) of the Central Act must be handed over to officer-in-charge of the nearest police station together with a report of the circumstances occasioning such search and seizure.
- (17) The provisions of Cr.P.C. governing search and seizure have to be followed during the course of search and seizure conducted in exercise of the powers conferred under Section 4(d) of the Central Act.
- (18) Section 6 of the Central Act in so far as it confers a discretion on the Central Government to grant or refuse sanction for instituting prosecution or a suit or proceeding against any person in respect of anything done or purported to be done in exercise of the powers conferred by the Act does not suffer from the vice of arbitrariness. Since the order of the Central Government refusing or granting the sanction under Section 6 is subject to judicial review, the Central Government shall pass an order giving reasons.
- (19) While exercising the powers conferred under clauses (a) to (d) of Section 4 the officers of the armed forces shall strictly follow the instructions contained in the list of "Do's and Don'ts" issued by the army authorities which are binding and any disregard to the said instructions would entail suitable action under the Army Act, 1950.
- (20) The instructions contained in the list of "Do's and Don'ts" shall be suitably amended so as to bring them in conformity with the guidelines contained in the decisions of this Court and to incorporate the safeguards that are contained in clauses (a) to (d) of Section 4 and Section 5 of the Central Act as construed and also the direction contained in the order of this Court dated July 4, 1991 in Civil Appeal No. 2551 of 1991.
- (21) A complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act shall be thoroughly enquired into and, if on enquiry it is found that the allegations are correct, the victim should be suitably

compensated and the necessary sanction for institution of prosecution and/or a suit or other proceeding should be granted under Section 6 of the Central Act.

- (22) The State Act is, in pith and substance, a law in respect of maintenance of public order enacted in exercise of the legislative power conferred on the State Legislature under Entry 1 of List II.
- (23) The Expression "or any officer of the Assam Rifles not below the rank of Havildar" occurring in Section 4 and the expression "or any officer of the Assam Rifles not below the rank of Jamadar" in Section 5 of the State Act have been rightly held to be unconstitutional by the Delhi High Court since Assam Rifles are a part of the armed forces of the Union and the State Legislature in exercise of its power under Entry of List II was not competent to enact a law in relation to armed forces of the Union.
- (24) The rest of the provisions of Sections 4 and 5 of the State Act are not open to challenge under Article 254 of the Constitution on the ground of repugnance to the provisions contained in Cr.P.C. and the Arms Act.
- (25) The considerations governing the exercise of the powers conferred under Sections 3 to 6 of the Central Act indicated above will also apply to exercise of powers conferred under Sections 3 to 6 of the State Act.
- (26) The directions Nos. (i) and (ii) given by the Gauhati High Court in its judgment dated March 20, 1991 cannot be sustained and must be set aside.

Conclusion

In order to curb violations of human rights of the detainees under the present security legislation in India it is necessary that the activities of the appointed personnel are in compliance with United Nations international instruments like *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984* and *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985*.

The observance of the following provisions is very important:

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985.

Access to justice and fair treatment

- 4. *Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.*

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.
6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
 - (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
 - (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
 - (c) Providing proper assistance to victims throughout the legal process;
 - (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
 - (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.
7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

WOMEN

Introduction

The United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955, while laying down the general rules applicable to the prisoners has specifically mentioned that there shall be no discrimination on grounds of gender and that women should be detained/imprisoned in institutions, specially designed for their requirements. The guidelines framed by the Justice Krishna Iyer Committee, 1987 have highlighted that women prisoners are primarily vulnerable to various abuses, especially abuses of a sexual nature, in a prison like environment and have recommended the appointment of more women officers in police and prison administration to ensure the safety and security of women prisoners. In today's date there are 16 women's jails operating in India and women consist 4% of the total prison population. The Committee on Empowerment of Women, 2002-2003 concentrated on the issues relating to women in detention. On a closer look at the report of the 2003 committee it becomes clear that the issues such as bail and temporary release of women from jails have not been addressed in depth. The Prisons Act, 1984, does not adequately prescribe separate norms for females. Moreover, gross exploitation of women has been seen in various prisons in the country and this demands a very serious revision of the implementation policies. The following case laws are useful to understand the special rights entitled to women prisoners.

In *Sheela Barse's* case (1983 (2) SCC 96), a journalist interviewed women prisoners in the Bombay Central Jail and had reported that the police assaulted and tortured the women inmates. To verify the allegations the Director of the College of Social Work was directed by the Court to visit the jail and make a report. Her report showed that there was no legal assistance for women, that the conditions of women in jail were abysmal and that lawyers had duped inmates of their belongings. The following suggestions regarding provisions of legal aid to women in jails were made:

- (i) Details relating to undertrials must be sent to the Legal Aid Committees with separate details in respect of men and women.
- (ii) Details were to be furnished about prisoners arrested 'on suspicion' under Section 41 of the Criminal Procedure Code and also in respect of those who were in jail for more than 15 days.
- (iii) Facilities were to be provided for visits and interviews by lawyers in private.

- (iv) In the Bombay area the police were to set aside five lockups in good localities for women only. Women were not to be kept on male lockups. Interrogations were to be done only in the presence of female constables.
- (v) Arrest without warrant out not to be done as far as possible. The accused immediately on arrest must be informed of the grounds of her arrest and she must be immediately informed of her right to bail.
- (vi) Every arrest should be intimated to the Legal Aid Committees.
- (vii) A women judge ought to be appointed for surprise visits to lockups specially to look after the interest of female prisoners.
- (viii) On arrest the police must immediately inform relatives and friends of the accused about the arrest.
- (ix) When produced in Court, the Magistrate must enquire from the accused about torture and must inform him of his rights, in respect of medical examination and free legal aid.

State of Maharashtra vs. C.K. Jain (AIR 1990 SC 658), concerned rape in police custody. Regarding evidence, the Supreme Court emphasized that in such cases unless the testimony of the prosecutions was unreliable, collaboration normally should not be insisted upon. Secondly, the presumption is to be made that ordinarily no woman would make a false allegation of rape. Thirdly, delay in the making of a complaint is not fatal and quite understandable reasons exist for delay on the part of the victim woman in making a complaint against the police. As far as sentence was concerned there was no room for leniency, the punishment must be exemplary.

In *Rekha M. Kholkar's* case (1995 (4) Bom Cr. 263), the Bombay High Court held that the provision of Section 160 (1) of the Code of Criminal Procedure prohibiting examination of women by police in any place other than their place of residence is mandatory and directed its strict compliance. The Court also awarded compensation to the victim for physical and mental torture.

In *Christian Community Welfare Council of India vs. Government of Maharashtra* [(1996) (1) Bom CR 70], the Bombay High Court directed that woman should not be arrested after sunset and before sunrise and only in the presence of lady constables. The Court directed the State Government to set up a Committee to formulate a comprehensive scheme for police accountability to human rights abuse and make special provisions for female detainees.

The Supreme Court in the case of *R.D. Upadhyay vs. State of Andhra Pradesh and Ors.*, (AIR 2006 SC 1946) laid down guidelines for the treatment of pregnant women in prison as well as their children. These included:

- Arrest of women should be made by lady officers only.
- Under Section 60(1) (d) of the Jail Manual bill, temporary or special leave can be granted to a prisoner having sufficient cause, and women who are pregnant can exercise this provision.
- Before sending a pregnant woman to jail, the concerned authorities must ensure that the jail in question has basic minimum facilities for child delivery.
- If a woman is found to be pregnant, it must be reported, and the woman should be sent to the female wing of the District Government Hospital to be periodically examined.
- Prenatal, postnatal care as well as all gynaecological examinations of the women will be conducted in the District Government Hospital.
- As far as possible, arrangements of temporary release or parole of the woman should be made for her delivery for the safety of both mother and child.
- Births in prison have to be registered at the local Birth Registration Office. It should not be mentioned that the child was born in prison.
- All facilities for naming rites should be extended.

In the case of *State of Maharashtra vs. Christian Community Welfare Council of India and Anr.*, (2003 (8) SCC 546) the direction given in the earlier case regarding arrest of women was modified by the Supreme Court. The Court held that while arresting a female person, all efforts should be made to keep a lady constable present but in circumstances where the arresting officer is reasonably satisfied that such presence of a lady constable is not available, or possible, and/or the delay in arresting caused by securing the presence of a lady constable would impede the course of investigation, such arresting officer for reasons to be recorded, either before the arrest, or immediately after the arrest, be permitted to arrest a female person for lawful reasons at any time of the day or night depending on the circumstances of the case even without the presence of a lady constable.

The Legal Aid Committee, High Court of A.P., (2003 (1) ALT 221), was a petition filed on behalf of the Committee constituted as per the suggestions of the Supreme Court Legal Aid Committee to look into all aspects of the conditions of the prisoners in jail, particularly with regard to juveniles, women prisoners and undertrials in prisons, and facilities of library, education, recreation, etc. for prisoners. On the records together with the reports

from 23 districts of Andhra Pradesh submitted by the Committee, the Andhra Pradesh High Court ensured that the following provisions were made in the jails with regard to women prisoners:

- Separate cells for male and female prisoners.
- Separate provision for lodging of female prisoners.
- Adequate drinking water facilities
- Construction of additional accommodation in some more jails
- Separate bathrooms and latrines for female prisoners
- State Jails for women are managed exclusively by women staff, while in other jails whenever female prisoners are admitted only female attendants will guard them.

World Human Rights Protection v. Union of India (UOI) and Ors., (AIR 2004 J&K 6), was a case of a woman from Pakistan found on Indian Territory. While in India she was held in custody, raped and became pregnant. She gave birth to a child on Indian soil. The High Court of Jammu & Kashmir while dealing with the issue of women in custody, and the care and citizenship of their child held that it is not in dispute that the minor is in custody along with her mother and for this detention she is not at fault. Therefore a writ of habeas corpus can be issued for securing the release of the minor but the further question would arise that whether the minor can stay without her mother. The Court held that even under Mohammedan law the mother has been held entitled to custody of person of a minor child. The right continues till she remains minor or unmarried. As the minor cannot stay without her mother and the mother being the legal guardian, therefore the consequential order of releasing the mother was also passed.

With regard to the citizenship of the child the Court ruled that as per Section 3(b) of the Citizenship Act, 1955, every person born in India and either of whose parents is a citizen of India at the time of his birth is to be treated as citizen of India by birth. As the minor was conceived in India, therefore, *prima facie* it has to be presumed that one of her parents is a citizen of India. The minor, therefore, would also be deemed to be a citizen of India, and would be treated as a domicile of the State of Jammu and Kashmir.

The Court further held that since the minor child was conceived in India while the mother was in custody, therefore, it is to be presumed that it is the servants of the State who are responsible for this act. The Court therefore ordered that a sum of Rs. 3 lakhs be paid as compensation to the minor child and the mother, and a suitable Government accommodation be made available to her.

**Supreme Court of India
1983 (2) SCC 96**

**Sheela Barse
vs
State of Maharashtra**

P.N. bhagwati, R.S. pathak, Amarendra Nath Sen,JJ

Bhagwati, J. This writ petition is based on a letter addressed by Sheela Barse, a journalist, complaining of custodial violence to women prisoners whilst confined in the police lock up in the city of Bombay. The petitioner stated in her letter that she interviewed fifteen women prisoners in the Bombay Central Jail with the permission of the Inspector General of Prisons between 11 and 17th May, 1982 and five out of them told her that they had been assaulted by the police in the police lock up. Of these five who complained of having been assaulted by the police, the petitioner particularly mentioned the cases of two, namely, Devamma and Pushpa Paeen who were allegedly assaulted and tortured whilst they were in the police lock up. It is not necessary for the purpose of this writ petition to go into the various allegations in regard to the ill-treatment meted out to the women prisoners in the police lock up and particularly the torture and beating to which Devamma and Pushpa Paeen were said to have been subjected because we do not propose to investigate into the correctness of these allegations which have been disputed on behalf of the State of Maharashtra. But, since these allegations were made by the women prisoners interviewed by the petitioner and particularly by Devamma and Pushpa Paeen and there was no reason to believe that a journalist like the petitioner would invent or fabricate such allegations if they were not made to her by the women prisoners, this Court treated the letter of the petitioner as a writ petition and issued notice to the State of Maharashtra, Inspector General of Prisons, Maharashtra, Superintendent, Bombay Central Jail and the Inspector General of Police, Maharashtra calling upon them to show cause why the writ petition should not be allowed. It appears that on the returnable date of the show cause notice no affidavit was filed on behalf of any of the parties to whom show cause notice was issued and this Court therefore adjourned the hearing of the writ petition to enable the State of Maharashtra and other parties to file an affidavit in reply to the averments made in the letter of the petitioner. This Court also directed that in the meanwhile Dr. (Miss) A.R. Desai, Director of College of Social Work, Nirmala Niketan, Bombay will visit the Bombay Central Jail and interview women prisoners lodged there including Devamma and Pushpa Paeen without any one else being present at the time of interview and ascertain whether they had been subjected to any torture or ill-

treatment and submit a report to this Court on or before 30th August, 1982. The State Government and the Inspector General of Prisons were directed to provide all facilities to Dr. Miss A.R. Desai to carry out this assignment entrusted to her. The object of assigning this commission to Dr. Miss A.R. Desai was to ascertain whether allegations of torture and ill-treatment as set out in the letter of the petitioner were, in fact, made by the women prisoners including Devamma and Pushpa Paeen to the petitioner and what was the truth in regard to such allegations. Pursuant to the order made by this Court, Dr. Miss A.R. Desai visited Bombay Central prison and after interviewing women prisoners lodged there, made a detailed report to this Court. The Report is a highly interesting and instructive socio-legal document which provides an insight into the problems and difficulties facing women prisoners and we must express our sense of gratitude to Dr. Miss A.R. Desai for the trouble taken by her in submitting such a wonderfully thorough and perceptive report. We are not concerned here directly with the conditions prevailing in the Bombay Central Jail or other jails in the State of Maharashtra because the primary question which is raised in the letter of the petitioner relates to the safety and security of women prisoners in police lock up and their protection against torture and ill-treatment. But even so we would strongly recommend to the Inspector General of Prisons, Maharashtra that he may have a look at this Report made by Dr. Miss A.R. Deasai and consider what further steps are necessary to be taken in order to improve the conditions in the Bombay Central Jail and other jails in the State of Maharashtra and to make life for the women prisoners more easily bearable by them. There is only one matter about which we would like to give directions in this writ petition and that is in regard to the need to provide legal assistance not only to women prisoners but to all prisoners lodged in the jails in the State of Maharashtra. We have already had occasion to point out in several decisions given by this Court that legal assistance to a poor or indigent accused who is arrested and put in jeopardy of his life or personal liberty is a constitutional imperative mandated not only by Article 39 but also by Articles 14 and 21 of the Constitution. It is a necessary sine qua non of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the foundations of democracy and rule of law, because nothing rankles more in the human heart than a feeling of injustice and those who suffer and cannot get justice because they are priced out of the legal system, lose faith in the legal process and a feeling begins to overtake them that democracy and rule of law are merely slogans or myths intended to perpetuate the domination of the rich and the powerful and to protect the establishment and the vested interests. Imagine the helpless condition of a prisoner who is lodged in a jail who does not know to whom he can turn for help in order to vindicate his innocence or defend his constitutional or legal rights or to protect

himself against torture and ill-treatment or oppression and harassment at the hands of his custodians. It is also possible that he or the members of his family may have other problems where legal assistance is required but by reason of his being incarcerated, it may be difficult if not impossible for him or the members of his family to obtain proper legal advice or aid. It is therefore absolutely essential that legal assistance must be made available to prisoners in C: jails whether they be under-trial or convicted prisoners.

The Report of Dr. Miss A.R. Desai shows that there is no adequate arrangement for providing legal assistance to women prisoners and we dare say the situation which prevails in the matter of providing legal assistance in the case of women prisoners must also be the same in regard to male prisoners. It is pointed out in the Report of Dr. Miss A.R. Desai that two prisoners in the Bombay Central Jail, one a German national and the other a Thai national were duped and defrauded by a lawyer, named Mohan Ajwani who misappropriated almost half the belongings of the German national and the jewellery of the Thai national on the plea that he was retaining such belongings and jewellery for payment of his fees. We do not know whether this allegation made by these two German and Thai women prisoners is true or not but, if true, it is a matter of great shame for the legal profession and it needs to be thoroughly investigated. The profession of law is-a noble profession which has always regarded itself as a branch of social service and a lawyer owes a duty to the society to help people in distress and more so when those in distress are women and in jail. Lawyers must realise that law is not a pleasant retreat where we are concerned merely with mechanical interpretation of rules made by the legislature but it is a teeming open ended avenue through which most of the traffic of human existence passes. There are many casualties of this traffic and it is the function of the legal profession to help these casualties in a spirit of dedication and service. It is for the lawyers to minimize the numbers of those casualties who still go without legal assistance. The lawyers must positively reach out to those sections of humanity who are poor, illiterate and ignorant and who, when they are placed in a crisis such as an accusation of crime or arrest or imprisonment, do not know what to do or where to go or to whom to turn. If lawyers, instead of coming to the rescue of persons in distress, exploit and prey upon them, the legal profession will come into disrepute and large masses of people in the country would lose faith in lawyers and that would be destructive of democracy and rule of law. If it is true—that these two German and Thai women prisoners were treated by Mohan Ajwani in the manner alleged by them—and this is a question on which we do not wish to express any opinion ex parte—it deserves the strongest condemnation. We would therefore direct that the allegations made by the two German and Thai women prisoners as set out in paragraph 9.2 of the Report of Dr. Miss A.R. Desai be referred

to the Maharashtra State Bar Council for taking such action as may be deemed fit. But, this incident highlights the need for setting up a machinery for providing legal assistance to prisoners in jails. There is fortunately a legal aid organisation in the State of Maharashtra headed by the Maharashtra State Board of Legal Aid and Advice which has set up committees at the High Court and district levels. We would therefore direct the Inspector General of Prisons in Maharashtra to issue a circular to all Superintendents of Police in Maharashtra requiring them-

- (1) to send a list of all under-trial prisoners to the Legal Aid Committee of the district in which the jail is situate giving particulars of the date of entry of the under-trial prisoners in the jail and to the extent possible, of the offences with which they are charged and showing separately male prisoners and female prisoners
- (2) to furnish to the concerned District Legal Aid Committee a list giving particulars of the persons arrested on suspicion under section 41 of the Code of Criminal Procedure who have been in jail beyond a period of 15 days.
- (3) to provide facilities to the lawyers nominated by the concerned District Legal Aid Committee to enter the jail and to interview the prisoners who have expressed their desire to have their assistance.
- (4) to furnish to the lawyers nominated by the concerned District Legal Aid Committee whatever information is required by them in regard to the prisoners in jail.
- (5) to put up notices at prominent places in the jail that lawyers nominated by the concerned District Legal Aid Committee would be visiting the jail on particular days and that any prisoner who desires to have their assistance can meet them and avail of their counselling services; and
- (6) to allow any prisoner who desires to meet the lawyers nominated by the concerned District Legal Aid Committee to interview and meet such lawyers regarding any matter for which he requires legal assistance and such interview should be within sight but out of hearing of and jail official.

We would also direct that in order to effectively carry out these directions which are being given by us to the Inspector General of Prisons, the Maharashtra State Board of Legal Aid and Advice will instruct the District Legal Aid Committees of the districts in which jails are situate to nominate a couple of selected lawyers practising in the district court to visit the jail or jails in the district atleast once in a fortnight with a view to ascertaining whether the law laid down by the Supreme Court and the High Court of Maharashtra in

regard to the rights of prisoners including the right to apply for bail and the right to legal aid is being properly and effectively implemented and to interview the prisoners who have expressed their desire to obtain legal assistance and to provide them such legal assistance as may be necessary for the purpose of applying for release on bail or parole and ensuring them adequate legal representation in courts, including filing or preparation of appeals or revision applications against convictions and legal aid and advice in regard to any other problems which may be facing them or the members of their families. The Maharashtra State Board of Legal Aid & Advice will call for periodic reports from the district legal aid committees with a view to ensuring that these directions given by us are being properly carried out. We would also direct the Maharashtra State Board of Legal Aid and Advice to pay an honorarium of Rs. 25/- per lawyer for every visit to the jail together with reasonable travelling expenses from the court house to jail and back. These directions in so far as the city of Bombay is concerned, shall be carried out by substituting the High Court Legal Aid Committee for the District Legal Aid Committee, since there is no District Legal aid committee in the city of Bombay but the Legal Aid Programme is carried out by the High Court Legal Aid Committee. We may point out that this procedure is being followed with immense benefit to the prisoners in jails by the Tamil Nadu State Legal Aid & Advice Board. We may now take up the question as to how protection can be accorded to the women prisoners in police lock ups. We put forward several suggestions to the learned advocate appearing on behalf of the petitioner and the State of Maharashtra in the course of the hearing and there was a meaningful and constructive debate in court. The State of Maharashtra offered its full co-operation to the Court in laying down the guidelines which should be followed so far as women prisoners in police lock ups are concerned and most of the as suggestions made by us were readily accepted by the State of Maharashtra. We propose to give the following directions as a result of meaningful and constructive debate in court in regard to various aspects of the question argued before us.

- (i) We would direct that four or five police lock ups should be selected in reasonably good localities where only female suspects should be kept and they should be guarded by female constables. Female suspects should not be kept in police lock up in which male suspects are detained. The State of Maharashtra has intimated to us that there are already three cells where female suspects are kept and are guarded by female constables and has assured the Court that two more cells with similar arrangements will be provided exclusively for female suspects.
- (ii) We would further direct that interrogation of females should be carried out only in the presence of female police officers/constables.

- (ii) Whenever a person is arrested by the police without warrant, he must be immediately informed of the grounds of his arrest and in case of every arrest it must immediately be made known to the arrested person that he is entitled to apply for bail. The Maharashtra State Board of Legal Aid & Advice will forthwith get a pamphlet prepared setting out the legal rights of an arrested person and the State of Maharashtra will bring out sufficient number of printed copies of the pamphlet in Marathi which is the language of the people in the State of Maharashtra as also in Hindi and English and printed copies of the pamphlet in all the three languages shall be affixed in each cell in every police lock up and shall be read out to the arrested person in any of the three languages which he understands as soon as he is brought to the police station.
- (iv) We would also direct that whenever a person is arrested by the police and taken to the police lock up, the police will immediately give an intimation of the fact of such arrest to the nearest Legal Aid Committee and such Legal Aid Committee will take immediate steps for the purpose of providing legal assistance to the arrested person at State cost provided he is willing to accept such legal assistance. The State Government will provide necessary funds to the concerned Legal Aid Committee for carrying out this direction.
- (v) We would direct that in the city of Bombay, a City Sessions Judge, to be nominated by the principal Judge of the City Civil Court, preferably a lady Judge, if there is one, shall make surprise visits to police lock ups in the city periodically with a view to providing the arrested persons an opportunity to air their grievances and ascertaining what are the conditions in the police lock ups and whether the requisite facilities are being provided and the provisions of law are being observed and the directions given by us are being carried out. If it is found as a result of inspection that there are any lapses on the part of the police authorities, the City Sessions Judge shall bring them to the notice of the Commissioner of Police and if necessary to the notice of the Home Department and if even this approach fails, the City Sessions Judge may draw the attention of the Chief Justice of the High Court of Maharashtra to such lapses. This direction in regard to police lock ups at the districts head quarters, shall be carried out by the Sessions Judge of the district concerned.
- (vi) We would direct that as soon as a person is arrested, the police must immediately obtain from him the name of any relative or friend whom he would like to be informed about his arrest and the police should get in touch with such relative or friend and inform him about the arrest; and lastly

(vii) We would direct that the magistrate before whom an arrested person is produced shall enquire from the arrested person whether he has any complaint of torture or maltreatment in police custody and inform him that he has right under section 54 of the Code of Criminal Procedure 1973 to be medically examined. We are aware that section 54 of the Code of Criminal Procedure 1973 undoubtedly provides for examination of an arrested person by a medical practitioner at the request of the arrested person and it is a right conferred on the arrested person. But very often the arrested person is not aware of this right and on account of his ignorance, he is unable to exercise this right even though he may have been tortured or maltreated by the police in police lock up. It is for this reason that we are giving a specific direction requiring the magistrate to inform the arrested person about this right of medical examination in case he has any complaint of torture or mal-treatment in police custody.

We have no doubt that if these directions which are being given by us are carried out both in letter and spirit, they will afford considerable protection to prisoners in police lock ups and save them from possible torture or ill-treatment. The writ petition will stand disposed of in terms of this order.

Supreme Court of India
AIR 1990 SC 658

State of Maharashtra

vs

Chandraprakash Kewal Chand Jain

AND

Stree Atyachar Virodhi Parishad, Maharashtra State

vs

**Chandraprakash Kewalchand Jain, Police Sub-Inspector, Nagpur and
Another**

A.M. Ahmadi, M. Fathima Beevi, JJ.

1. This appeal by special leave is brought by the State of Maharashtra against the judgment of acquittal recorded by the Nagpur Bench of the High Court of Bombay (Maharashtra) reversing the conviction of the respondent Chandraprakash Kewalchand Jain, a Sub-Inspector of Police, under Section 376, I.P.C. for having committed rape on Shamimbanu, a girl aged about 19 or 20 years on 22nd August, 1981. The learned Additional Sessions Judge, Nagpur, came to the conclusion that the prosecution had brought home the charge under Section 376, I.P.C. and sentenced the respondent to suffer rigorous imprisonment for 5 years and to pay a fine of Rs.1,000, in default to suffer rigorous imprisonment for 6 months. He was, however, acquitted of the charge under Section 342, I.P.C. The respondent challenged his conviction in appeal to the High Court. The High Court set aside the order of conviction and sentence imposed by the trial court and acquitted the respondent. The State feeling aggrieved sought special leave to appeal. On the same being granted this appeal is before us.
2. Briefly the facts are that the parents of Shamimbanu were residing as tenants in a part of the building belonging to the father of Mohmad Shafi while the remaining portion was occupied by the owner's family. PW 1 Mohmad Shafi aged about 25 years fell in love with PW 2 Shamimbanu aged about 19 years. The prosecution case is that although the parents of both knew about their love affair, for some reason or the other, they were not married. Both of them left Nagpur and went to Bombay where they contracted a marriage through a Kazi and returned to Nagpur by train on 20th August, 1981. They got down at Anjani Railway Station (a suburb of Nagpur) and went

to a nearby Gurudeo Lodge and occupied Room No. 204. That night i.e. on the night of 20th/21st August, 1981, PW 8 Police Sub Inspector Qureishi checked the hotel and learnt that the couple was living in the said room in the assumed names of Mohmad Shabbir and Sultana. On being questioned PW 1 Mohmad Shafi gave out the true facts and showed the Nikahnama. Ex. 10. On being satisfied about the correctness of the version, Police Sub-Inspector qureishi got their correct names substituted in the register of the Lodge as is evident from the entry Ex. 31, proved by PW 5 Manohar Dhote, the Manager of the Lodge. Police Sub-Inspector Qureishi did not deem it necessary to take any steps against the couple.

3. On the next night between 21st and 22nd August, 1981 the respondent-accused went to the hotel room No. 204 occupied by the couple at the odd time of about 2.30 a.m. and knocked on the door. He was accompanied by PW 7 Constable Chandrabhan. When Mohmad Shafi opened the door the respondent questioned him on seeing Shamimbanu with him. Mohmad Shafi told him that she was his wife and gave their correct names. Notwithstanding their replies the respondent insisted that they accompany him to the police station. PW 5 requested the respondent to sign his visit book since he had inspected a few rooms of his Lodge including Room No. 204 but the respondent told him that he would do it later. So saying he left the Lodge with the couple.
4. On reaching the police station the respondent separated the couple. He took Shamimbanu to the first floor of the police station while her husband Mohmad Shafi was taken to another room by PW 7. Shamimbanu alleges that after she was taken to the first floor, the respondent flirted with her, slapped her when she refused to respond to his flirtation and demanded that she spend the night with him. The respondent also demanded that she should give her age as 15 years so that Mohmad Shafi could be booked. On her refusing and protesting against his behaviour he threatened her with dire consequences.
5. In the other room Mohmad Shafi was subjected to beating by PW 7. After sometime both the boy and the girl were brought down to the main hall of the police station. By then it was around 5.00 or 5.30 a.m. Thereafter he sent Mohmad Shafi with a constable to fetch the girl's father. The girl's parents arrived at the police station shortly. The respondent asked the girl's parents if they were prepared to take back the girl who claimed to have married Mohmad Shafi. The girl's parents showed annoyance and left the police station refusing to take her with them. Mohmad Shafi's parents also adopted the same attitude.

6. The respondent then recorded an offence under Section 110 read with 117 of the Bombay Police Act against Mohmad Shafi on the allegation that he was found misbehaving on a public street uttering filthy abuses in front of Gujarat Lodge near Gurudeo Lodge. After putting Mohmad Shaft in the lock-up he sent the girl Shamimbanu to Anand Mahal Hotel with PW 7. Initially PW 4, the Hotel Manager refused to give a room to an unescorted girl but PW 7 told him that he had brought her on the directive of the respondent. Thereupon PW 4 allotted Room No. 36 to her. He made an entry in the hotel register to the effect 'Shamimbanu wife of Mohmad Shaft as per instructions of Police Sub-Inspector Shri Jain ' vide Ex. 25. After leaving the girl in Room No. 36, PW 7 left the hotel. It is the prosecution case that after the girl was allotted the room, as per the usual practice, the hotel boy changed the bed-sheets, pillow covers and quilt cover. The rent was charged from the girl. Having thus separated the couple and finding the girl thoroughly helpless, the respondent visited the girl's room and knocked on the door. The unsuspecting Shamimbanu opened the door. The respondent entered the room and shut the door behind him. Thereafter he asked the girl to undress but on the girl refusing he forcibly removed her 'kurta' and threw it away. He gagged the girl's mouth and threatened her with dire consequences if she did not submit. He then threw the girl on the cot, forcibly removed her 'salwar' and denuded her. He then had sexual intercourse with her, notwithstanding her protestations. After satisfying his lust, the respondent left threatening that he would bury both of them alive if she complained to anyone. He told her that he would now arrange to send back her husband.
7. Not fully satisfied the respondent returned to the hotel room after about half an hour and knocked on the door. Shamimbanu opened the door thinking that her husband had returned. When she saw the respondent she tried to shut the door but the respondent forced his way into the room and shut the door from within. He once again had sexual intercourse with her against her will. He repeated his threat before leaving.
8. On the other hand Mohmad Shafi was sent to Court on his arrest under Sections 110/117 of the Bombay Police Act. He was released on bail. He returned to the police station by about 5.00 p.m. and enquired about the whereabouts of his wife. PW 7 told him she was in Room No. 36 of Anand Mahal Hotel. He immediately went to his wife. On seeing him she was in tears. She narrated to him what she had gone through at the hands of the respondent. Enraged Mohmad Shaft went back to the police station and informed PW 14 Inspector Pathak about the commission of assault

and rape on his wife by the respondent. PW 14 recorded the same in the station diary at 6.35 p.m. and informed his superiors about the same presumably because a police officer was involved. Thereupon Deputy Commissioner of Police Parassis and Assistant Commissioner of Police Gupta arrived at the police station. The Assistant Commissioner of Police asked Inspector Pathak to accompany Mohmad Shafi and fetch Shamimbanu. On their return with Shamimbanu Mohmad Shaft was asked to give a written account of the incident which he did. On the basis thereof an offence under section 376, I.P.C. was registered and the investigation was entrusted to Inspector Korpe of Crime Branch.

9. In the course of investigation a spot panchnama of Room No. 36 was drawn up and certain articles such as bed-sheet, quilt cover, mattress, etc. which had semen-like stains were attached. The hotel register containing the relevant entry (Ex. 25) was also seized and statements of witnesses were recorded. Both the respondent and Shamimbanu were sent for medical examination and their blood samples were taken along with that of Mohmad Shafi to determine their blood groups. Similarly the garments of the respondent and Shamimbanu were attached and sent for chemical examination along with the articles seized from the hotel room. On the conclusion of the investigation the respondent was charge sheeted and put up for trial before the Additional Sessions Judge, Nagpur. The respondent pleaded not guilty to the charge and denied the accusation made against him. His defence was that he arrested Mohmad Shaft on the charge under Sections 110/117, Bombay Police Act, and took him to Gurudeo Lodge and from there he took him and Shamimbanu to the police station. Since the parents of both the boy and the girl disowned them he had no alternative but to place Mohmad Shaft in the lock-up and allow Shamimbanu to leave the police station as a free citizen since she was not accused of any crime. It was his say that after Shamimbanu left the police station she went to Anand Mahal Hotel and stayed in Room No. 36 awaiting Mohmad Shafi. According to him as Mohmad Shaft was annoyed because of his detention in the lock-up, he had, with the assistance of Shamimbanu, falsely involved him on the charge of rape.
10. The trial court found that the respondent had visited Room No. 204 at an odd hour and had taken the couple to the police station where he had misbehaved with the girl. It also found that he had booked the boy on a false charge and had lodged the girl in Room No. 36 after their parents disowned them. It lastly held that the evidence of the prosecutrix clearly established that the respondent had raped her twice in that room. The trial court convicted the respondent under Section 376, I.P.C.

11. The respondent preferred an appeal to the High Court. A learned Single Judge of the High Court allowed the appeal and acquitted the respondent. The High Court took the view that the oral information Ex. 50 furnished by Mohmad Shafi to Inspector Pathak at 6.35 p.m. constituted the First Information Report and the subsequent written information Ex. 7 given at 8.30 p.m., was inadmissible in evidence as hit by Section 162 of the Code. The High Court then took the view that except in the 'rarest of the rare cases' where the testimony of the prosecutrix is found to be so trustworthy, truthful and reliable that no corroboration is necessary, the Court should ordinarily look for corroboration. Accord- ing to it as Ex. 50 did not unfold two successive acts of rape, this was not a case where it would be safe to base a conviction on the sole testimony of the prosecutrix, more so because both the girl and the boy had reason to entertain a grudge against the respondent who had booked the latter. Lastly the High Court pointed out that the version of the prosecutrix is full of contradictions and is not corroborated by medical evidence, in that, the medical evidence regarding the examination of the prosecutrix is negative and does not show marks of violence. These contradictions and inconsistencies have been dealt with in paragraphs 24 to 31 of the judgment. The High Court also noticed certain infirm- ities in the evidence of PW 1 Mohmad Shafi in paragraphs 32 to 34 of its judgment. The High Court, therefore, concluded that the prosecution had miserably failed to prove the guilt of the accused and accordingly acquitted him. It is against this order of the High Court that the State has preferred this appeal by special leave.
12. The learned counsel for the appellant-State submitted that the entire approach of the High Court in the matter of appreciation of evidence of the prosecution witnesses, particularly PW 2, betrays total ignorance of the psychology of an Indian woman belonging to the traditional orthodox society. He submitted that the prosecutrix of this case came from an orthodox muslim family, was semi-literate having studied upto the VII Standard and whose parents considered it a shame to take her back to their fold because she had eloped and married a boy of her own choice. He submitted that the statement of law in the High Court judgment that implicit reliance cannot be placed on a prose- cutrix except in the rarest of rare cases runs counter to the law laid down by this Court in Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, [1983] 3 SCR 280. He also submitted that the evidence of the prosecutrix has been rejected on unsustainable grounds which do not touch the substratum of the prosecution case and which can be at- tributed to nervousness and passage of time. According to him this approach of the High Court has resulted in gross miscarriage of justice

which this Court must correct in exercise of its jurisdiction under Article 136 of the Constitution. The learned counsel for the respondent, however, supported the High Court judgment.

13. It is necessary at the outset to state what the approach of the Court should be while evaluating the prosecution evidence, particularly the evidence of the prosecutrix, in sex-offences. Is it essential that the evidence of the prosecutrix should be corroborated in material particulars before the Court basis a conviction on her testimony? Does the rule of prudence demand that in all cases save the rarest of rare the Court should look for corroboration before acting on the evidence of the prosecutrix? Let us see if the Evidence Act provides the clue. Under the said statute 'Evidence' means and includes all statements which the Court permits or requires to be made before it by witnesses, in relation to the matters of fact under inquiry. Under Section 59 all facts, except the contents of documents, may be proved by oral evidence. Section 118 then tells us who may give oral evidence. According to that section all persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Even in the case of an accomplice Section 133 provides that he shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. However, illustration (b) to Section 114, which lays down a rule of practice, says that the Court 'may' presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Thus under Section 133, which lays down a rule of law, an accomplice is a competent witness and a conviction based solely on his uncorroborated evidence is not illegal although in view of Section 114, illustration (b), courts do not as a matter of practice do so and look for corroboration in material particulars. This is the conjoint effect of Sections 133 and 114, illustration (b). A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person

who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage: "It is only in the rarest of rare cases if the Court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary."

14. With respect, the law is not correctly stated. If we may say so, it is just the reverse. Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation. We think it proper, having regard to the increase in the number of sex-violation cases in the recent past, particularly cases of molestation and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars except in the rarest of rare cases. To insist on corroboration except in the rarest of rare cases is to equate a woman who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her story of woe will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissive society as in some of the Western and

European countries. Our standard of decency and morality in public life is not the same as in those countries. It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. An Indian woman is now required to suffer indignities in different forms, from lewd remarks to eve-teasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those who violate the societal norms. The standard of proof to be expected by the Court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity.

15. But when such a crime is committed by a person in authority, e.g. a police officer, should the Court's approach be the same as in any other case involving a private citizen? By our criminal laws wide powers are conferred on police officers investigating cognizable offences. The infrastructure of our criminal investigation system recognises and indeed protects the right of a woman to decent and dignified treatment at the hands of the investigating agency. This is evident from the proviso to sub-section (2) of Section 47 of the Code which obliges the police officer desiring to effect entry to give an opportunity to the woman in occupation to withdraw from the building. So also subsection (2) of Section 53 requires that whenever a female accused is to be medically examined such examination must be under the supervision of a female medical practitioner. The proviso to Section 160 stipulates that whenever the presence of a woman is required as a witness the investigating officer will record her statement at her own residence. These are just a few provisions which reflect the concern of the legislature to prevent harassment and exploitation of women and preserve their dignity. Notwithstanding this concern, if a police officer misuses his authority and power while dealing with a young helpless girl aged about 19 or 20 years, her conduct and behaviour must be judged in the backdrop of the situation in which she was placed. The purpose and setting, the person and his position, the misuse or abuse of Office and the despair of the victim which led to her surrender are all relevant factors which must be present in the mind of the Court while evaluating the conduct-evidence of the prosecutrix. A person in authority, such as a police officer, carries with him the awe of office which is bound to condition the behaviour of his victim. The Court must not be oblivious of the emotional turmoil and the psychological injury that a prosecutrix suffers on being molested or raped. She suffers a tremendous sense of

shame and the fear of being shunned by society and her near relatives, including her husband. Instead of treating her with compassion and understanding as one who is an injured victim of a crime, she is, more often than not, treated as a sinner and shunned. It must, therefore, be realised that a woman who is subjected to sex-violence would always be slow and hesitant about disclosing her plight. The Court must, therefore, evaluate her evidence in the above background. It is time to recall the observations of this Court made not so far back in Bharwada Bhognibhai Hirjibhai, (*supra*): "In the Indian setting, refusal to act on the testimony of a victim of sexual assaults in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyse the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the Western World which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to transplane it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical."

16. Proceeding further this Court said:

"Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because: (1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the Society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near

relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

17. We are in complete agreement with these observations. We now proceed to examine if the High Court was justified in upturning the order of conviction passed by the Trial Court. The High Court refused to confirm the conviction of the respondent as it found the evidence of the prosecutrix full of contradictions and not consistent with medical evidence as well as the findings recorded by the Chemical Analyst. We may first indicate the contradictions which prompted the High Court to look for corroboration. They are:

- (i) the version that the respondent had misbehaved with her in the police station and had molested her could not be believed because she did not complain about the same to the other police officers who were present in the police station main hall on the ground floor or to her relatives who were called to the police station;
- (ii) the conduct of the respondent in calling her parents and in giving them an opportunity to take her with them does not smack of an evil mind;
- (iii) the evidence of the prosecutrix that the respondent was instrumental in lodging her in Anand Mahal Hotel room is not supported by any evidence;
- (iv) the conduct of the prosecutrix in not informing and seeking assistance from the hotel management after the first incident and even after the second incident of rape in the hotel room is unnatural and surprising;
- (v) the find of semen-stains on the 'salwar' and 'kurta' of the prosecutrix runs counter to her evidence that on both the occasions she was completely denuded before she was ravished;

- (vi) the absence of marks of physical violence also runs counter to her version that when she tried to raise an alarm she was slapped by the respondent;
 - (vii) the evidence of PW 3 Dr. Vijaya and the medical report Ex. 17 do not lend corroboration to the evidence of the prosecutrix that the respondent had sexual intercourse with her notwithstanding the resistance offered by her; (viii) the report of the Assistant Chemical Analyst Ex. 71 shows that neither semen nor spermatozoa were detected from the vaginal smear and slides that were forwarded for analysis; and
 - (ix) the evidence of PW 12 Dr. More and his report Ex. 41 shows that no physical injuries were found on the person of the respondent to indicate that he had forcible sexual intercourse shortly before his examination.
18. Before we proceed to deal with these discrepancies we think it is necessary to clear the ground on the question whether the prosecutrix had a sufficiently strong motive to falsely involve the respondent and that too a police officer. It is possible that she may have felt annoyed at being dragged out of the hotel room at dead of night after they had satisfied Police Sub-Inspector Qureishi that they were legally wedded only a few hours back. PW 1 may also have felt offended at being wrongly hooked under Sections 110/117, Bombay Police Act. The question is whether on account of this annoyance both PW 1 Mohmad Shaft and PW 2 Shamimbanu would be prepared to stake the reputation of the latter? As pointed out earlier ordinarily an Indian woman would be most reluctant to level false accusation of rape involving her own reputation unless she has a very strong bias or reason to do so. In the present case although the couple had reason to be annoyed with the conduct of the respondent, the reason was not strong enough for Mohmad Shafi to involve his wife and soil her reputation nor for Shamimbanu to do so. An Indian woman attaches maximum importance to her chastity and would not easily be a party to any move which would jeopardise her reputation and lower her in the esteem of others. There are, therefore, no such strong circumstances which would make the court view her evidence with suspicion.
19. The next question is whether the High Court was justified in refusing to place reliance on her evidence in view of the discrepancies and inconsistencies indicated above. It is not in dispute that the respondent had taken both PW 1 and PW 2 to the police station at dead of night. At the police station both of them were separated. She was all alone with the respondent till about 5.00 a.m. This was her first encounter with the police. She must have been nervous and considerably shaken. She must have felt helpless as she was all alone. She must be terribly worried not only about her own fate

but also that of her husband. It is during the time she was alone with the respondent that the latter is alleged to have misbehaved with her. How could she complain to the other police officers in the police station about the behaviour of their colleague unless she be sure of their response? Having seen the behaviour of one of them, how could she place confidence in others belonging to the same clan? She may rather prefer to ignore such behaviour than speak of it to unknown persons. Ordinarily an Indian woman is ashamed to speak about such violations of her person, more so to total strangers about whose response she is not sure. There was no point in speaking to her parents who had disowned her. She, however, claims to have informed her husband about the same on his return. The omission on the part of her husband to make a mention about the same cannot discredit her. Even if we assume that she omitted to mention it, the said omission cannot weaken her evidence as obviously she would attach more importance to what happened thereafter in the hotel room. The respondent's behaviour in the police station had paled into insignificance in view of his subsequent misdeeds. No wonder she would attach greater importance to the subsequent events rather than dwell on advances made earlier. We, therefore, cannot agree with the High Court's observation that "the prosecutrix is not only prone to make improvements and exaggerations, but is also a liar disclosing a new story altogether to serve her interest". This is a harsh comment which, we think, is totally unwarranted.

20. The High Court has argued that the conduct of the respondent in sending for her parents and in permitting her to go with them shows that the respondent's intentions were not evil. In the first place it must be mentioned that the suggestion to call the parents came from PW 1.
21. Secondly the evil thought may have taken concrete shape after the parents refused to take her with them. It was then that the respondents realised the helplessness of the girl and chalked out a plan to satisfy his lust. As a part of that design he falsely booked Mohmad Shaft and made arrangements to lodge the girl in a hotel of his choice. The evidence of PW 4 Suresh Trivedi read with the entry in the hotel register and the contradiction brought on record from his police statement leave no room for doubt that the girl was lodged in his hotel at the instance of the respondent. PW 6 and PW 7 have also resiled from their earlier versions to help the respondent. But notwithstanding their denial we see no reason to disbelieve Shamimbanu on the point of PW 7 having lodged her in Room No. 36 of Anand Mahal Hotel as the same is corroborated not only by the remark in the entry Exh. 25 of the hotel register but

also by the fact that it was PW 7 who informed Mohmad Shaft that she was in Room No. 36. We are, therefore, of the view that her evidence in this behalf is supported by not only oral but also documentary evidence. How then could she seek help or assistance from the hotel staff which was under the thumb of the respondent? The hotel was situate within the jurisdiction of the respondent's police station. It was at the behest of the respondent that she was kept in that room. She must have realised the futility of complaining to them. Failure to complain to the hotel staff in the above circumstances cannot be described as unnatural conduct.

22. It is true that the prosecutrix had deposed that on both the occasions she was completely denuded before the respondent raped her. On the first occasion he had removed her 'kurta' before she was laid on the cot. Her 'salwar' was removed while she was lying on the cot. Therefore, the 'salwar' may be lying on the cot itself when the act was committed. It is, therefore, not at all surprising to find semen stains on the 'salwar'. She was wearing the same clothes when she was ravished the second time. On the second occasion he first threw her on the cot and then undressed her. Therefore, both the 'kurta' and the 'salwar' may be lying on the cot at the time of sexual intercourse. Besides she had worn the same clothes without washing herself immediately after the act on each occasion. It is, therefore, quite possible that her clothes were stained with semen. It must also be remembered that this is not a case where the prosecuting agency can be charged of having concocted evidence since the respondent is a member of their own force. If at all the investigating agency would try to help the respondent. There is, therefore, nothing surprising that both these garments bore semen stains. Besides, there was no time or occasion to manipulate semen stains on her clothes and that too of the respondent's group. Her clothes were sent along with the other articles attached from Room No. 36 for chemical analysis under the requisition Ex. 67. The report of the Assistant Chemical Analyser, Ex. 69 shows that her clothes were stained with human blood and semen. The semen found on one of her garments and on the bed sheet attached from the room was of group A which is the group of the respondent, vide Ex. 70. Of course the other articles, viz., the mattress and the underwear of the respondent bore no stains. On the contrary the find of semen tends corroboration, if corroboration is at all needed to the version of the prosecutrix. The possibility of the semen stains being of Mohmad Shaft is ruled out as his group was found to be 'B' and not 'A'. In the circumstances the absence of semen or spermatozoa in the vaginal smear and slides, vide report Ex. 71, cannot cast doubts on the creditworthiness of the prosecutrix. The evidence of PW 3 Dr. Vijaya Lele shows that she had taken the vaginal smear and the slides on 23rd August, 1981

at about 1.30 p.m. i.e., almost after 24 hours. The witness says that spermatozoa can be found if the woman is examined within 12 hours after intercourse, thereafter they may be found between 48 and 72 hours but in dead form. Shamimbanu may have washed herself by then. Therefore absence of spermatozoa cannot discredit her evidence.

23. The absence of marks of physical violence on the prosecutrix is not surprising. According to her the respondent had slapped her and threatened her with dire consequences when she tried to resist him on both occasions. Since she was examined almost 24 hours after the event it would be too much to expect slap marks on her person. It is, however, true that according to PW 12 Dr. More there were no marks of injury on the body of the respondent when he was examined on the 22nd itself at about 8.45 p.m. While it is true that the version of the prosecutrix is that she had tried to resist him, it must be realised that the respondent being a strong man was able to overpower her and take her by force. Be-sides, he was a man in authority in police uniform. The prosecutrix was alone and helpless. In the circumstances as pointed out earlier the resistance would be considerably dampened. But the evidence of PW 12 Dr. More who examined the respondent on the 22nd at 8.45 p.m. reveals that he had noticed (i) absence of smegma around the glans penis and (ii) the frenum tortuous and edematous, indicative of the respondent having had sexual intercourse within the preceding 24 hours. However, absence of marks of violence and absence of matting of pubic hair led the witness to state that no definite opinion could be given whether or not the respondent had sexual intercourse in the last 24 hours. In cross-examination an attempt was made to show that smegma may be absent in a man with clean habits; that the frenum may be edematous if there is friction with rough cloth and tortuousness of the frenum could be due to anything that causes swelling of the skin. The witness, however, said that he had not seen marks of itching thereby negating the suggestion. Be that as it may, the evidence of this witness does show that there was evidence suggesting the possibility of the respondent having had sexual intercourse within the preceding 24 hours although the witness could not hazard a definite opinion. Therefore, the non-committal opinion of this witness cannot be said to run counter to the evidence of the prosecutrix. It may be that the evidence as to resistance may have been overstated, a tendency which is generally noticed in such cases arising out of a fear of being misunderstood by the society. That is not to say that she was in any way a consenting party. She was the victim of brute force and the lust of the respondent.

24. PW 1 Mohmad Shafi's evidence is also brushed aside on account of so-called contradictions set out in paragraphs 32 to 34 of the High Court Judgment. The first reason is the non-disclosure of details in the first oral statement which was reduced to writing at Ex. 50. That was skeleton information. That is why the need to record a detailed version Ex. 7 was felt. Therefore, merely because the details are not set out in Ex. 50 it cannot be said that the prosecutrix had not narrated the details. We have treated Ex. 50 as FIR for deciding this case. The previous involvement of PW 1 in a couple of cases is not at all relevant because the decision of the case mainly rests on his wife's evidence. But even Ex. 50 shows that his wife had told him that the respondent had raped her. We, therefore, do not see how the evidence of PW 1 can be said to be unacceptable.
25. The fact that the respondent had gone to Gurudeo Lodge at an odd hour and had taken the prosecutrix and her husband to the police station at dead of night is not disputed. The fact that the respondent refused to sign the police visit book of the Lodge, though requested by the Manager PW 5 Manohar Dhote, on the pretext that he was in a hurry and would sign it later, which he never did, speaks for itself. Then the respondent booked Md. Shafi under a false charge and put him behind the bars thereby isolating the prosecutrix. We say that the charge was false not merely because it is so found on evidence but also because of the report Ex. 46 dated 21st September, 1981 seeking withdrawal of prosecution for want of material to sustain the charge. Having successfully isolated the prosecutrix he sent her to Anand Mahal Hotel with PW 7 who lodged her in Room No. 36. The respondent, therefore, had planned the whole thing to satisfy his lust. The subsequent attempt on the part of the respondent to commit suicide on being prosecuted as evidenced by the FIR Ex. 56 betrays a guilty conscience. We are, therefore, of the opinion that if the prosecution evidence is appreciated in the correct perspective, which we are afraid the High Court failed to do, there can be no hesitation in concluding that the prosecution has succeeded in proving the respondent's guilt. Unfortunately the High Court stigmatised the prosecutrix on a thoroughly erroneous appreciation of her evidence hereby adding to her woes. If the two views were reasonably possible we would have refrained from interfering with the High Court's order of acquittal. In our opinion the trial court had adopted a correct approach and had properly evaluated the evidence and the High Court was not justified in interfering with the trial court's order of conviction. On the question of sentence we can only say that when a person in uniform commits such a serious crime of rape on a young girl in her late teens, there is no room for sympathy

or pity. The punishment must in such cases be exemplary. We, therefore, do not think we would be justified in reducing the sentence awarded by the trial court which is not harsh. In the result we allow this appeal, set aside the order of the High Court acquitting the respondent and restore the order of conviction and sentence passed on the respondent by the trial court. The respondent will surrender forthwith and serve out his sentences in accordance with law. His bail bond will thereupon stand cancelled.

Criminal Appeal No. 220 of 1986.

In view of the order passed in the State's appeal, we need not pass separate orders in this appeal. The appeal will, therefore, stand disposed of in view of the order passed in the above appeal.

R.N.J. Appeal allowed.

Bombay High Court
1995 (4) Bom. CR 263
Rekha M. Kholkar
vs
State of Goa and Others

Dr. E. S. Da Silva, A.P. Shah, JJ

1. The petitioner filed this petition under Articles 226 and 227 of the Constitution alleging that the respondents had violated her fundamental rights under Article 21 by torturing her, damaging her person, abusing her womanly dignity and causing her enormous trauma and, as a result of such acts, her reputation has also been gravely harmed and her employment has been severely curtailed. It was further alleged that the respondents also violated the petitioner's rights under Articles 14 and 22 when they detained her without authority of law and without any complaint being filed against her. More particularly, the petitioner has stated that the respondents violated the provisions of section 160(1) of the Criminal Procedure Code, which prohibits the Police from requiring women to present themselves for enquiry or interrogation at any place other than the place at which the woman may reside. It was further alleged that the petitioner was a victim of high-handed and arbitrary action of the Police officials, who have not only brutally assaulted the petitioner, but subjected her to all types of indignities not countenanced by any civilised form of society and to mental torture. She therefore prays that by an appropriate writ, direction or order, respondent No. 5 should conduct full departmental enquiry into the incident and direct appropriate punishment of all the officers concerned. A further writ has been sought that a direction or order to the respondents No. 1 to 5 be made to pay jointly and severally to the petitioner a sum of Rs. 1,00,000/- as compensation for the assault and damage caused to her person. An additional prayer was sought for by the petitioner for a general direction to the respondent No. 7 to allow requests for copies of medical reports to detenus, undertrials and prisoners and persons affected in case of Police violence, and lastly, a general direction was sought also to the respondent No. 5 that he should instruct his officers in writing that the provisions of section 160(1) of the Criminal Procedure Code should be strictly followed in all cases involving interrogation of women.

3. The case of the petitioner is that she had been employed as a part-time domestic helper in the house of respondents Nos. 3 and 4, for the past eight or nine years and her job included sweeping the house, washing utensils and other domestic chores. The petitioner used to work daily at the house of respondents No. 3 and 4 for about an hour from about 7.30 a.m. to 8.30 a.m. On the morning of 18th November, 1993, petitioner went to the house of respondents No. 3 and 4 and worked as usual. Around noon of the same day, the petitioner was called to the house of respondents No. 3 and 4 by their daughter. She immediately went to the house, where she was met by respondent No. 4 who enquired with her whether she had taken some money and a licence from the pant pocket while she was cleaning the room that day. The petitioner denied knowledge of the same, after which she returned home. Thereupon the daughter of the respondents No. 3 and 4 and a relative accompanied her where they searched her house but found nothing. Sometime later, on the same day, respondent No. 3 accompanied by policeman came to the house of the petitioner. The policeman told the petitioner that she was wanted in the police station in connection with a theft that had taken place at the house of respondent No. 3. The petitioner accompanied by her mother, went immediately alongwith the policeman and respondent No. 3 to the police station, around 4 p.m. There she was taken into a room where there were two women police. The room was shut and the petitioner's mother was kept outside. The petitioner was repeatedly questioned about the alleged theft and she told the police that she had not taken the money or licence. Inspite of that she was slapped, beaten and abused several times by both the male and female police. They put handcuffs on her and threatened to parade her in the Canacona Market place. The petitioner was told several times by the police that she should confess to the alleged crime and only then they would stop. The police also threatened to undress her. In this respect, the women police removed the petitioner's skirt and threw it in a corner of the room. When this happened, male police were present in the room. It is the case of the petitioner that this was deliberately done in an attempt to shame and humiliate her and force her to confess that she had stolen the money. After sometime, her garment was returned. Then the police personnel put a rope round under the shoulders of the petitioner and hung her from the ceiling. The petitioner remained hanging in that position for a long while, during which time the police personnel continued to beat her. Finally, she was let down from the hanging trauma and pushed out of the room, where she fainted at the door. It was also stated that when she was released in a state of shock and bruised all over, her face was swollen and her head was throbbing and she was bleeding at the mouth and her earring

was broken. She was taken in this condition by her parents and some neighbours to the nearby Health Centre where she was admitted and kept in the ladies ward for about five days. During this time, the petitioner was examined by the doctors of the primary Health Centre and was given tablets and medicines. She continued to complain of pain on the head specially the area of the temple and abdomen and upper back and after five days she was referred to the Hospicio Hospital, where she was taken by ambulance on 23rd November, 1993. She was admitted in the hospital and medically treated. The petitioner remained in the Hospicio Hospital for about two days. Thereupon she was discharged at her own request. It was stated that as it was financially difficult for her parents to attend her at the hospital, the petitioner's parents requested that she be discharged even though she had not fully recovered. Subsequently, the petitioner visited the primary Health Centre of Canacona on two occasions for pain in the abdomen and she was treated as an out patient and given medication. The petitioner's health continued to deteriorate, but as she was the only earning member of the household she was forced to resume work as soon as possible. It is further her case that since then her health continued to be poor. Ever since the incident she feels faint very easily and cannot work for long. She also suffers from neck and back pain and occasionally from abdomen pain, but more than the physical stress are the traumas of what she has gone through. Petitioner suffers nightmares and wakes up at night. She feels humiliated and frightened.

...

5. On the basis of the said reports of the Enquiry officer and Reviewing Officer, Mr. Bhobe, learned Public Prosecutor, has stated that show cause notices had been given to the concerned police officers for the purpose of taking action against them and the replies and action thereon would take some time. He further stated that in all probability that would take about four weeks to finalise whatever action the Disciplinary Authority proposed to take in its turn. In view of this statement, we feel that the first prayer made by the petitioner with regard to the issuance of an appropriate writ, direction or order to the respondent No. 5 to conduct a full departmental enquiry be admitted and appropriate punishment be given to all the concerned officers, is to be deemed as satisfied. Mrs. Alvares, learned Counsel appearing for the petitioner, agrees that in view of the statement made by Mr. Bhobe, no further directions/orders are required to be passed by this Court.
6. This leaves us to the question of the second prayer made by the petitioner, with regard to the compensation of Rs. 1,00,000/- . Mrs. Alvares forcefully argued in this

regard that the petitioner has been given physical ill-treatment at the hands of the police after having been illegally taken to the Police Station in clear violation of section 160(1) and its proviso of the Criminal Procedure Code, wherein she was subjected to all kinds of indignities and tortures. She has also stated that this has caused to the petitioner a great physical and mental trauma, she being a member of the weaker section of Society. On account of this ill-treatment she had to be hospitalized and receive medical treatment, as a result whereof she was deprived from carrying on her normal activities for the purpose of her maintenance and the maintenance of her family. It was urged that the petitioner was the only earning member of the family although her mother was also attending occasionally to outside work in order to provide for the support of the entire family. She therefore prayed that suitable compensation should be granted to the petitioner in order to make good not only the material loss she had sustained, but also to compensate her for the trauma and the physical injuries she had been inflicted on account of the ill-treatment given to her. Mrs. Alvares has also pointed out that while illegally summoning the petitioner to the Police Station for the purpose of intimidating her and forcing her to confess a crime in respect whereof not even a written complaint was lodged, there was a clear violation of her fundamental rights enshrined in the constitution and for which she ought to be compensated.

7. Mr. Bhobe has fairly conceded that the action taken by the police cannot be justified in the eye of law although he had made a feeble attempt to explain the background of the case and the circumstances under which the police has tried to get the petitioner to the Police Station in order to enquire into the alleged complaint made by the respondents No. 3 and 4 with regard to the theft of money and some documents which were in the house wherein the petitioner was working as an attendant. The learned Counsel, however, agreed that some compensation could be granted to the petitioner in view of the clear violation on the part of the concerned police officers, who were otherwise found guilty in the departmental enquiry conducted by the Disciplinary Authority.

....

9. Now, with regard to the prayer for compensation, we have given an anxious thought on the case sought to be made by the petitioner. We have gone also through the medical report of the petitioner's treatment by the doctor of the Primary Health Centre of Canacona wherein she was examined, which suggests that she had sustained simple injuries only like echymosis or bruises and swelling of upper lip besides pain

in the left thigh. There is no material to point out that the petitioner appears to have been injured in the region of her ear or stomach and has suffered any serious beating or assault which might have caused her pain and impaired vital organs of her body. In such circumstances, we are satisfied that in the facts and circumstances available to us from the record, a compensation of Rs. 30,000/- appears to be quite a commensurate amount of money which would meet the ends of justice in this case, irrespective of the petitioner's right to approach the competent forum in order to lay down her claim to be indemnified for a higher amount, in case she succeeds in establishing the nature of the injuries or damages to her health caused by the ill-treatment inflicted to her by the concerned police officers.

10. So far the prayer made by the petitioner to issue general directions to the respondent No. 7 to directly allow request for copies of medical reports to the detenus, undertrials and prisoners in prison in cases of police violence, we feel no difficulty in allowing such prayer and we accordingly direct that not only respondent No. 7, but all Superintendents of Government Hospitals should issue such copies of medical reports in similar circumstances.
11. Lastly, the prayer for a general direction to respondent No. 5 that he should instruct his officers in writing that the provisions of section 160(1) of the Criminal Procedure Code should be strictly followed in cases of interrogation of criminals the same is to be allowed and needless to say that such direction was not even required to be given, bearing in mind that the police force is always expected to comply strictly with the mandatory provisions of law, namely, of the Criminal Procedure Code, in the matter of investigation of criminal offences.
12. We, therefore, direct the respondent No. 5, to see to it that all his officers strictly comply with the mandatory provisions of section 160(1) of the Criminal Procedure Code in all cases involving interrogation of women.

**Bombay High Court
1996 (1) Bom. CR 70**

**Christian Community Welfare Council of India (Regd.)
vs
Government of Maharashtra and Another**

R.M. Lodha, M.B. Ghodeswar, JJ.

1. Police lock-up or death trap? Police lawlessness or rule of law? Police muscle or personal modesty? Police harassment or human rights? Yet again a case of custodial death has given rise to myriad hard-touching and soul searching questions. In this country where rule of law is inherent in each and every action and right of life and liberty is prized fundamental right adorning highest place amongst all important fundamental rights, whether life has no meaning to a person in police custody? Whether personal modesty, decency, dignity on arrest of a person are increasingly exposed to third-degree practices which over-step the bounds of propriety? How long, harsh, crude, oppressive, excessive and torturous third-degree methods to the arrested person in the name of seeking information or investigation can be allowed to continue? Whether police personnel are custodians of law and order or law unto themselves and predators of civil liberties? Whether to strip a person of his clothes and making him bare, naked and employing all sorts of physical and mental torture is not violative of prized constitutional right enshrined under Article 21 of the Constitution of India? Whether police power admits of no human rights of a person in its custody? Whether for inhuman acts of its officers and servants, the State must be made liable for violation of fundamental rights of its citizens?
2. A sad and pathetic scenario first.
3. In the intervening night of 23-6-1993 and 24-3-1993 at 00.45 hours, police party consisting of Police Inspector Narule, Assistant Police Inspector Karade, Police Sub-Inspector Kadu, H. C. Nilkanth (B/No. 2180), H. C. Jahiruddin Deshmukh (B/No. 2562), H. C. Raghunath (B/No. 1417), H. C. Namdeo, (B/No. 2982), P. C. Ramesh (B/No. 2376), P. C. Sudhakar (B/No. 1784) and P.C. 1 (B/No. 3091) of Crime Branch Office, Nagpur (City) went to the house of one Jaoinous Adam Illamatti, resident of quarter No. B/363, Ajni Railway, Nagpur. The said police personnel forcibly dragged Junious from his house and he was beaten by the said police personnel near his house and

then in the police lock-up. According to the averments made in the writ petition which was initially filed in the cover of public interest litigation by the Christian Community Welfare Council of India, a registered society for development, defence, public justice and solving problems of the minority christian community to safeguard and protect the fundamental rights guaranteed to the citizens of India, but later on the petitioner No. 2 Mrs. Jarina wd/o Junious Adam Illamatti was impleaded and the State of Maharashtra which was initially made party through the Commissioner of Police, Nagpur was further added party through the Home Secretary, Bombay, late Junious Adam was taken into unlawful custody and while arresting said Junious, the Police personnel also illegally detained his wife Jarina (petitioner No. 2) and when she objected, the Police personnel assaulted her and later on they molested and beat her. The aforesaid police officials severely assaulted and gave beating to Junious in the police lock-up with the result, in the early hours of 24th June 1993 Junious died in the lock-up. The wife Jarina also lodged a complaint later on that Junious Adam was so severely beaten by the Police while in their unlawful custody and detention that he died there in the police lock-up and they also molested her and to cover their crime, had threatened her to the consequences of death. According to the averments in the writ petition, the aforesaid police officials who took part in this sordid game of beating and molestation of a person belonging to the minority christian community, have managed to slip away due to connivance of high officials of Police Department. The allegations against the Deputy Superintendent of Police Mr. Godbole, the Investigating Officer in the crime, have also been made to the effect that he was reluctant to charge the accused persons with murder despite clear evidence of brutality and excesses perpetuated by the police personnel on Junious resulting into his death and instead of registering the case of murder under section 302 of the Indian Penal Code, a case under Section 304 of the Indian Penal Code was registered which gave an opportunity to those police officials to abscond. The petitioners in the writ petition have stated that the present case of custody death is not the first in the city, but there has been several such cases. The beating/assault and subsequent death is covered under excesses by the police and a matter of human rights protection and calls for serious consideration and if the law enforcing authority takes law in its hand and kills or murders detainees, the fundamental right of life and safety and freedom would be entirely crushed and breached.

Deceased Junious was employed as Class IV employee (Khalasi) in the Central Railway and drawing as salary of Rupees 1600/- per month and according to the petitioners, he was 32 years of age and survived by his widow, the petitioner No. 2, one minor

son and one minor daughter. The petitioners have alleged that this is a case where the State C.I.D. and the Investigating Officer have allowed several lapses which has created a suspicion in the mind of people whether there would be fair, prompt and just investigation and according to the petitioners, therefore, it was necessary that investigation was handed over to the Central Bureau of Investigation (CBI), because it related to the crime perpetuated by the police officials.

4. The petitioners have thus prayed for the following reliefs from this Court :-
 1. *To direct by appropriate writ the respondent No. 1 to hold enquiry by independent machinery and to hand over the said enquiry of murder to CBI of New Delhi.*
 2. *To direct the respondent No. 2 to release immediately the settlement dues of late Junios to his wife and also to consider giving her appointment on compassionate grounds.*
 3. *To direct the respondent No. 1 to take steps to immediately arrest the accused, and to get the bail cancelled and also to attach the property of the accused.*
 4. *To direct the respondent No. 1 to form a committee of Jurists and granting representation to the petitioner to impartially lead the enquiry.*
 5. *To direct the respondent No. 1 to pay compensation of Rs. ten lakhs to the wife of deceased and to pay interim relief for her maintenance.*
 6. *To call for the report of the case diary and other reports lodged for taking proper action by this H'ble Court.*
 7. *To direct the respondent No. 1 to see that the evidence is not destroyed and that effective steps are taken to preserve the circumstantial evidence.*
 8. *To decide the case in the light of Human Rights commission directives of protection of Human rights and in the light of the Constitutional guarantee of Constitution of India.*
 9. *Any other directions/writ/orders deemed fit and proper by this Hon'ble Court.*
 10. *To direct by appropriate writ State Government of Maharashtra to pay compensation of Rs. 10 lakhs to the widow of the deceased and the 2 children. Out of these amount of compensation 1/2 should be given to the widow the petitioner No. 2 and the remaining 1/2 amount may be equally divided and deposited in the name of 2 children namely Tannis Lass Adam and George Adam in the joint account with mother, petitioner No. 2 with a directions that the petitioners shall not withdraw the amount until the minors attain the age of 21 years but they shall have liberty to withdraw the interest thereupon".*
-
11. In the post-moterm report the opinion of the doctor as to the cause and/or probable cause of death is shock due to aforesaid injuries described in column No. 17.

12. The facts aforesaid lead to an irresistible conclusion for the purpose of present case that Junious Adam Illamatti died in the police lock-up as a result of custodial violence on his person. Junious Adam was done to death on account of beatings by the police personnel, an agency of sovereign power acting in violation and excess of power vested in such agency. The First Information Report bearing Crime No. 438/93 under Ss. 302, 342, 330, 354, 323 read with S. 34 of the Indian Penal Code against the ten accused police officials, implicates them for the death and murder of Junious Adam Illamatti. The post-mortem report of deceased Junious shows that due to beating and assault by those police officials Junious sustained 23 injuries and due to shock from the said injuries, he died. The investigation which has been concluded and as a result thereof charge-sheet against the aforesaid police officials has been filed under the various sections of the Indian Penal Code including Ss. 302 and 34 thereof, no further enquiry is required to be made to find out whether death of Junious Adam was the case of custodial death or not. Even the Assistant Government Pleader has not disputed nor it could be disputed by the State of Maharashtra that death of Junious Adam was not death in the police custody or police lock-up. Undisputedly Junious was victim of custodial violence and died in the police custody. The Asst. Government Pleader appearing for the State has also rightly not disputed the liability of the State for payment of compensation in this proceeding for violation of fundamental right to life under Art. 21 of the Constitution of India in view of the death of Junious in police custody and police lock-up. However, before we examine the quantum of compensation payable by the State of Maharashtra to the petitioner No. 2, widow of Junious for the custodial death of her husband by this Court and under Art. 226 of the Constitution of India, we would like to consider the question of custodial violence and prevention thereof.
13. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Art. 22 of the Constitution of India provides for protection against arrest and detention in certain cases. Chapter V of the Code of Criminal Procedure, 1973 deals with the arrest of persons. S. 41 makes provision when police may arrest without warrant. How arrest can be made is provided under S. 46 of Cr.P.C. S. 47 deals with search of place entered by the person sought to be arrested and S. 50 provides when person arrested should be informed of grounds of arrest and of right to bail. S. 51 makes a provision for search of arrested person. At the request of the arrested person, he should be examined by the medical practitioner under S. 54, Cr.P.C. Section 56 provides that a police officer making an arrest without warrant, shall without unnecessary delay and subject to

the provisions as to bail take the person arrested before the Magistrate or officer in charge of Police Station and under S. 57 of Cr.P.C. the person arrested shall not be detained more than 24 hours by the police officer in the absence of special order of the Magistrate under S. 167, Cr.P.C. Chapter XI of Cr.P.C. deals with preventive action of police and S. 151 makes a provision for arrest to prevent commission of cognizable offence.

14. Indiscriminate arrest by the police and violation of human rights led the Apex Court to consider this aspect in the light of increasing crime rates and in *Joginder Kumar v. State of U.P.*, the Supreme Court struck the balance between the two by observing as under (Para 9) :-

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

The Apex Court has laid down the guidelines for effective enforcement of the fundamental rights in the aforesaid judgment, as under (Para 26):

1. *An arrested person being held in custody is entitled, if he so requests to have one friend relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where is being detained.*
 2. *The Police Officer shall inform the arrested person when he is brought to the police station of this right.*
 3. *An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from Arts. 21 and 22(1) and enforced strictly".*
15. In *Joginder Kumar's* case (1994 Cri LJ 1981) (supra) the Apex Court has held that no arrest can be made because it is lawful for the police officer to do so. The existence of power to arrest is one thing and the justification for exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner or on mere allegation of commission of an offence made against a person. Directions of the Apex Court in *Joginder Kumar's* case (supra) which are in the nature of law

and binding on all concerned, by itself would reduce the indiscriminate arrests by the police without any justification to arrest a person and as a result thereof, also reduce in indiscriminate violence, assault, beating and excesses of police in police lock-up and police custody. However, before the Apex Court question to prevent police torture, police indecency, use of third-degree methods and abuse of police power in the name of seeking information from the arrested person or investigation were not involved. Time has come that the State Government rises to the occasion by striking the balance between the life of a person in police custody and the power of law enforcing agencies to bring the criminals to the book by making appropriate rules or providing guidelines to the police personnel in such matters. Gross and flagrant violation of human rights of the persons in police custody or in police lock-up has rendered the fundamental rights enshrined in Art. 21 of the Constitution of India not meaningful. Has not Police Manual become outdated? Naked condition in which Junious was found dead in Police lock-up, the inhuman beatings and the number of injuries sustained by him shows pathetic condition of police violence on the person in its custody. How long such degree of police torture can be permitted on the face of prized fundamental right of life and liberty under Art. 21 of the Constitution of India? Measures to set right such violence by police on the person in its custody have to be made. State owes responsibility to protect the lives of its citizens even while they are in police custody or detention. We, therefore, feel that the State Government should immediately constitute a committee consisting of its Home Secretary, Law Secretary and Director General of Police to go into all the aspects of custodial violence by the police and suggest measures and guidelines to prevent and check violence in the police custody and police lock-up and also suggest for that purpose suitable amendments in the Police Manual of the State and also submit comprehensive scheme for police accountability of human rights abuse. The aforesaid committee should be constituted by the State Government within 15 days and if the said Committee thinks fit, may co-opt renowned human right activist. The committee should submit its report to the State Government within three months of its constitution. The State Government is further directed to take effective steps in implementing the measures and guidelines suggested by the committee in preventing and checking the custodial violence. We, however, feel that to minimise custodial violence, the State Government should immediately issue necessary instructions to all concerned police officials that besides right of the arrested person under S. 54 of the Code of Criminal Procedure, 1973 for his medical examination by a medical practitioner at his request, in every case before the arrested person is taken to the Magistrate, he should be medically examined and

the details of his medical report should be noted in the Station House Diary of police station and should be forwarded to the Magistrate at the time of his production. Even after the police remand is ordered by the concerned Magistrate for any period, every third day he should be medically examined and such medical reports should be entered in the Station House Diary. In every police lock-up a complaint box duly locked should be provided and the keys of that complaint box should be kept by the officer in charge of the Police Station. The officer in charge of the concerned Police Station should provide paper and pen to the detainee, if so demanded for writing complaint and should every day in the morning open the complaint box and if any complaint is found in the complaint box, the officer in charge of the Police Station should take such complaining detainee to the Magistrate immediately along with his complaint and the concerned Magistrate should pass appropriate orders in the light of the complaint made for medical examination, treatment, aid or assistance as the case may warrant. We hope these two safeguards would go a long way in reducing the custodial violence till appropriate recommendations are made by the Committee, rules and guidelines framed by the State Government and amendments are made in the Police Manual.

16. The Supreme Court in *Nilabati Behera v. State of Orissa*, AIR 1993 SC 1960, has emphasised that the precious guarantee by Art. 21 of the Constitution of India cannot be denied to convicts, under trials or other prisoners in custody except according to the procedure established by law and police or prison authorities owe a great responsibility to ensure that citizens in police custody are not deprived of their right to life because their liberty is in the very nature of things circumscribed by the very fact of their confinement and, therefore, their interest in the limited liberty left is rather precious. The Apex Court in unequivocal terms held that the duty of care on the part of the State is strict and admits of no exception. Para 30 of the said judgment reads as under:

"It is axiomatic that convicts, prisoners or undertrials are not denuded of their fundamental rights under Art. 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State, to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law while the citizen is in its custody. The precious right guaranteed by Art. 21 of the Constitution of India cannot be denied to convicts, under trials or other prisoners in custody, except according to the procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is "not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact

of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions. The wrong-doer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law. I agree with Brother Verma, J. that the defence of "sovereign immunity" in such cases is not available to the State and in fairness to Mr. Altaf Ahmed it may be recorded that he raised no such defence either".

17. Before we advert to the compensation which may be awarded to the petitioner No. 2 for the custodial death of her husband, the sequence of events which had taken place and assault and molestation of the petitioner No. 2 in the mid-night by ten male police officials has shocked the conscience of this Court. The breach of law by the law and order agency of the State is really shocking. How can the male police officials in the mid-night take away Mrs. Jarina, petitioner No. 2 in contemplation of any interrogation? Not only taking away a lady forcibly in the mid-night by male police officials was deplorable but gross and blatant abuse of power shows that such police officials have no regard for public morality and decency. It is, therefore, imperative that the State Government immediately looks into this aspect of the matter and issues directions to all the police stations in the State providing guidelines relating to arrest of female persons in the State. The State should ensure that no lady or female person is arrested without presence of lady constable and in no case, after sun-set and before sun-rise and if there are already rules or guidelines to that effect, these are to be strictly followed and complied with. We direct that the State Government should make proper provision for female detainees separately throughout the State in separate lock-ups and all other safeguards preventing police torture. This aspect too should be examined by the Committee constituted for the aforesaid purpose and proper recommendations be made by the Committee to the State Government to curb this menace and the State Government is directed to implement the said recommendations of the Committee relating female detainees as well.
18. Now coming to the last question of award of compensation to the petitioner No. 2 for custodial death of her husband Junious Adam Illamatti.
19. The legal position admits of no ambiguity and doubt that the State Government is liable to pay compensation for the custodial death.
20. The Supreme Court in *Rudal Sah v. State of Bihar*, held that one of the ways by which violation of fundamental right under Art. 21 of the Constitution of India can be reasonably compensated by award of compensation against the State for flagrant

fulfilment of fundamental right by its agency, instrumentality or its officials. The Supreme Court in *Rudul Sah's* case (*supra*) thus observed (Para 10) :-

"..... One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Art. 21 secured is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. Respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers".

21. In *Bhim Singh, MLA v. State of J & K*, the Supreme Court held as under (at p. 499, Para 2 of AIR) :-

"..... Police Officers who are the custodians of law and order should have the greatest respect for the personal liberty of citizens and should not flout the laws by stooping to such bizarre acts of lawlessness. Custodians of law and order should not become predators of civil liberties. Their duty is to protect and not to abduct."

22. The Supreme Court again examined the liability of the State for payment of compensation and custodial death due to police atrocities in *Saheli, a Women's Resources Centre v. Commr. of Police, Delhi*, and held that custodial death on account of beating and assault by the agency of sovereign power acting in violation of the power vested in such agency makes the State liable. The Supreme Court, thus held (para 11) :-

"An action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In cases of assault, battery and false imprisonment the damages are at large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death"

23. The Apex Court spelt out clearly the principle on which the liability of the State arises in such cases for payment of compensation and distinction was drawn relating to the liability in private law for payment of compensation in an action of tort at great length in *Nilabati Behera's* case (1993 Cri LJ 2899) (*supra*). It was, thus held therein that -

"16. It follows that a claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution is an acknowledged remedy for enforcement and protection of such rights and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and

in addition to the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Arts. 32 and 226 of the Constitution. This is what was indicated in Rudul Sah, and is the basis of the subsequent decisions in which compensation was awarded under Arts. 32 and 226 of the Constitution, for contravention of fundamental rights".

In para 21 of the said report, it was observed as under :-

"The above discussion indicates the principle on which the Court's power under Arts. 32 and 226 of the Constitution is exercised to award monetary compensation for contravention of a fundamental right. This was indicated in Rudul Sah, and certain further observations therein adverted to earlier, which may tend to minimise the effect of the principle indicated therein, do not really detract from that principle. This is how the decisions of this Court in Rudul Sah and others in that line have to be understood and Kasturilal, distinguished therefrom. We have considered this question at some length in view of the doubt raised, at times, about the propriety of awarding compensation in such proceedings, instead of directing the claimant to resort to the ordinary process of recovery of damages by recourse to an action in tort. In the present case, on the finding reached, it is a clear case for award of compensation to the petitioner for the custodial death of her son".

24. Thus, it is clear that the respondent State of Maharashtra cannot escape its liability from payment of compensation to the petitioner No. 2 for the death of her husband Junious Adam Illamatti in police custody/police lock-up and such liability rightly has not been disputed by the learned Asst. Government Pleader.
25. After holding that the State is liable to pay compensation to the petitioner No. 2 for custodial death of her husband and that in exercise of jurisdiction under Art. 226 of the Constitution of India such compensation can be awarded against the State of Maharashtra and in favour of the petitioner No. 2, the only question that remains to be considered is the quantum of compensation. Admittedly, deceased Junious was employed in the Railways and was drawing salary of Rs. 1600/- per month. This fact is not disputed by the Assistant Government Pleader. Though there is some dispute about the age of the deceased because according to the petitioners, the deceased Junious was 32 years old and the evidence and material collected

during the investigation shows the age of deceased Junious about 34-35 years, but according to the Assistant Government Pleader, Junious Adam was 42 years old at the time of his custodial death, we feel that the dispute of age in the facts and circumstances of the present case is not very material, because we are not examining the award of compensation under the Law of Tort. Even if we assume for the sake of arguments that deceased Junious was 42 years old at the time of his death, he being a permanent employees in the Railways of the Central Government, and the young age of petitioner No. 2 and minor children and in this view of the matter, applying the principles laid down by the Apex Court in Nilabati Behera's case (1993 Cri LJ 2899) (*supra*), we deem it just and proper that a total amount of Rs. 1,50,000/- would be appropriate as compensation to be awarded to the petitioner No. 2 in the present case. If the petitioner No. 2 or the minor children take any other proceeding for recovery of compensation on the same ground or any other ground, the amount of Rs. 1,50,000/- which is awarded to the petitioner No. 2, would be adjusted. It is, however, made clear that this award of compensation to the tune of Rs. 1,50,000/- in favour of the petitioner No. 2 and against the State of Maharashtra will not affect any other liability of the respondents or any other person flowing from the custodial death of the petitioner No. 2's husband Junious Adam Illamatti. It will be open to the State of Maharashtra to recover the amount of compensation awarded by us from the erring police officials proportionately.

26. Now, a word about the petitioner's prayer for handing over of the investigation of the case to the Central Bureau of Investigation. We have looked into the complete material of investigation conducted by Mr. S. P. Godbole and the evidence and material collected by him and the fact that now the charge-sheet had already been submitted by him before the Chief Judicial Magistrate, Nagpur and the case has already been committed for trial to the Court of Sessions Judge by the Chief Judicial Magistrate, in the facts and circumstances of the case, we do not feel that now any purpose would be served by ordering investigation of the case by the Central Bureau Investigation. Of course, from the material placed on record it does seem that the accused police officials avoided their arrest for few days. Though Mr. Godbole in his affidavit has stated that he has made all out efforts for the arrest of all the accused persons immediately, but was not successful, since he did not have sufficiently staff. This explanation is not satisfactory and we direct the State Government to enquire into the question whether there was any lapse on the part of the Investigating Officer in the arrest of the ten accused police officials and if so, proper action be taken.

27. We, however, make it clear that any observation made by us in this judgment would not have any bearing in the criminal trial pending against the police officials in connection with the death of Junious Adam Illamatti since the said police officials are not parties before us.
28. Before we conclude, we express our appreciation for the assistance rendered by Mr. R. S. Agrawal, Advocate of this Court who was requested by us to assist us in this matter since the counsel for the petitioner did not appear despite all efforts made. Mr. D. N. Kukdey, the learned Asst. Government Pleader also deserves a word of appreciation for the assistance rendered by him.
29. In the result, this writ petition is allowed and rule is made absolute in the following terms :-
- (1) The respondent State of Maharashtra is directed to constitute a Committee consisting of its Home Secretary, Law Secretary and Director General of Police within 15 days from today for going into all the aspects of custodial violence by the police in the State and suggest comprehensive measures and guidelines to prevent and check custodian violence and death and also suggest for that purpose suitable amendments in the Police Manual of the State and also submit comprehensive scheme for police accountability of human rights abuse;
 - (ii) The said Committee is directed to submit its report to the State Government within three months of its constitution;
 - (iii) The State Government is directed to take effective steps in implementing the measures and guidelines suggested by the Committee in preventing and checking the custodian violence immediately after submission of report by the said Committee;
 - (iv) The State Government is directed to issue immediately necessary instructions to all concerned police officials of the State that in every case after arrest and before detainee is taken to the Magistrate, he should be medically examined and the details of his medical report should be noted in the Station House Diary of Police Station and should be forwarded to the Magistrate at the time of production of detainee;
 - (v) The State Government should also issue instructions to all concerned police officials in the State that even after the police remand is ordered by the concerned Magistrate for any period, every third day, the detainee should

be medically examined and such medical reports should be entered in the Station House Diary;

- (vi) The State Government is further directed to provide a complaint box duly locked in every police-lockup and the keys of the complaint box should be kept by the Officer in-charge of the Police Station. The Officer in-charge of the concerned Police Station should provide paper and pen to the detainee if so demanded for writing complaint and the Officer in charge of the concerned Police Station should open the complaint box every day in the morning and if any complaint is found in the complaint box, the officer in-charge of the Police Station should produce such complaining detainee to the Magistrate immediately along with his complaint and the concerned Magistrate would pass appropriate orders in the light of the complaint made for medical examination, treatment, aid or assistance, as the case may warrant;
- (vii) The State Government should issue instructions immediately in unequivocal and unambiguous terms to all concerned that no female person shall be detained or arrested without the presence of lady constable and in no case, after sun-set and before sun-rise;
- (viii) The State Government should make proper provision for female detainee in separate lock-ups throughout the State of Maharashtra;
- (ix) The State Government is directed to enquire into the conduct of Investigating Officer Mr. S. D. Godbole, Dy. Superintendent of Police, CID (Crime). Nagpur as to whether there was any lapse on his part in the arrest of ten accused police officials and if so, proper action be taken against him;
- (x) The State Government is directed to pay compensation amounting to Rs. 1,50,000/- awarded in favour of the petitioner No. 2 Jarina wd/o Junious Adam in this proceeding for the custodial death of her husband Junious Adam Illamatti within one month from today. The said amount of compensation shall be paid by the State Government to the petitioner No. 2 by depositing that amount in the Fixed Deposit account of the petitioner No. 2 in any nationalised bank for a period of five years. The petitioner shall be entitled to withdraw the interest on the said Fixed Deposit during that period. It would be open to the State Government to recover the said amount of compensation from the erring police officials proportionately. However, it is made clear that this award of compensation to the tune of Rs. 1,50,000/- in favour of the petitioner No. 2 will not affect any other liability of the respondents or any

other person flowing from the custodial death of the husband of petitioner No. 2. If the petitioner No. 2 or her minor children take any other proceeding for recovery of compensation on the same ground or any other ground in any competent Court for the custodial death of the husband of petitioner No. 2, the amount of Rs. 1,50,000/- which is awarded to the petitioner No. 2, would be adjusted.

- (xi) The Sessions Judge, Nagpur is directed to assign the trial of Sessions Trial No. 416 of 93 arising out of Crime No. 438/93 registered at Sadar Police Station, Nagpur either to itself or any other competent Court on or before 17-9-1994, the date fixed for appearance of the accused and the said Court is directed to conclude the trial in Sessions Trial No. 416 of 93 expeditiously and as far as possible, within six months from 17-9-1994;
- (xii) The Additional Registrar (Judicial) of this Court is directed to send the record of Sessions Trial No. 416/93 to the Sessions Judge, Nagpur immediately; and
- (xiii) The State Government is directed to pay a fee of Rs. 2500/- to Mr. R. S. Agrawal, Advocate (amicus curie) for petitioners. This amount has been quantified by us looking to the nature of case and the assistance rendered by Mr. R. S. Agrawal, Advocate.
- (xiv) Let the copy of this judgment be sent to the Chief Secretary of the Government of Maharashtra, Bombay immediately.

Supreme Court of India

AIR 2006 SC 1946

R.D. Upadhyay

vs

State of A.P. and Others

Y.K. Sabharwal, C.J., C.K. Thakker and P.K. Balasubramanyan, JJ.

1. Concerned by the plight of the undertrial prisoners languishing in various jails in the country, various directions were issued by this Court from time to time. Presently, we are considering mainly the issue of directions for the development of children who are in jail with their mothers, who are in jail either as undertrial prisoners or convicts. Children, for none of their fault, but per force, have to stay in jail with their mothers. In some cases, it may be because of the tender age of the child, while in other cases, it may be because there is no one at home to look after them or to take care of them in absence of the mother. The jail environment is certainly not congenial for development of the children.
2. For the care, welfare and development of the children, special and specific provisions have been made both in Part III and IV of the Constitution of India, besides other provisions in these parts which are also significant. The best interest of the child has been regarded as a primary consideration in our Constitution. Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth. Article 15(3) provides that this shall not prevent the State from making any special provision for women and children. Article 21A inserted by 86th Constitutional Amendment provides for free and compulsory education to all children of the age of six to fourteen years. Article 24 prohibits employment of children below the age of fourteen years in any factory or mine or engagement in other hazardous employment. The other provisions of Part III that may be noted are Articles 14, 21 and 23. Article 14 provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 23 prohibits trafficking in human beings and forced labour. We may also note some provisions of Part IV of the Constitution. Article 39(e) directs the State to ensure that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity

to enter avocations unsuited to their age or strength. Article 39(f) directs the State to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Article 42 provides that the State shall make provision for securing just and humane conditions of work and maternity relief. Article 45 stipulates that the State shall Endeavour to provide early childhood care and education for all children until they complete the age of six years. Article 46 provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. Article 47 provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

3. Apart from the aforesaid constitutional provisions, there are wide range of existing laws on the issues concerning children, such as, the Guardians and Wards Act, 1890, Child Marriage Restraint Act, 1929, the Factories Act, 1948, Hindu Adoptions and Maintenance Act, 1956, Probation of Offenders Act, 1958, Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960, the Child Labour (Prohibition and Regulation) Act, 1986, Juvenile Justice (Care and Protection of Children) Act, 2000, the Infant Milk Substitutes, Feeding Bottles and Infant Foods, (Regulation of Production, Supply and Distribution) Act, 1992, Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, Immoral Traffic (Prevention) Act, 1986.
4. The Juvenile Justice Act, 2000 replaced the Juvenile Justice Act, 1986 to comply with the provisions of the Convention on the rights of the child which has been acceded to by India in 1992. In addition to above, the national policy for children was adopted on 22nd August, 1974. This policy, inter alia, lies down that State shall provide adequate services for children both before and after birth, and during the growing stages for their full physical, mental and social development. The measures suggested include amongst others a comprehensive health programme, supplementary nutrition for mothers and children, promotion of physical education and recreational activities, special consideration for children of weaker sections and prevention of exploitation of children.

5. India acceded to the UN Convention on the rights of the child in December 1992 to reiterate its commitment to the cause of the children. The objective of the Convention is to give every child the right to survival and development in a healthy and congenial environment. The UN General Assembly Special Session on children held in New York in May 2002 was attended by an Indian delegation led by Minister of Human Resource Development and consisted of Parliamentarians, NGOs and officials. It was a follow up to the world summit held in 1990. The summit adopted the declaration on the survival, protection and development of children and endorsed a plan of action for its implementation.
6. The Government of India is implementing various schemes and programmes for the benefit of the children. Further, a National Charter for children 2003 has been adopted to reiterate the commitment of the Government to the cause of the children in order to see that no child remains hungry, illiterate or sick. By the said Charter, the Government has affirmed that the best interests of children must be protected through combined action of the State, civil society and families and their obligation in fulfilling children's basic needs. National Charter has been announced with a view to securing for every child inherent right to enjoy happy childhood, to address the root causes that negate the health, growth and development of children and to awake the conscience of the community in the wider societal context to protect children from all forms of abuse, by strengthening the society and the nation. The National Charter provides for survival, life and liberty of all children, promoting high standards of health and nutrition, assailing basic needs and security, play and leisure, early childhood care for survival, growth and development, protection from economic exploitation and all forms of abuse, protection of children in distress for the welfare and providing opportunity for all round development of their personality including expression of creativity etc.
7. The National Institute of Criminology and Forensic Sciences conducted a research study of children of women prisoners in Indian jails. The salient features of the study brought to the notice of all Governments in February 2002, are:
 - i) The general impression gathered was the most of these children were living in really difficult conditions and suffering from diverse deprivations relating to food, healthcare, accommodation, education, recreation, etc.
 - ii) No appropriate programmes were found to be in place in any jail, for their proper bio-psychosocial development. Their looking after was mostly left to their mothers. No trained staff was found in any jail to take care of these children.

- iii) It was observed that in many jails, women inmates with children were not given any special or extra meals. In some cases, occasionally, some extra food, mostly in the form of a glass of milk, was available to children. In some jails, separate food was being provided only to grown up children, over the age of five years. But the quality of food would be same as supplied to adult prisoners.
 - iv) No special consideration was reported to be given to child bearing women inmates, in matters of good or other facilities. The same food and the same facilities were given to all women inmates, irrespective of the fact whether their children were also living with them or not.
 - v) No separate or specialized medical facilities for children were available in jails.
 - vi) Barring a few, most mother prisoners considered that their stay in jails would have a negative impact on the physical as well as mental development of their children.
 - vii) Crowded environment, lack of appropriate food, shelter and above all, deprivation of affection of other members of the family, particularly the father was generally perceived by the mothers as big stumbling blocks for the proper development of their children in the formative years of life.
 - viii) Mother prisoners identified six areas where urgent improvement was necessary for proper upkeep of their children. They related to food, medical facilities, accommodation, education, recreation and separation of their children from habitual offenders.
 - ix) No prison office was deployed on the exclusive duty of looking after these children or their mothers. They had to perform this duty alongside many other duties including administrative work, discipline maintenance, security-related jobs etc. None of them was reported to have undergone any special training in looking after the children in jails.
8. Some of the important suggestions emanating from the study are:
- i) In many States, small children were living in sub-jails which were not at all equipped to keep children. Women prisoners with children should not be kept in such sub-jails, unless proper facilities can be ensured which would make for a conductive environment there, for proper bio-psycho-social growth of children.
 - ii) Before sending a woman in stage of pregnancy, to a jail, the concerned authorities must ensure that particular jail has got the basic minimum facilities for child delivery as well as for providing pre-natal and post-natal care for both to the mother and the child.

- iii) The stay of children in crowded barracks amidst women convicts, undertrials, offenders relating to all types of crime including violent crimes, is certainly harmful for such children in their personality development. Children are, therefore, required to be separated from such an environment on priority basis, in all such jails.
 - iv) A permanent arrangement needs to be evolved in all jails, to provide separate food with ingredients to take care of the nutritional needs of children to them on regular basis.
 - v) Children of women prisoner should be provided with clothes, bed sheets, etc. in multiple sets. Separate utensils of suitable size and material should also be provided to each mother-prisoner for giving food to her child.
 - vi) Medical care for every child living in a jail has to be fully ensured. Also, in the event of a women prisoner falling ill herself, alternative arrangements for looking after the child should be made by the jail staff.
 - vii) Adequate arrangements should be available in all jails to impart education, both formal and informal, to every child of the women inmates. Diversified recreational programmers/facilities should also be made available to the children of different age groups.
 - viii) A child living in a jail along with her incarcerated mother is not desirable at all. In fact, this should be as only the last resort when all other possibilities of keeping the child under safe custody elsewhere have been tried and have failed. In any case, it should be a continuous endeavor of all the sectors of the criminal justice system that the least number of children are following their mothers to live in jails.
9. The State Governments and Union Territories were requested to consider the aforesaid suggestions for implementation. By filing IA Nos. 1 and 7, the attention of this Court has been drawn to the plight of little children on account of the arrest of their mothers for certain criminal offences.
- I.A. No. 1 was filed by Women's Action Research and Legal Action for Women (WARLAW), through its program coordinator, Ms. Babita Verma stating that more than 70% of the women prisoners are married and have children. At the time of arrest of the women prisoners having children, indiscriminate arrest is not confined only to women/mother prisoners but such arrest is automatically extended to these children who are of tender age and there is no one to look after the child and take care of the

child without their mother. Such children are perforce subjected to a kind of arrest for no offence committed by them. Further, the atmosphere in jail is not congenial for a healthy upbringing of such children. There are two non-Governmental organizations (NGO's), namely Mahila Pratiraksha Mandal and Navjyoti who are counselors. Adjoining the jail premises at Delhi there is Nari Niketan which is a women's reform home. Some of the children who are detained in jail are sent to Kirti Nagar Children's home for their studies. The arrangement pertaining to the education and looking after of these children is not adequate. To the best of the information of the applicant, there is no specific provision or regulation in Jail Manual for facilitating the mother prisoners to meet the children. It is for the family protection of these women prisoners including their minor children that the trial period of undertrials shall be minimized and a period of two years shall be fixed.

10. It was suggested that arrest of women suspects be made only by lady police. Such arrests should be sparingly made as it adversely affects innocent children who are taken into custody with their mother. To avoid arrest of innocent children the care and custody of such children may be handed over to voluntary organizations which can assist in the growth of children in a congenial and healthy atmosphere. Periodic meeting rights should be available to the women/mother prisoners in order to mother the healthy upkeep of the children.
11. A letter dated 8th March, 2000 written by a 6 years old girl child, studying in upper KG in a school at Bangalore, to Chief Justice of India enclosing an article 'Dogged by Death in Jail' in a women's magazine dated 20th January, 2000 narrating plight of children in jail with their mothers, was registered as IA No. 7. The article, inter alia, notes that the fate of the women undertrials is more pitiable because some of them live with their tiny tots whether born at home or inside the jail and that a visitor to jail is sure to see a series of moving scenes.
12. The order dated 20th March, 2001 notes that the learned Solicitor General shares the concern of the Court regarding the plight of the children in jail and the submission that with a view to frame some guidelines and issue instructions, it would be necessary to first ascertain the number of female prisoners in each of the jails, in each of the States/union Territories, the offences for which they have been arrested; the duration of their detention and whether children with any of those female prisoners are also lodged in jail. The Court directed the States and Union Territories to disclose on affidavit the following:

- i) The number of female prisoners (undertrial) together with the nature of offence for which they have been detained;
 - ii) Period of their detention;
 - iii) Children, if any, who are with the mothers lodged in the jail;
 - iv) Number of convicted female prisoners and whether any children are also lodged with such convicts in the jails;
 - v) Whether any facilities are available in the jail concerned for taking care of such children and, if so, the type of facilities.
13. Various State Governments and Union Territories submitted reports which provided detailed answers to the aforestated questions. The following is a brief conspectus of the reports filed:

In the Andaman & Nicobar Islands, children are allowed to live with their mothers up to the age of 5 years. A special diet is prescribed for children by the Medical Officer including proper vitamins and minerals. As far as the future of the children is concerned, in consultation with the District Magistrate, the children are handed over to the relatives or to some trustworthy person as selected by the District Magistrate himself.

In Andhra Pradesh, milk is provided to the children every day with a protein diet for elder kids. Special medical facilities are available as prescribed by the Medical Officer. Vaccines like Polio etc are provided at regular intervals. Education is also provided.

In Assam, children are allowed to live with their mothers up to the age of 6 years. Literary training is provided to small children who are lodged with their prisoner mothers. Lady teachers are also present. Instructions have been issued to provide sufficient study material to the children, as also adequate playing material. As for their future, in consultation with the District Magistrate, the children are handed over to the relatives or to some trustworthy person as selected by the District Magistrate himself.

In Bihar, children are allowed to live with their mothers up to the age of 2 years and up to 5 years in special cases where there is no other caretaker for child. Provision is made for special ration above and beyond the normal labouring ration for nursing mother and for supplementary cow's milk for children under the age of one year not receiving sufficient milk from the mother. Provision is also made for ration for children from 12-18 months, and from 18-24 months or as specified by the Medical Officer. Health and clothing facilities are provided by the Government. Toys and other forms of entertainment are also available in some jails.

In Chandigarh, a special diet is provided for. Medical facilities are also present.

In Chhattisgarh, children are allowed to live with their mothers up to the age of 6 years. Normal food and additional milk is provided. Polio drops are provided on pulse

polio day. Medical treatment is done by full time and part time doctors present in the jail. Children are sent outside for expert medical treatment and advice if required. NGO's have provided for clothes. Inside the jail, a child education center is being run so that they develop interest in education and may learn to read and write. TV and fans for the female prisoners and their kids have been provided by some social service organizations, as also sports and recreation material, swings and cycles. Children are taken to public parks and for public functions to get acquainted with the outside world. After the age of six, these children are sent to the local 'children's home', where their primary education starts. Female children are sent to the Rajkumari Children's Home at Jabalpur where there is adequate arrangement of education.

In Delhi, children are allowed to live with their mothers up to the age of 6 years. A special diet inclusive of 750 gm milk and one egg each is provided to children in jail. Proper diets and vaccine for popular diseases are adequately provided for the children. Clothing is also provided for. Children above 4 years are taught to read and write. They are prepared for admission to outside schools. Sponsorships for the funding of the children education is provided for by the CASP (Community Aid Sponsorship Programme). Two NGO's by the name of Mahila Pratiraksha mandal and Navjyoti Delhi Police Foundation run crches. Picnics are arranged by NGO's to take them to the Zoo and parks and museums to make them familiar with the outside world. Admission of the children above 5 years of age to Government cottage homes and to residential schools is facilitated through NGO's.

In Goa, the report states that dietary facilities for children are provided by the Government. The Medical Officer of the primary Health center, Candolim visits prisoners and children twice a week. If required, they are sent for better treatment to Government Hospitals.

In Gujarat, a special diet and special medical facilities as prescribed by the Medical Officer are available for children. Cradle facilities are provided for infants.

In Haryana, a standard diet of rice, flour, milk and dal is provided with a special diet provided on the advice of Medical Officer. Health issues are looked after as per the advice of Medical Officer. Regular literacy classes are taken by two lady teachers on deputation from the State Education Dept. at Borstal Jail, Hissar. Books and toys are provided.

In Himachal Pradesh, children are allowed to live with their mothers up to the age of 4 years or in special cases up to 6 years by the approval of the Superintendent. Children under the age of 1 year are provided with milk, sugar and salt. Provision is also made for ration for children from 12- 18 months and from 18-24 months. Extras may be ordered by the Medical Officer. Female prisoners and their children are in a separate ward, with its own toilets. This ensures that there is no mixing between the children and the male prisoners.

In Jammu & Kashmir, a special diet is available, as prescribed by the Medical Officer. Supplements are also provided to breast feeding mothers.

In Jharkhand, children are allowed to live with their mothers up to the age of 5 years. Provisions are made for special ration above and beyond the normal labouring ration for nursing mother and for supplementary cow's milk for children under the age of 1 year not receiving sufficient milk from the mother. Provision is also made for ration for children from 12-18 months and from 18-24 months. Health and clothing are taken care of by the Jail superintendent. Toys and items of entertainment have been provided in some jails.

In Karnataka, children are allowed to live with their mothers up to the age of 6 years. Education is looked after for by various NGO's. When the children are to leave the jail, they are handed over to the relatives or to some trustworthy person, Agency or school.

In Kerala, a special diet and medical facilities are made available as prescribed by the Medical Officer. Special clothing can also be so prescribed.

In Lakshadweep, it was reported that there is no undertrial prisoner lodged in jail along with her child and, therefore, need for making arrangements for children along with mothers is not felt necessary.

In Madhya Pradesh, children are allowed to live with their mothers up to the age of 4 years or in special cases up to 6 years by the approval of the Superintendent. There is provision for special ration above and beyond the normal labouring ration for nursing mother and for supplementary cow's milk for children under the age of 1 year not receiving sufficient milk from the mother. Provision is also made for ration for children from 12-18 months and from 18-24 months. For children who are leaving the jail, in consultation with the District Magistrate the children are handed over to the relatives or to some trustworthy person as selected by the District Magistrate himself.

In Maharashtra, children are allowed to live with their mothers up to the age of 4 years. They are to be weaned away from their mothers between the ages of 3 to 4 years. A special diet is prescribed under the Maharashtra Prison Rules. Changes can be recommended by the Medical Officer. Specific amounts of jail-made carbolic soap and coconut oil are to be provided for by the authorities. Garments are to be provided as per the Maharashtra Prisons Rules. Two coloured cotton frocks, undergarments and chaddies per child have been prescribed per year. A nursery school is conducted by 'Sathi', an NGO in the female jail on a regular basis. Primary education is provided for by 'Prayas', a voluntary organization in Mumbai Central Prisons. A small nursery with cradles and other reasonable equipments is provided in each woman's ward. Toys are also provided for by the authorities. On leaving the jail, children are handed over to the nearest relative, in whose absence to the officer-in-charge of the nearest Government remand home, or institution set up for the care of the destitute children under the Bombay Children Act, 1948.

In Manipur, provision is made for special ration above and beyond the normal labouring ration for nursing mother and for supplementary cow's milk for children under the age of one year not receiving sufficient milk from the mother. Provision is also made for ration for children from 12-18 months and from 18-24 months. The

Superintendent is entrusted with the responsibility of providing clothing for children who are allowed to reside with their mothers.

In Meghalaya, children are allowed to live with their mothers up to the age of 6 years. All aspects of the children's welfare are taken care of according to the Rules under the State Jail Manual.

In Mizoram, children are allowed to live with their mothers up to the age of 6 years. A special diet is prescribed under the Rules of the Jail Manual. However, no proper facilities for education or recreation exist.

In Nagaland, the provisions of the Assam Jail Manual have been adopted vis-a-vis facilities for women and for children living with their mothers.

In Orissa, children are allowed to live with their mothers up to the age of 4 years or in special cases up to 6 years by the approval of the Superintendent. A special diet is available, as prescribed by the Medical Officer. Children are provided with suitable clothing. On leaving the jail, in consultation with the District Magistrate, the children are handed over to the relatives or to some trustworthy person, as selected by the District Magistrate himself.

In Pondicherry, a special diet is available as prescribed by the Medical Officer. Play things, toys etc. are provided to the children at Government cost or through NGOs.

In Punjab, children under the age of one year are provided with milk and sugar. Provision is also made for ration for children from 12-18 months and from 18-24 months. Extra diet is available on the advice of the Medical Officer. There is a play way nursery and one ayah or attendant who looks after the children from time to time.

In Rajasthan, a special diet is available under the rules of the Jail Manual. Special medical facilities are also provided for as prescribed in the manual. Clothing and toys are provided for by NGOs.

In Tamil Nadu, children are allowed to live with their mothers up to the age of 6 years. A special diet and special clothing are available as prescribed by the Medical Officer. Children under 3 years of age are treated in the crèches and those up to the age of 6 years are treated in the nursery. Oil, soap and hot water are available for children. On leaving the jail, in consultation with the District Magistrate, the children are handed over to the relatives or to some trustworthy person, as selected by the District Magistrate himself.

In Tripura, the diet of children is as per the instructions of the Medical Officer. Medical care and nursing facilities are available. Mothers accompanied by children are kept separately.

In Uttar Pradesh, children are allowed to live with their mothers up to the age of 6 years. A special diet is available under the Rules of the Jail Manual. On leaving prison, in consultation with the District Magistrate, the children are handed over to the relatives or to some trustworthy person, as selected by the District Magistrate himself.

In Uttarakhand, food is provided as under the Rules of the Jail manual. Education

provided for by the Government, which also makes arrangement for extra-curricular activities such as sports.

In West Bengal, normal facilities are available and in addition to that Inner Wheel club also runs a Homeopathic clinic for children. A non-formal school is run by an NGO for rendering elementary education to the children.

From the various affidavits submitted, it seems that there were 6496 undertrial women with 1053 children and 1873 convicted women with 206 children.

14. On 23rd January, 2002, it was noted that three matters were required to be dealt with by the Court: (1) Creation of sufficient number of subordinate courts as well as providing adequate infrastructure and filling up of the existing vacancies; (2) necessary direction with regard to dealing with the children of women undertrial prisoners/ women convicts inside jail; and (3) arrangement required to be made for mentally unsound people who are either undertrial prisoners or have been convicted. It was then directed that the question of dealing with the children of women undertrial prisoners and women convicts be taken up first. That is how we have taken up this issue for consideration, perused various reports, and heard Mr. Ranjit Kumar, Senior Counsel, who assisted this Court as Amicus Curiae, Mr. Sanjay Parikh and other learned Counsel appearing for Union of India and State Governments. We place on record our appreciation for the able assistance rendered by learned Amicus and other learned Counsel. It may be noted that on 29th August, 2002, a field action project prepared by the Tata Institute of Social Science on situation of children of prisoners was placed before this Court. Responses thereto have been filed by the Union of India as well as the State Governments.
15. The report puts forward five grounds that form the basis for the suggestion to provide facilities for minors accompanying their mothers in the prison:
 - a) The prison environment is not conducive to the normal growth and development of children;
 - b) Many children are born in prison and have never experienced a normal family life, sometimes till the age permitted to stay inside (four to five years);
 - c) Socialization patterns get severely affected due to their stay in prison. Their only image of male authority figures is that of police and prison officials. They are unaware of the concept of a home, as we know it. Boys may sometimes be found talking in the female gender, having grown up only among women confined in the female ward. Unusual sights, like animals on the road (seen on the way to Court with the mother) are frightening.

- d) Children get transferred with their mothers from one prison to another, frequently (due to overcrowding), thus unsettling them; and
 - e) Such children sometimes display violent and aggressive, or alternatively, withdrawn behavior in prison.
16. Specific suggestions have been put forward vis-a-vis children once they reach the confines of the prison. The minimum is the existence of a Balwadi for such children, and a crèches for those under the age of two. The Balwadi should be manned by a trained Balwadi teacher and should have the facilities of a visiting psychiatrist and pediatrician. A full-time nurse could also be made available. Immunization should take place on a regular basis. If the child is sick and needs to be taken outside the prison, the mother should be allowed to accompany the child. The Balwadi would provide free space, toys and games for children. It can also organize programmes on mother and child care, hygiene and family life for mothers. It has also been suggested that these facilities should be located outside, but attached to the prison. This would combat the negative psychological impact of the prison environment and expose the children to 'normal' figures not found in the women's barracks. It is also suggested that specialized clothing including winter-wear and bedding including plastic sheets should be provided to children. Concerns have also been raised regarding the issuance of a birth certificate that mentions the prison as the place of birth of a child born in prison. It is suggested that child's residence should be mentioned as the place of birth and not the prison.
17. Emphasis has been placed on the diet of such children. It recommends that a special diet be prescribed, as per the norms suggested by a nutrition or child development expert body such as the National Institute of Public Cooperation and Child Development. The diet should be standardized according to the age of the child and not prescribed as uniform irrespective of the age of the child. The special needs of the child should be kept in mind, for instance, milk needs to be kept fresh which will not be the case if it is handed out only once in the morning. Toned milk may be required or boiled water may need to be provided. For satisfying these needs and providing a satisfactory diet may even require the creation of a separate kitchen unit for children.
18. Several suggestions have been made vis-a-vis the judiciary, legal aid authorities, the Department of Women and Child Development/Welfare and the Juvenile Justice Administration (under the Juvenile Justice Act) and the Probation Department in relation to the welfare measures that can be taken for children of undertrial and incarcerated prisoners, both living within and outside the jail premises.

19. The Union of India, in its affidavit, has pointed out that it has taken several measures for the benefit of children in general, including children of women prisoners in this larger group. These measures include 'Sarva Shiksha Yojna', Reproductive and Child Health Programme, and Integrated Child Development Projects and passing of the Juvenile Justice (Care and Protection of Children) Act, 2000 for the welfare of children in general.

Union of India also pointed out that the Swadhar scheme has been launched by the Department of Woman and Child Development with the objective of providing for the primary needs of shelter, food, clothing, care, emotional support and counselling to the women convicts and their children, when these women are released from jail and do not have any family support, among other groups of disadvantaged women.

20. Reference has already been made to the report of the National Institute of Criminology and Forensic Sciences which was forwarded to various States and Union Territories in 2002. Union of India also brought to the notice of the Court that a Jail Manual Bill ("The Prison Management Bill, 1998") had been prepared which, inter alia, deals with the plight of women prisoners, under Chapters XIV and XVI. This Bill was prepared with the laudable aim of bringing uniformity to jail management across the country. It is important to note that Chapter II of the Bill delineates various rights and duties of prisoners. The rights include the right to live with human dignity; adequate diet, health and medical care, clean hygienic living conditions and proper clothing; the right to communication which includes contact with family members and other persons; and the right to access to a court of law and fair and speedy justice. Clearly, the rights of children of women prisoners living in jail are broader than this categorization, since the children are not prisoners as such but are merely victims of unfortunate circumstances. It is also important to note that Section 33 of the Bill mandates the provision of a Fair Price Shop in all prisons accommodating more than 200 prisoners. This shop should also offer essential items for children of prisoners. In addition, Section 60 (1)(d) provides for temporary or special leave being granted to a prisoner who shows sufficient cause to the State Government or the concerned authority. This can be utilized to grant parole to pregnant women. It may also be noted that Chapter IV of the Bill relates to release and after care and Chapter XVI deals with special categories of prisoners. Both these chapters have a special significance when considering the rights of Children of Women prisoners.

21. The Union of India noted that the "National Expert Committee on Women Prisoners", headed by Justice V.R. Krishnaiyer, framed a draft Model Prison Manual. Chapter

XXIII of this manual makes special provision for children of women prisoners. This manual was circulated to the States and Union Territories for incorporation into the existing jail manuals. It is significant to note that this committee has made important suggestions regarding the rights of women prisoners who are pregnant, as also regarding child birth in prison. It has also made suggestions regarding the age up to which children of women prisoners can reside in prison, their welfare through a crches and nursery, provision of adequate clothes suiting the climatic conditions, regular medical examination, education and recreation, nutrition for children and pregnant and nursing mothers.

22. Various provisions of the Constitution and statutes have been noticed earlier which cast an obligation on the State to look after the welfare of children and provide for social, educational and cultural development of the child with its dignity intact and protected from any kind of exploitation. Children are to be given opportunities and facilities to develop in a healthy manner and in a condition of freedom and dignity. We have also noted U.N. conventions to which India is a signatory on the Rights of the Children.
23. This Court has, in several cases, accepted International Conventions as enforceable when these Conventions elucidate and effectuate the fundamental rights under the Constitution. They have also been read as part of domestic law, as long as there is no inconsistency between the Convention and domestic law (See *Vishaka v. State of Rajasthan* AIR 1997SC3011). In *Sheela Barse v. Secretary, Children's Aid Society* MANU/SC/0118/1986 : [1987]1SCR870 which dealt with the working of an Observation Home that was maintained and managed by the Children's Aid Society, Bombay, it was said:
5. Children are the citizens of the future era. On the proper bringing up of children and giving them the proper training to turn out to be good citizens is what the future of the country depends on. In recent years, this position has been well realized. In 1959, the Declaration of all the rights of the child was adopted by the General Assembly of the United Nations and in Article 24 of the International Covenant on Civil and Political Rights, 1966. The importance of the child has been appropriately recognized. India as a party to these International Charters having ratified the Declaration, it is an obligation of the Government of India as also the State machinery to implement the same in the proper way. The Children's Act, 1948 has made elaborate provisions to cover this and if these provisions are properly translated into action and the authorities created under the Act become cognizant of their role, duties and obligation in the performance of the statutory mechanism created under the Act and they are properly motivated to meet the situations that arise in handing the problems, the situation would certainly be very much eased.

24. True, several legislative and policy measures, as aforesaid, have been taken over the years in furtherance of the rights of the child. We may again refer to the Juvenile Justice Act which provides for the care and rehabilitation of neglected and delinquent children, under specially constituted Juvenile welfare boards/courts. It provides for institutionalization of such children, if necessary. Juvenile children's homes have been set up both by the State as well as by NGO's to house such children. In some states, Social Welfare and Women and Child Development/Welfare Departments have specific schemes for welfare and financial assistance to released prisoners, dependants of prisoners and families of released prisoners. Some States have appointed Prison Welfare Officers to look after the problems of prisoners and their families. In some other States, Probation Officers are performing this task, apart from their role under the P.O. Act, 1958.
25. However, on the basis of various affidavits submitted by various State Governments and Union Territories, as well as the Union of India, it becomes apparent that children of women prisoners who are living in jail require additional protection. In many respects, they suffer the consequences of neglect. While some States have taken certain positive measures to look after the interests of these children, but a lot more is required to be done in the States and Union Territories for looking after the interest of the children. It is in this light that it becomes necessary to issue directions so as to ensure that the minimum standards are met by all States and Union Territories vis-a-vis the children of women prisoners living in prison.
26. In light of various reports referred to above, affidavits of various State Governments, Union Territories, Union of India and submissions made, we issue the following guidelines:
1. A child shall not be treated as an undertrial/convict while in jail with his/her mother. Such a child is entitled to food, shelter, medical care, clothing, education and recreational facilities as a matter of right.
 2. Pregnancy:
 - a. Before sending a woman who is pregnant to a jail, the concerned authorities must ensure that jail in question has the basic minimum facilities for child delivery as well as for providing pre- natal and post-natal care for both, the mother and the child.
 - b. When a woman prisoner is found or suspected to be pregnant at the time of her admission or at any time thereafter, the lady Medical Officer shall

report the fact to the superintendent. As soon as possible, arrangement shall be made to get such prisoner medically examined at the female wing of the District Government Hospital for ascertaining the state of her health, pregnancy, duration of pregnancy, probable date of delivery and so on. After ascertaining the necessary particulars, a report shall be sent to the Inspector General of Prisons, stating the date of admission, term of sentence, date of release, duration of pregnancy, possible date of delivery and so on.

- c. Gynecological examination of female prisoners shall be performed in the District Government Hospital. Proper pre-natal and post-natal care shall be provided to the prisoner as per medical advice.
3. Childbirth in prison:
 - a. As far as possible and provided she has a suitable option, arrangements for temporary release/parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the prison. Only exceptional cases constituting high security risk or cases of equivalent grave descriptions can be denied this facility.
 - b. Births in prison, when they occur, shall be registered in the local birth registration office. But the fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned.
 - c. As far as circumstances permit, all facilities for the naming rites of children born in prison shall be extended.
4. Female prisoners and their children:
 - a. Female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years.
 - b. No female prisoner shall be allowed to keep a child who has completed the age of six years. Upon reaching the age of six years, the child shall be handed over to a suitable surrogate as per the wishes of the female prisoner or shall be sent to a suitable institution run by the Social Welfare Department. As far as possible, the child shall not be transferred to an institution outside the town or city where the prison is located in order to minimize undue hardships on both mother and child due to physical distance.
 - c. Such children shall be kept in protective custody until their mother is released or the child attains such age as to earn his/her own livelihood.

- d. Children kept under the protective custody in a home of the Department of Social Welfare shall be allowed to meet the mother at least once a week. The Director, Social Welfare Department, shall ensure that such children are brought to the prison for this purpose on the date fixed by the Superintendent of Prisons.
 - e. When a female prisoner dies and leaves behind a child, the Superintendent shall inform the District Magistrate concerned and he shall arrange for the proper care of the child. Should the concerned relative(s) be unwilling to support the child, the District Magistrate shall either place the child in an approved institution/home run by the State Social Welfare Department or hand the child over to a responsible person for care and maintenance.
5. Food, clothing, medical care and shelter:
- a. Children in jail shall be provided with adequate clothing suiting the local climatic requirement for which the State/U.T. Government shall lay down the scales.
 - b. State/U.T. Governments shall lay down dietary scales for children keeping in view the calorific requirements of growing chic. A permanent arrangement needs to be evolved in all jails, to provide separate food with ingredients to take care of the nutritional needs of children who reside in them on a regular basis.
 - c. Separate utensils of suitable size and material should also be provided to each mother prisoner for using to feed her child.
 - d. Clean drinking water must be provided to the children. This water must be periodically checked.
 - e. Children shall be regularly examined by the Lady Medical Officer to monitor their physical growth and shall also receive timely vaccination. Vaccination charts regarding each child shall be kept in the records. Extra clothing, diet and so on may also be provided on the recommendation of the Medical Officer.
 - f. In the event of a woman prisoner falling ill, alternative arrangements for looking after any children falling under her care must be made by the jail staff.
 - g. Sleeping facilities that are provided to the mother and the child should be adequate, clean and hygienic.
 - i. Children of prisoners shall have the right of visitation.

- j. The Prison Superintendent shall be empowered in special cases and where circumstances warrant admitting children of women prisoners to prison without court orders provided such children are below 6 years of age.
6. Education and recreation for children of female prisoners:
 - a. The child of female prisoners living in the jails shall be given proper education and recreational opportunities and while their mothers are at work in jail, the children shall be kept in crèches under the charge of a matron/female warder. This facility will also be extended to children of warders and other female prison staff.
 - b. There shall be a crèche and a nursery attached to the prison for women where the children of women prisoners will be looked after. Children below three years of age shall be allowed in the crèche and those between three and six years shall be looked after in the nursery. The prison authorities shall preferably run the said crèche and nursery outside the prison premises.
7. In many states, small children are living in sub-jails that are not at all equipped to keep small children. Women prisoners with children should not be kept in such sub-jails, unless proper facilities can be ensured which would make for a conducive environment there, for proper biological, psychological and social growth.
8. The stay of children in crowded barracks amidst women convicts, undertrials, offenders relating to all types of crimes including violent crimes is certainly harmful for the development of their personality. Therefore, children deserve to be separated from such environments on a priority basis.
9. **Diet:** Dietary scale for institutionalized infants/children prepared by Dr. A.M. Dwarkadas Motiwala, MD (Pediatrics) and Fellowship in Neonatology (USA) has been submitted by Mr. Sanjay Parikh. The document submitted recommends exclusive breastfeeding on the demand of the baby day and night. If for some reason, the mother cannot feed the baby, undiluted fresh milk can be given to the baby. It is emphasized that "*dilution is not recommended; especially for low socio-economic groups who are also illiterate, ignorant, their children are already malnourished and are prone to gastroenteritis and other infections due to poor living conditions and unhygienic food habits. Also, where the drinking water is not safe/reliable since source of drinking water is a question mark. Over-dilution will provide more water than milk to the child and hence will lead to malnutrition and infections. This in turn will lead to growth retardation and developmental delay both physically and mentally.*" It is noted that since an average Indian

mother produces approximately 600 - 800 ml. milk per day (depending on her own nutritional state), the child should be provided at least 600 ml. of undiluted fresh milk over 24 hours if the breast milk is not available. The report also refers to the "Dietary Guidelines for Indians - A Manual," published in 1998 by the National Institute of Nutrition, Council of Medical Research, Hyderabad, for a balanced diet for infants and children ranging from 6 months to 6 years of age. It recommends the following portions for children from the ages of 6-12 months, 1-3 years and 4-6 years, respectively: Cereals and Millets - 45, 60-120 and 150-210 grams respectively; Pulses - 15, 30 and 45 grams respectively; Milk - 500 ml (unless breast fed, in which case 200 ml); Roots and Tubers - 50, 50 and 100 grams respectively; Green Leafy Vegetables - 25, 50 and 50 grams respectively; Other Vegetables - 25, 50 and 50 grams respectively; Fruits - 100 grams; Sugar - 25, 25 and 30 grams respectively; and Fats/Oils (Visible) - 10, 20 and 25 grams respectively. One portion of pulse may be exchanged with one portion (50 grams) of egg/meat/chicken/fish. It is essential that the above food groups to be provided in the portions mentioned in order to ensure that both macronutrients and micronutrients are available to the child in adequate quantities.

10. Jail Manual and/or other relevant Rules, Regulations, instructions etc. shall be suitably amended within three months so as to comply with the above directions. If in some jails, better facilities are being provided, same shall continue.
11. Schemes and laws relating to welfare and development of such children shall be implemented in letter and spirit. State Legislatures may consider passing of necessary legislations, wherever necessary, having regard to what is noticed in this judgement.
12. The State Legal Services Authorities shall take necessary measures to periodically inspect jails to monitor that the directions regarding children and mother are complied with in letter and spirit.
13. The Courts dealing with cases of women prisoners whose children are in prison with their mothers are directed to give priority to such cases and decide their cases expeditiously.
14. Copy of the judgement shall be sent to Union of India, all State Governments/Union Territories, and High Courts.
15. Compliance report stating steps taken by Union of India, State Governments, Union territories and State Legal Services Authorities shall be filed in four months where after the matter shall be listed for directions.
27. In view of above, Writ Petition (Civil) No. 133 of 2002 is disposed of.

**Supreme Court of India
2003 (8) SCC 546**

**State of Maharashtra
vs**

Christian Community Welfare Council of India and Another

N. Santosh Hegde and B.P. Singh, JJ.

1. These two appeals arise from a judgement of the Nagpur Bench of the High Court of Judicature at Bombay made in Writ Petition (Criminal) No. 204 of 1993. Even though the points for our consideration in these Appeals have narrowed down considerably because of the previous orders of this Court in these appeals as also some previous judgements of this Court, we think it necessary to very succinctly refer to the facts to the extent that is necessary.
2. Some of the policemen on duty in the Crime Branch Office of Nagpur City took into custody one Junious Adam Illamatti, a resident of Ajini Railway Colony on 23.6.1993. While he was in Police custody, it is stated he was found dead. It is also alleged that when his wife Jarina Adam went to the Police Station to enquire about her husband, she was also locked up by the said Police and molested. On 26.6.1993 a criminal case being Crime No. 438 of 1993 was registered for offences under Sections 302, 342, 330, 354 read with 34 against 10 Police Officers. The investigation in this regard was conducted by a Deputy Superintendent of Police. State CID (Crimes) Mr. Godbole. After investigation said Police Officers were chargesheeted for the offences mentioned hereinabove and in the trial in S.C. No. 416 of 1993 before the Additional Sessions Judge, Nagpur, said 10 Police Officers were acquitted of the charge under Section 302 IPC but were convicted for offences punishable under section 333 read with 34, 342 read with 34, 355 read with 34, and a punishment of 3 years' RI with fine for the principal offence was awarded by said Sessions Judge to the abovementioned 10 Police Officers.
3. A criminal appeal against the said judgement and conviction is pending before the High Court.
4. On 29.9.1993 Criminal Writ Petition No. 204 of 1993 was filed initially by the respondent in Criminal Appeal No. 508 of 1996 before us i.e. Christian Community Welfare Council of India. Subsequently above mentioned Jarina Adam wife of deceased

was also impleaded as petitioner No. 2. In the said writ petition inter alia a direction was sought to the respondent State to conduct a proper inquiry into the custodial death. There was a prayer to direct the respondent State to pay compensation of Rs. 10 lacs to the second petitioner. The High Court by the impugned order issued various directions in regard to the laying down of guidelines to prevent and check custodial violence and procedures to be followed by Police while arresting any person as also procedures to be followed by the Police after arresting such person, procedures to be followed in arresting a female person, manner in which such female person is to be detained, etc. The High Court also directed the State Government to pay a compensation of Rs. 1, 50,000 to the second petitioner, the widow of the deceased. During the course of judgement the High Court directed the State Government to enquire into the conduct of the I.O. Mr. Godbole to find out whether there was any lapse on his part in arrest/his investigation. The court also observed in the body of its judgement that the amount of Rs. 1, 50,000 directed to be paid as compensation to the 2nd petitioner may ultimately be recovered from the concerned Police Officers pro rata depending upon their involvement in the death of the deceased. Against the said judgement apart from the 2 appeals mentioned herein above the I.O. Mr. Godbole also filed a SLP which later on came to be withdrawn by him with liberty to approach the High Court.

5. At this stage it is necessary to note that this Court while granting leave has confined the same to consider whether the directions issued by the High Court in sub-paras iv, v and vii of the operative part of the judgement in paragraph 29 need to be retained, modified or deleted. There is no dispute in regard to this limited scope of the appeal. Sub-paras (iv) & (v) of the operative portion of the judgement reads thus:

"(iv) The State Government is directed to issue immediately necessary instructions to all concerned police officials of the state that in every case after arrest and before detainee is taken to the Magistrate, he should be medically examined and the details of his medical report should be noted in the Station House Diary of Police Station and should be forwarded to the Magistrate at the lime of production of detainee;

"(v) The State Government should also issue instructions to all concerned police officials in the State that even after the police remand is ordered by the concerned Magistrate for any period, every third day, the detainee should be medically examined and such medical reports should be entered in the Station House Diary."

6. We are informed by learned counsel appearing for the State that so far as the direction issued in these sub-paras of the judgement are concerned, the law is settled by the

judgement of this Court in D.K. Basu v. State of WB: 1997CriLJ743 wherein this Court has held in sub-paras (7) and (8) of para 35 of the said judgement as follows:

- "(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.*
- (8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State of Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well."*
- 7. We are in agreement with the submission made by learned counsel for the State that in view of the said requirement laid down by this Court in the said judgement the directions issued by the High Court in Clause (iv) & (v) of its operative part will have to stand modified and will be substituted by the requirement laid down by this Court in sub-paras (7) and (8) of para 35 of the judgement in Basu's case (supra).
- 8. In sub-para (vii) the High Court has directed the State Government to issue instructions in the following terms:
"(vii) The State Government should issue instructions immediately in unequivocal and unambiguous terms to all concerned that no female persons shall be detained or arrested without the presence of lady constable and in no case, after sunset and before sun-rise;"
- 9. Herein we notice the mandate issued by the High Court prevents the Police from arresting a lady without the presence of a lady constable. Said direction also prohibits the arrest of a lady after sunset and before sunrise under any circumstances. While we do agree with the object behind the direction issued by the High Court in Clause (vii) of operative part of its judgement, we think a strict compliance of the said direction, in a given circumstance, would cause practical difficulties to the investigating agency and might even give room for evading the process of law by unscrupulous accused. While it is necessary to protect the female sought to be arrested by the Police from Police misdeeds, it may not be always possible and practical to have the presence of a lady constable when the necessity for such arrest arises, therefore, we think this direction issued requires some modification without disturbing the object behind the same. We think the object will be served if a direction is issued to the arresting authority that while arresting a female person, all efforts should be made to keep a lady constable present but in circumstances where the arresting officers is reasonably satisfied

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

11. With the said observations this appeal is also disposed of.

**Andhra Pradesh High Court
2003 (1) ALT 221**

**The Legal Aid Committee, High Court of A.P.
vs**

The Director General and Inspector General of Prisons and Others

B. Sudershan Reddy and Ghulam Mohammed, JJ.

1. On the strength of a letter from Ms. Sheela Barse, a social activist addressed to the Honourable the Chief Justice of India with respect to deplorable conditions in which mentally ill and insane women are locked up and kept in Presidency Jail, Calcutta, a writ petition was registered and certain directions were issued by the Supreme Court of India. For whatever reason, the said Ms. Sheela Barse withdrew from the matter. The Supreme Court Legal Aid Committee was substituted in her place.
3. On the suggestions made by the learned counsel for the Supreme Court Legal Aid Committee and also some other learned counsel appearing on behalf of the various State Governments, the Supreme Court issued various directions by its order dated 5-9-1995 in Writ Petition (Criminal) No. 237 of 1989, in the following manner:
 1. The office shall prepare requisite number of sets of the record of this case. The record shall be in two parts. Part-I shall contain the letter written by Ms. Sheela Barse (along with the enclosures thereto), the orders passed by this Court from time to time arranged in proper sequence and the reports of the Commissioners appointed by this Court, again in their proper sequence.
 2. The office shall separate the affidavits, counter affidavits, rejoinders and further affidavits, if any, along with their annexures with respect to each State separately. If there are any affidavits, reports or other documents filed by the Union of India, the same may be included in each of such sets. This shall be treated as Part-II of the record. Obviously, it will be separate for each State concerned herein.
 3. The cost of preparing both Parts-I and II shall be borne by the Union of India. After the record is prepared as directed above, the cost thereof shall be intimated to the learned counsel for the Union of India in this case who shall communicate the same to the concerned authority. The payment shall be made into the office of this Court within three months therefrom.

4. The office shall communicate a copy of Part-I to each of the High Courts. Along with Part-I, Part-II relating to that particular State shall also be enclosed.
5. The High Courts are requested to register the record so received by them as a Public Interest Litigation. The Hon'ble Chief Justice of each of the High Courts is requested to designate a Judge of that Court to deal with the matter. The High Court shall make all such necessary and appropriate orders as may be warranted, from time to time, for a proper implementation of the orders of this Court. The High Court shall also be free to pass such other and further orders as may be found necessary or appropriate to protect and improve the conditions obtaining in places where women and children - not accused or convicted of any crime - are detained⁶.
6. The High Court Legal Aid Committee of each of the High Courts shall be treated as the petitioner in the matter in that High Court. Copies of Part-I (and part-II, wherever applicable) shall be communicated to the respective Legal Aid Board in the High Court.

The High Court Legal Aid and Advice Board will assist the High Court in the matter of monitoring compliance with the orders and directions made by this Court. It will be entitled to apply for such further orders and directions from the High Court as may be found necessary in the matters.

7. It is made clear that the High Courts to whom the proceedings are being made over shall be fully free and competent to pass such further orders and make such further directions as they think appropriate in the light of the facts and circumstances obtaining in that particular State consistent with and to further the objectives underlying the orders of this Court.
 8. So far as the State of Assam is concerned, the High Court shall ensure that the State of Assam complies with the several suggestions made in the report of the Commissioner, Sri Gopal Subramaniam, and the order made by this Court on October 3, 1994 on the basis of the said report.
4. Pursuant to the above directions of the Supreme Court, this Court registered a case in taken up W.P. No. 7052 of 1996 (i.e. present writ petition).
5. It so happened that one S. Appa Rao, addressed a letter to the Chairman, National Human Rights Commission, New Delhi while marking a copy of the same to the Honourable the Chief Justice, High Court of Andhra Pradesh complaining of certain irregularities in the Jails in the State of Andhra Pradesh. In the said application, it

is inter alia alleged that the jail authorities were taking the law into their hands by providing rich prisoners to outside hospital facility. Certain allegations were levelled against the individual officers. The said complaint is taken up as W.P. No. 5329 of 1996.

6. This Court by its order dated 21-3-1996 directed this writ petition and W.P. No. 5329 of 1996 to be heard together. Notices were accordingly directed to be issued to all the concerned. Even at that stage, this Court ordered to constitute a Committee consisting of the District Judge, a representative of the Red Cross Society and a representative of any Women Organisation operating in the District to take up a comprehensive study of the conditions in the prisons within the territorial jurisdiction of the District Judge concerned. The District Judge is made to act as the Chairman-cum-Secretary of the Committee. The Committee so nominated was directed in general to look into all the aspects of the conditions of the prisoners in jail and in particular submit a report to this Court:
 - i) Whether there are boys below the age of sixteen years and girls below the age of eighteen years in any prison and if so, why and how they have been forwarded to the prison and by whom;
 - ii) Whether there are woman prisoners and if there are woman prisoners, whether there are adequate arrangements in the prison for safe custody of the woman prisoners;
 - iii) Whether there are under trial prisoners who have been in prison as under trial for a period of two years or more, and about the stage of the proceeding in court in their respective cases and the charges for which they have been taken in custody;
 - iv) Whether there are facilities of library and education of the prisoners, facilities for recreation of the prisoners and such other facilities which laws extend to them and to which they are entitled to in spite of their imprisonment.
7. The matter was again directed to be listed for further hearing on 22-3-1996. On 22-3-1996, the said Appa Rao was produced in the Court and he has been confronted with the signature on the representation purported to have been made by him to the Chairman, Human Rights Commission and the Honourable the Chief Justice of this Court. The said Appa Rao has, however, stated that he has not signed the representation and the representation does not bear his signature.
8. In such view of the matter, this Court dismissed the said W.P. No. 5329 of 1996 and accordingly directed the said Appa Rao to be returned to the prison. That is how W.P. No. 5329 of 1996 was dismissed.

9. However, this Court instead of recording the order passed by this Court on 21-3-1996 in both the writ petitions i.e. W.P. Nos. 5329 and 7052 of 1996 recorded only in W.P. No. 5329 of 1996. But we shall now proceed on the ground that the order dated 21-3-1996 has been passed mainly in this writ petition i.e. W.P. No. 7052 of 1996 which is taken on file pursuant to the directions of the Supreme Court.
10. In pursuance of the orders passed by this Court dated 21-3-1996, the Committees consisting of the District Judges, representatives of the Red Cross Societies and representatives of Women Organisations were constituted. The records together with the reports from 23 Districts of Andhra Pradesh have been received.
11. The learned Advocate representing the State Legal Services Authority culled out the maladies prevalent in the Jails as is evident from the reports submitted by the Committees headed by the learned District Judges. The main features noticed by the Committees constituted by this Court are:
 - (a) Due to non-availability of bathrooms and latrines, the prisoners are forced to attend the nature's call within the cells. Due to non-availability of proper security guards and also due to lack of compound walls with barbed wires and electrical facilities, there is a scope for prisoners to scale the walls and escape. In order to keep a watch on the prisoners and due to lack of security, they were not allowed outside the cells even to attend the nature's call after dusk.
 - (b) Most of the prisoners are under trials and due to lack of facility for bringing them before the concerned Magistrate, the under trials are languishing in the jails and their remand period is being extended without producing them before the concerned Magistrate. General complaint is that for want of escort, the prisoners are not produced before the concerned magistrate and hence their cases are not being disposed of.
 - (c) In pursuance of the reports of the districts, no special arrangements have been made to keep the female prisoners separately. In case female prisoners are remanded to custody, they are lodged amongst the male prisoners. Thus, construction of separate enclosures for female prisoners is a must. Therefore, steps should be taken for providing speedy measures taking into consideration the privacy required for women prisoners. In reality as submitted on page 5 of the report from Chittoor District, no female security is provided to avoid several offence in any of the sub-jails, besides lack of privacy, female security should be enforced. Due to lack of privacy and separate enclosures male and female

prisoners attend to their nature's call in the cells without even separate parapet wall, which is most essential for privacy.

- (d) The cleanliness of the jails should be maintained at all costs for hygienic conditions for the prisoners to have the bare minimum necessities like water using for washing for washing and cleaning. The un-hygienic conditions of the jails are the result of keeping the prisoners as per rules stated by the sub-jails' superintendents and wardens - Chittoor District to keep the prisoners after 6 p.m. inside the cells without the facility to take them out till 6 a.m. next morning. Thus forcing the prisoners to resort to answering the nature calls within the cells - Resulting in profusely unclean and unhygienic conditions. Disinfects like phenyl, soap etc., should be provided in jails to ward off nasty smell and dirt. The flooring in jails is uneven and in very bad condition, which is one of the reasons stated by the Chittoor authorities who find difficulty in keeping the flooring clean.
12. Having regard to the concise report and recommendations made by various Committees regarding the prevailing conditions in the Jails in Andhra Pradesh we have directed the Director General and Inspector General of Prisons and Correctional Services, Andhra Pradesh to submit a detailed affidavit with reference to the findings and observations made by the Committees constituted pursuant to the directions of this Court. Accordingly, the Director General and Inspector General of Prisons and Correctional Services himself filed a very comprehensive affidavit duly narrating the position existing as on today in the Jails in the State of Andhra Pradesh.
13. According to the averments made in the affidavit, there has been a significant progress made in order to improve the conditions in Jails after 1996, when this writ petition and W.P. No. 5329 of 1996 were taken on file by this Court. In the affidavit, it is stated in categorical terms that such of those mentally retarded/ill persons, who are not involved in any criminal cases, are not kept in prisons in the State of Andhra Pradesh. It is also stated that pursuant to the letter dated 7-2-2000 from the Chair Person, National Human Rights Commission fresh instructions were issued by the Government vide G.O.Ms. No. 82, Home (Prisons) Department, dated 1-4-2000 directing all the concerned to ensure that the mentally ill persons are not kept in jails under any circumstances. It is also stated that the said G.O. is being implemented in the State of Andhra Pradesh strictly and scrupulously. The whole case of the representation in the writ petition undertaken by the Supreme Court leading to passing of the order dated 5-9-1995 is based upon an allegation that mentally retarded persons were also lodged in Presidency Jail, Calcutta. There is no finding as such by any of the Committees that

- such of those mentally retarded persons/ill persons, who are not involved in any criminal cases, are kept in jails in the State of Andhra Pradesh. There is no adverse finding in this regard by any of the Committees constituted by this Court.
14. In the circumstances, no fresh directions as such are required to be issued in this regard.
 15. So far as the female prisoners are concerned, the Director General and Inspector General of Prisons and Correctional Services states in his affidavit that they are kept separately from the male prisoners and separate arrangements are provided in jails with regard to the female prisoners. Adequate drinking water facilities are also made in all the jails. May be there are no separate jails as such exclusively meant for the female prisoners. But, according to the Director General and Inspector General of Prisons and Correctional Services, a separate provision is made in the jails for lodging the female prisoners.
 16. The authorized accommodation for all the jails put together is 11,272 while the actual number of prisoners confined as on 26-10-2002 is 13,554. Thus the excess overcrowding works out to about 18% to 20%. It is stated that steps are being taken for construction of additional accommodation in some more jails. Two new Central Prisons at Cherlapalli, Ranga Reddy District and Adavivaram in Visakhapatnam District were recently constructed at a cost of about Rs.60 crores and they are fully occupied now. In the State of Andhra Pradesh about 65% of the prison population consists of under trial prisoners as on 26-10-2002.
 17. With regard to the requirement of making a provision for separate bathrooms and latrines to the female prisoners, it is specifically stated that separate cells are earmarked for women and almost all the cells are attached with toilets, which ensure privacy for women prisoners, and there is no need or necessity for the women prisoners to come out. It is stated that during night time prisoners use the toilets attached to the cells. There are two State Jails for Women and all Central Prisons and District Jails have separate enclosures for women prisoners. It is also stated that the State Jails for women are managed exclusively by women staff while in other jails whenever female prisoners are admitted only female attendants will guard them.
 18. With regard to the non-availability of police escort resulting in non-production of under trial prisoners before the Courts, the State Government, in order to mitigate the problem, on experimental basis introduced electronic video linkage between Central Prison, Hyderabad and Criminal Courts Complex, Nampally, Hyderabad which

is proved to be successful. It is also stated that steps are being taken to extend this facility to other Central Prisons and District Jails. The Government of Andhra Pradesh vide G.O.Rt. No. 1286, Home (Police Budget) Department, dated 30-10-2002 accorded permission to incur the expenditure to a maximum of Rs. 2.50 crores for executing the project of video linkage.

19. The Government in order to ensure speedier production of under trial prisoners constituted a High Level Committee vide G.O.Ms. No. 317, Home (Prisons-A) Department, dated 16-10-1999 consisting of the Additional Director General of Police (Land and Order) and other Civil Officers. The said Committee is periodically reviewing, monitoring and suggesting the measures to be taken for speedier and prompt production of under trial prisoners in the Courts. The percentage of production of under trial prisoners, as at present, has increased to 70% after introduction of video linkage system.
20. It is, however, conceded that running water facility is not available in all the Jails and steps are being taken to provide overhead tank for providing running water facility to the prisoners. It is also admitted that there is water scarcity in some of the sub-jails and steps are being taken to provide municipal water. It is, however, stated that the prisoners are being provided with clean drinking water. The rest of the averments in the counter affidavit relate to making the provision for medical facilities etc.
21. Having regard to the response from the respondents, we are of the considered opinion that no further directions as such are required to be issued except to direct the respondents herein:
 - (a) To take further necessary steps for speedier and prompt production of under trial prisoners in the Courts, since, even according to the respondents, the percentage of production of under trial prisoners as on today is only about 70%. May be in comparison to what it used to be earlier there is a significant improvement in the position. But the respondents are required to take further steps in order to produce all the under trial prisoners in accordance with the schedule before the concerned courts:
 - (b) As stated in the affidavit filed by the Director General and Inspector General of Prisons and Correctional Services himself, there is a need to improve the drinking water facility in all the jails in the State. Necessary steps also shall be taken for providing running water in the latrines and toilets, so that the latrines and toilets are kept in clean and good condition:

- (c) Necessary steps also shall be taken to provide exclusive lavatories and toilets to women prisoners, so that there won't be any need for them to leave their barracks in order to answer the calls of nature.
22. For the present, we propose to dispose of this writ petition with the above directions.
23. We do not find any reason not to accept as to what has been stated in the affidavit filed by the Director General and Inspector General of Prisons and Correctional Services. We appreciate the Director General and Inspector General of Prisons and Correctional Services for having placed the true and correct factual position before this Court.
24. It shall always be open to any one of the genuinely public interest litigants to bring to the notice of this Court if the steps as directed above are not initiated by the respondents.
25. The writ petition is accordingly disposed of.

**High Court of Jammu and Kashmir
AIR 2004 J&K 6**

**World Human Rights Protection
vs
Union of India (UOI) and Others**

Tejinder Singh Doabia and Sudesh Kumar Gupta, JJ.

The circumstances in which the lady (S) came to be arrested and later on convicted is not the subject-matter of dispute. It is also not in dispute that she came over to this side of the country on or around 3rd Oct., 1995 and it was after coming to this side, she got pregnant. Therefore, one fact which stands established and regarding which there can be no two opinions is that the child (M) was conceived through a father who belongs to this side of the State.

5. The further case as projected by the respondent-State is that a case stands registered under Section 376 of the Penal Code. This has been registered against one Mohd Din, Jail Warden, District Jail, and Poonch. The trial is on. There was some delay as some revision-petitions came to be filed in this Court. These proceedings arose because a need was felt to have a DNA test of the accused-Warden so that the relationship with the minor child could be determined.
6. It is the further case of the respondent-State that an all out effort was made to deport lady (S) to Pakistan on 26th June, 2001. This was not successful. Efforts were made again. The communications regarding this by the State authorities and by the Border Security Force authorities have been placed on the record. The fact remains that the mother and the child continue to stay in this part of the country.
7. The further fact is that so far as the mother is concerned, she is now under detention in terms of an order passed by the Special Secretary to Government, Home Department on 3rd August, 2001. This order has been passed under the Public Safety Act. This is because it is felt that the lady (S) is in custody in India in connection with the militant activities. Order Annexure A passed in this regard is being reproduced below:--

"Whereas Shahnaz Sayeda w/o Mohammad Younis r/o Village Haryan Dabagh Tehsil Sumani District Mirpora, POK is a resident of POK, occupied area of the State and at present in custody in India in connection with his militant activities;

Whereas the Government is satisfied that with a view to regulating his continued presence in the State, it is necessary so to do;

Now therefore, in exercise of powers conferred by Section 8(1)(b)(i) of the Jammu and Kashmir Public Safety Act, 1978, the Government hereby direct that said Shahnaz alias Sayeda w/o Mohammad Younis r/o Village Haryan Dabagh Tehsil Sumani District Mirpora POK be detained for a period of 24 months and lodged in District Jail, Jammu.

....

Sd/-

*Spl. Secretary to Government
Home Department."*

8. A perusal of this order would indicate that this order has been passed mechanically. The authority passing the order has not even taken care to describe the detenu property. It has been mentioned that detention order has been passed because of ". . .connection with his militant activities." It has been further stated as under :
"..... with a view to regulating his continued presence in the State, it is necessary so to do."

As indicated, the respondents have not taken care to distinguish between 'his' and 'her.' If such is the state of affairs, then the order on the face of it appears to have been passed mechanically and without application of mind. This is one aspect of the matter. Even otherwise, when the lady (S) was originally detained, it was never the ground for her detention.

9. The other aspect of the matter poses a larger question. The minor child is in custody along with mother. Can the minor be so kept? If the child cannot be kept in custody and if she has to be under the guardianship, of mother, the further question would arise as to whether mother can be kept in custody in the manner it has been done.
10. The importance of child welfare cannot be over emphasised. Concern has been shown at the international level. This concern resulted in the declaration of rights of the child adopted by the General Assembly of the United Nations on 20th Nov., 1959. The declaration in its Preamble points out that "the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth," and that "mankind owes to the child the best it has to give." Some of the principles which were laid down and have some relevancy for the purposes of this petition are being reproduced below :

"Principle 2: The child shall enjoy special protection and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally,

morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interests of the child shall be the paramount consideration."

"Principle 3: *The child shall be entitled from his birth to a name and a nationality.*

"Principle 6: *The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and in any case in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.*

"Principle 9: *The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.*

"Principle 10: *The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, and friendship among peoples, peace and universal brotherhood and in full consciousness that his energy and talents should be devoted to the service of his fellow men."*

11. Thus, there is a growing realisation in every part of the globe that children must be brought up in an atmosphere of love and affection and under the care and attention of parents so that they may be able to attain full mental, intellectual and spiritual stability and a clear self-confidence, self-respect and plan out a life with full realization of a role which they have to play. Article 15, Clause 3 of the Constitution of India enables the State to make special provisions for children; Article 21 provides that no child below the age of 14 shall be employed to work in a factory or engaged in any other hazardous employment. Article 39, Clauses (e) and (f) provide that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength and that children should be given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. The present is a case where the mother was exploited. It is high time that steps are taken with a view to protect the minor from exploitation.

12. So far as the minor in this case is concerned, all systems whether judicial or executive have to protect her in a manner that she grows and attains maturity and majority uninfluenced by the circumstances in which she has been placed. At present she may not be aware of the difficulties which she may face in future. As she grows and

moves in the company of those children who have both their parents by their side, she would definitely be asked questions to which the mother may have some answers but those answers may not satisfy the creative mind of a child. She is likely to suffer psychologically also. Therefore, it is necessary that she is taken care of in a manner which would be in the interest of minor.

13. It is not in dispute that the minor is in custody along with her mother and for this detention she is not at fault if this be the situation, and then so far as the minor is concerned, a writ of habeas corpus can always be issued. This is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful detention whether in State or in private custody. By it, the Court commands the production of the subject and enquiries into the cause of his detention. If there is no legal justification for the detention the party is ordered to be released. The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty. The principal aim of the writ is to provide for a swift judicial review of alleged unlawful restraint on liberty of a subject. In *Cox v. Hakes* (1890) 18 App Cases 506, Lord Halsbury made the following memorable observations:

"For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject, if upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody."

16. The nature of writ is described in Halsbury Laws of England Vol. II, paragraph 1455 of Fourth Edition as under:

"The writ of Habeas Corpus ad Subjiciendum unlike other writs of habeas corpus is prerogative writ, that is to say it is an extraordinary remedy, which is issued upon cause shown in cases where the ordinary legal remedies are in applicable or inadequate."

"The writ is writ of right and is granted ex debito justitiae. It is not, however, a writ of course. Both at common law and by statute the writ of habeas corpus may be granted only upon ground for its issue being shown: The writ may not in general be refused merely because there exists an alternative remedy by which validity of the detention can be questioned."

In paragraph 1476, it is further observed:

"Any person is entitled to institute proceedings to obtain a writ of Habeas Corpus for the purpose of liberating another from an illegal imprisonment and any person who is legally entitled to the custody of another may apply for the writ in order to regain that custody. In any case where access is denied to a person alleged to be unjustifiably detained, so that there are no instructions from the prisoner, the application may be made by any relation or friend on an affidavit setting forth the reasons for its being made."

17. In Corpus Juris Secundum, the subject is dealt with and the nature of writ is described at page 459 of Vol. 39, 1976 Ed. as under :--

"The writ of Habeas Corpus is a writ directed to the person detaining another, commanding him to produce the body of the prisoner at a designated time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the Court or Judge awarding the writ shall consider in that behalf. The writ is the process of testing the authority of one who deprives another of his liberty and it is designed to give a person whose liberty is restrained an immediate hearing to inquire into and determine the legality of the detention."

18. Therefore, a writ of habeas corpus can be issued for securing the release of the minor but the further question would arise as to whether the minor can stay without her mother.
19. There are judicial precedents where even under the Mohammedan law, the mother has been held entitled to custody of person of a minor child. "Mullas" Principles of Mohammedan law 18th Edition, 1977, deals with this aspect of page 367. It has been concluded that the mother is entitled to the custody (hizanat) of her female child until she has attained puberty. The right continues till she remains minor or unmarried. The difference between custody and guardianship was explained by the Allahabad High Court in Khatija Begum v. Gulam Dastgir 1975 All WR 199. In Immambandi v. Mutsadi (1918) 45 Ind App 73 : AIR 1918 PC 11), their Lordships of the Privy Council observed that under the Mohammedan law the mother is entitled only to custody of the person of minor child.
20. Some of the decisions on the subject and as quoted by Mulla from Pakistan are as under :
21. In Khyushi Muhammad v. Muhammadunnissa PLD 1961 (WP) Lah 786, it was observed that "merely inability to maintain the children is not ground for depriving the mother of the custody of her children, if she is not otherwise disqualified. If the mother is of bad character she may be deprived of the custody of the child.".

24. Reference can also be made to the decision of Madhya Pradesh High Court in the case of where the custody of minor female child was given to the mother with the following observations (paras 8, 9 and 10) :--

"Evidently, the short question for our consideration in this case is whether the petitioner should be deemed to have lost her right to the custody of the child merely because she is not residing with her husband, the father of the child. In his annotation, on para 354 Mulla has referred to judicial exposition of the rules obtaining in Pakistan, as regards mother's disqualification."

"The learned commentator has quoted Rizvi, J., who in Bavi v. Shah Nawaz Khan PLD (WP) Lah 509 observed :

"The principle of Mohammanan law as regards hizanat is fundamentally based on this fact that it is for the welfare of the minors to live with their guardians as directed under the law."

"following the judicial dicta in Shah Bano's case, (AIR 1985 SC 945), buttressed in Jordan Diengdeh we are bound to construe teleologically and humanistically sub-para (2) of para 354 above referred."

"In our view the mother of the child shall not suffer disqualification to have custody of the child for the mere fact that she is not residing with her husband, the child's father."

"When personal laws are divinely sanctioned, a presumption will naturally arise that such laws have a humanistic content because when great seers, saints and prophets found any faith, they act as benefactors of the mankind as a whole, if man is God's child and if child is the father of the man, no personal law claiming divine sanction afford to deny paramount consideration to the welfare of the child,"

25. Thus, the mother can be given the custody of the child and in the present case, she is the only parent available, and therefore, is entitled to the custody of the child.
26. The concept of citizenship is also required to be taken note of. The citizenship is dealt with in the Central Act namely the Citizenship Act of 1955. As per Section 3(b) of the said Act, every person born in India on or after commencement of this Act and either of whose parents is a citizen of India at the time his birth is to be treated as citizen of India by birth. As the minor (M) was conceived in India, therefore, *prima facie* it has to be presumed that one of her parents is a citizen of India. On account of the above section, the minor therefore, would also be deemed to be a citizen of India. In a case reported in, Naziranbai v. State, the applicant-wife was born in India, domiciled in India lateron migrated to Pakistan after 1st March, 1947 was not held to the benefit of provisions of Article 5 of the Constitution of India and was not treated as a citizen of India. Though she was born in India, she lost her Indian citizenship as she had migrated to Pakistan but her minor children were held entitled to Indian citizenship because the father had continued to stay in India. It was concluded that the citizenship of the minor would depend upon the citizenship of the father. In the present case the father of the minor (M) *prima facie* is an Indian citizen as the minor was conceived in India while the lady (S) was in Jail. Therefore, the minor is to be treated for all intents and purposes to be a citizen of India. Even otherwise, if the Declaration of Rights of Child adopted by the General Assembly of the United Nation on 20th Nov., 1959, are taken into consideration, then as per Principle 3 noticed above, the child is entitled from his birth to a name and nationality. Therefore, even if this salutary principle is applied,

even then, so far as the minor is concerned, she would be entitled to claim citizenship of India. To repeat, it be seen that the minor (M) was conceived and has taken birth in the State of Jammu and Kashmir. Under normal circumstances, the minor is to have the same domicile as his father. This is because every person acquires a domicile which becomes a domicile of his birth or domicile of region and this domicile continues till he or she acquires a new domicile which is called a domicile of choice. Here is a case where so far no one is sure about the fatherhood of the minor child. This is yet to be established. Therefore, so far as the minor is concerned, she would be treated as a domicile of the State of Jammu and Kashmir. It is for her to express a choice in this regard. The choice can be expressed by her mother also but the question as to whether she can be deported to Pakistan would depend upon the decision which the authorities in Pakistan may take in this regard. If they refuse to recognise her, then she has to be treated as a person having domicile in the State of Jammu and Kashmir.

27. The above situation leads to the consideration of another fact which is of importance. The minor child is under custody for no fault of her. She cannot be kept in custody, but at the same time, she cannot be deprived of the company of her mother. The mother is also in detention because the respondent authorities have not been able to deport her to Pakistan. There is no dispute that coming over to this part of the country without permission was an offence on the part of lady(s). For that she has been punished. The respondent authorities want to deport her to Pakistan but, as indicated above, have not been able to do so. This is because the authorities on the other side of the country i.e. Pakistan are, as per respondents not co-operating with the authorities on this side of the country. Under these circumstances, can it be said that the lady(s) is responsible for the situation in which she is placed at present. The respondents have now passed an order of detention under the Public Safety Act. This has been done with a view to give legal colour to her detention. In the order of detention, it is stated that she has come to this country in connection with militant activities. She came over to this country in Oct. '95. At that point of time, a First Information Report was lodged. That was for a limited purpose. There was no assertion anywhere that the lady(s) is engaged in militant activities. Therefore, the order now passed in this regard is held to be based on a plea which is after-thought and the detention of law(s) is found to be not justifiable.
28. Independently of the above we are of the opinion that as the minor cannot be kept in custody and her detention along with her mother is illegal, she is entitled to be set at liberty. We order accordingly. We also direct that as the minor cannot stay without her

mother and the mother being the legal guardian, therefore, the consequential order of releasing the mother is also being passed. As a result, both of them (mother and child) would be set at liberty.

29. One other aspect of the matter is as to how the minor child and the mother is to be compensated. It is not in dispute that when mother(s) was in custody, her person was violated allegedly by a person who was supposed to take care of her. He was an employee of the State. No doubt, that fact is yet to be established and a judicial verdict is yet to some, nevertheless, the fact remains that there is no escape from ultimate conclusion that on account of acts of omission and commission, the person of mother(s) was violated and this led to her pregnancy, which resulted in the birth of minor child in the month of Oct. 96. For this act, both the mother and the child are required to be compensated. In this regard, it would be apt to take notice of a decision given by the Allahabad High Court in the case reported as 1996 (1) All WC 469 Uttarakhand Sangharsh Samiti v. State of Uttar Pradesh. There was an agitation being conducted for creation of State of Uttranchal. The police authorities were found to be perpetuated crimes falling within the mischief of various provisions of Penal Code. For the acts falling under Section 376 of the Penal Code, the State was burdened and was directed to pay compensation to the extent of Rs. 5 lakhs. The doctrine that the State can also be held liable for acts on the part of its servants was made applicable. What was said by the Allahabad High Court in this regard is being reproduced below :--

'Thus as the record stands the High Court holds the State Administration of Uttar Pradesh at the relevant time, responsible for the constitutional torts. Human rights were violated by the let and demur, deliberate or otherwise and subject silence was shown by the administration on whatever was suffered by the civil rights activities from the hills in furthering a cause which State politics as a formality had committed to them. Death by shooting concealing the bodies of the dead, rape of women, molestation of them, and detention of women and children indeed against the provisions of the Constitution of India and the substantive and procedural law of the land debased the rule of law. No official agency of the State of Uttar Pradesh accepts the reality of the tragedies. The effort throughout the proceedings was to filibuster the proceedings on any pretext which could achieve the result. The means adopted to shake the Court from inquiring within and the out would if it succeeds render the judicature system ineffective.'

Let the international community not say that Indian Courts are object spectators when constitutional torts are perpetuated in this nation.

30. The position in this case is similar. As indicated above, the minor child was conceived in India while the mother was in custody. Therefore, it is to be presumed that it is

the servants of the State who are responsible for this act. We accordingly direct that the State would pay a sum of Rs. 3 lakhs as compensation to be deposited in the name of minor. The interest out of this amount would be spent on the welfare of the minor. The State would be at liberty to recover this amount from the Jail Warden if he is ultimately found to be the person responsible for the illegal act. Otherwise, as indicated above, the State is equally liable for the illegal acts of its servants. Therefore, the State is burdened with the damages indicated above. We also direct that till and so long as the minor child wants to stay in India and till she is accepted by the Pakistan authorities, she would stay in India and for her stay, a Government accommodation, which is available to a Government servant of the lowest category in the State would be made available to her. This accommodation can be made available in an area means for police or Jail staff so that the mother(s) can be called upon to report to the police authorities so that she remains in constant touch with them. This will take care of the interest of the State as also the welfare of the minor both of which are of paramount importance.

31. We accordingly hold :

- (i) That so far the minor is concerned, she is being detained in jail without any authority of law and for no fault of her; she is entitled to release. A writ of Habeas Corpus is issued in this regard;
- (ii) That so far as mother is concerned, she has already been punished for illegal act committed by her. Her further stay in India is not of her free volition and therefore, to keep her in custody would not be apt. It is precisely for this reason, an order of detention has been passed on 3rd Aug. 2001, which order has been passed without application of mind and is accordingly quashed. The mother(s) is held entitled to be released;
- (iii) That independently of what has been said at Sl. No. (ii) above, as the child is supposed to remain in custody of mother and as she requires her continuous presence, therefore, by applying the doctrine of necessity, we direct that independently of what we have said at Sl. No. (ii), the mother is to be released along with minor child. Both of them will stay together;
- (iv) That suitable Government accommodation shall be provided to the mother and the minor child;
- (v) That compensation as indicated above would be paid to the minor child.

32. We understand that the lady(S) as well as the minor (M) are at present in Central Jail, Jammu. The lady(S) is engaged in the trade of stitching. She is being taken care of by the Jail authorities. Therefore, before releasing the lady(S) and minor (M) in pursuance of the judgement given by this Court, the wish of the mother(S) shall be determined. If she wants to continue with her activities of that of stitching inside the jail and if she feels that she is better placed inside the jail, then she would be at liberty to exercise this option. This option would be exercised in presence of Chief Judicial Magistrate and in presence of the counsel who has espoused the cause of lady(S) and minor (M) in this Public Interest Litigation. In case, she expresses her willingness to have the benefit of this judgement and wants to be out of the jail, then she would be provided with the facilities indicated in the foregoing paragraphs.

33. Let this order be complied with within a period of two weeks from today.

Disposed of accordingly.

Conclusion

As seen above, most of the above mentioned cases were reported because of their occurrence in exceptional circumstances in which the crimes against women were committed in prisons. Many women in the prisons in India are illiterate, which is the core reason that majority of violations against them are not reported through appropriate channels. For these reasons, unique and effectual vigilance mechanisms need to be employed. Special education and employment opportunities should be provided to women in order to make them financially stable and socially aware. It is required that special conditions under which women prisoners should be allowed to be temporarily released be recognized and made a part of the state jail manuals. Because the crimes committed by women result from more complex societal situations it is needed that more liberal and effective gender-responsive treatments be advanced towards women prisoners.

This Volume of Prisoners' Rights comes after a decade and at a time when serious attempts are being made by governments to change the entire criminal justice system with the sole aim that every arrested person should be guilty. These changes in the criminal law are being brought on the pretext of fighting terrorism and to deliver justice to victims. Yet rules of free and fair trial and the basic time tested principles of criminal law are being tampered with and torturous procedures such as the Narco Analysis test and brain mapping are being resorted to without any scientific credibility to those tests. The system of video conferencing for the production of accused in court has been introduced in the various parts of the country. In some states even criminal trials are being conducted through video conferencing. Recently, the government has introduced the 'Fast Track Court' across the country for speedy disposal of criminal trials. Many times criminal trials have been completed in matter of days. This is a dangerous trend. The country has also witnessed media frenzy over criminal cases and has held trials almost through the electronic and the print media. Several bar association passed resolutions appealing to its members to defend the accused in the trial in certain cases. The constitutional right of an accused to be represented by an advocate is ignored. Justice for the victim does not mean the basic principles of criminal justice should be ignored. The thin dividing line between the media campaign and media trial is often breached in number of cases. Armed Forces Special Powers Act, one of the most draconian legislations, continues to imposed on the northeastern states of the country and citizens continue to be tortured and killed in the name of insurgency without any proper investigation or enquiry into this killings. The last decade also saw a huge increase in extra-judicial killings. The prisons in the country continue to be populated with mainly under trials who are poor, literate and also form minority or fringe groups. Nothing much has changed vis-à-vis the conditions of prisons and prisoners' rights since the last Volume of the Prisoners' Rights book.

