The Human Rights Law Network (HRLN) is a collective of lawyers and social activists dedicated to the use of the legal system to advance human rights, struggle against violations, and ensure access to justice for all. A not-for-profit, non-governmental organisation, HRLN defines rights to include civil and political rights as well as economic, social, cultural and environmental rights. We believe human rights are universal and indivisible, and their realisation is an immediate goal.

Starting in 1989 as an informal group of lawyers and social activists, HRLN has evolved into a human rights organisation with an active presence in many states of India. The organisation provides pro bono legal services to those with little or no access to the justice system.

It participates in the struggle for rights through its various activities including public interest litigation, advocacy, legal awareness programmes, investigations into violations, publishing 'know your rights' materials, and participating in campaigns.

HRLN collaborates with social movements, human rights organizations, and grass-roots development groups to enforce the rights of children, dalits, people with disabilities, farmers, HIV positive people, the homeless, indigenous peoples, prisoners, refugees, religious and sexual minorities, women, and workers, among others.

HRLN views the legal system as a limited but crucial instrument for realising human rights. We believe that large scale struggles against human rights violations have to be waged by social and political movements, and that the legal system can play a significant supportive role in these struggles.

The Centre for Constitutional Law, Policy and Governance (CLPG) is a research centre at the National Law University, Delhi. CLPG focuses on foregrounding rights, rightslessness, and other vulnerabilities in understanding, critiquing, and reforming laws, legal institutions, and modes of governance, so that they reflect the constitutional ideals of justice. The Centre works on issues of Human Rights and Access to Justice, and has been actively involved in research and policy making on criminal justice, judicial process reform, and violence against women. CLPG undertakes a variety of research activities aimed at providing empirically grounded and data driven inputs into law reform and policy making.

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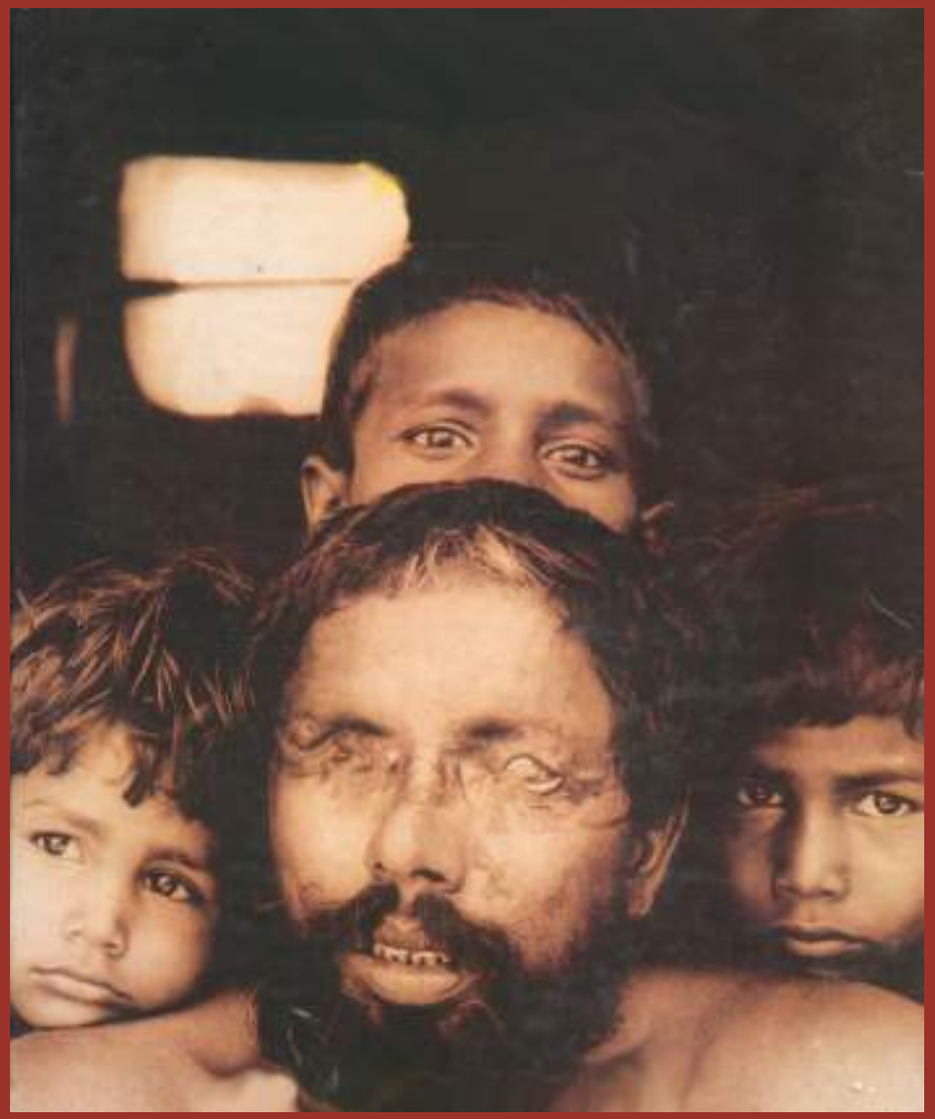
PRISONERS' RIGHTS-II

PRISONERS' RIGHTS

4TH EDITION Vol-II



Compiled and Edited by:
Aparna Chandra, Mrinal Satish, Ritu Kumar & Suma Sebastian

Human Rights Law Network

Centre for Constitutional Law, Policy and Governance,
National Law University, Delhi

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January 2017

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Human Rights Law Network

Centre for Constitutional Law, Policy and Governance,
National Law University, Delhi

This book is dedicated to Tanvi Ahuja, Coordinator of the Human Rights Law Network's Prisoners Rights Initiative, who died very young while this Edition was being completed.

Brave and kind, we miss her very much.

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CONTENTS

CHAPTER 1
SPEEDY TRIAL

Speedy Trial

The Supreme Court in **Hussainara Khatoon v. Home Secy., State of Bihar**,[1] recognized the right of an accused to a speedy trial. Relying on **Maneka Gandhi v. Union of India**,[2] the Court held that the procedure for depriving a person of his/her life or liberty needs to be just, fair, and reasonable. It held that the procedure will not be just, fair, and reasonable, and will contravene Article 21 of the Constitution of India, if it does not provide for a speedy determination of the guilt or otherwise of the person. Subsequently, in **Mantoo Majumdar v. State of Bihar**,[3] the petitioners who had been languishing in prison for over seven years without any investigation or filing of chargesheet were directed to be released on bail without sureties. In **Kadra Pahadiya v. State of Bihar**,[4] the Court followed the dictum in ***Hussainara Khatoon*** and directed the State Government to report to it the time periods for which undertrial prisoners had been in prison. It ruled that those undertrials in whose cases committal proceedings had not been completed must be considered for bail.

A question that the courts have dealt with over a range of judgments is what remedy is available to an accused person if his/her right to speedy trial is violated. In **State v. Maksudan Singh**,[5] the Patna High Court held that in case of an infringement, the charges levelled against the accused would fall and he/she would be entitled to an unconditional release. In **Madhu Mehta v. Union of India**,[6] the Supreme Court, holding that the right to speedy trial applies to mercy petitions as well, set aside the death sentence of a person who had been awaiting a response to his mercy petition since 8 years. In **Abdul Rehman Antulay v. R.S. Nayak**,[7] the Court laid down a set of general propositions to be followed when the right to speedy trial is infringed – all charges against the accused are liable

1 (1980) 1 SCC 81
2 (1978) 1 SCC 248
3 (1980) 2 SCC 406
4 (1983) 2 SCC 104
5 AIR 1986 Pat 38
6 (1989) 4 SCC 62
7 (1992) 1 SCC 225

to be quashed, unless it would not be in the interest of justice to do so, in which case bail must be granted to the accused. In **Supreme Court Legal Aid Committee v. Union of India**,[8] the Court considered whether undertrials under the NDPSA were to be released on bail and laid down certain directives to be followed with regard to provision of bail.

These principles were duly applied in subsequent cases. In **Pankaj Kumar v. State of Maharashtra**,[9] as well as in **Vakil Prasad Singh v. State of Bihar**,[10] the Court quashed criminal.

proceedings against the accused. Further, in **Thana Singh v. Central Bureau of Narcotics**,[11] the Court issued detailed directions to ensure that NDPS are not unnecessarily delayed.

An important issue decided by a seven-judge bench of the Supreme Court in **P. Ramachandra Rao v. State of Karnataka**,[12] was whether the judiciary could lay down limitation periods for completion of trials, after the completion of which the trial/criminal proceedings would be stopped, leading to the acquittal of the accused person. The Supreme Court ruled that it is not permissible for the judiciary to lay down such limitation periods. The Court reiterated and upheld the guidelines laid down in ***A.R. Antulay*****,** and also reminded courts, and the State of its ruling in ***Hussainara Khatoon***.

8 (1994) 7 SCC 731
9 (2008) 16 SCC 117
10 (2009) 3 SCC 355
11 (2013) 2 SCC 590
12 (2002) 4 SCC 578

IN THE SUPREME COURT OF INDIA

Hussainara Khatoon v. Home Secy., State of Bihar

(1980) 1 SCC 81

P.N. Bhagwati, R.S. Pathak & A.D. Koshal, JJ.

A writ of habeas corpus was filed in respect of a large number of persons including children who had been behind bars for several years awaiting trial. The Court examined whether the trial procedure which deprived these persons of their life and liberty was hit by Article 21 and the dictum in Maneka Gandhi v. Union of India.

P.N. Bhagwati, J. (for himself and Koshal, J.): "1. This petition for a writ of habeas corpus discloses a shocking state of affairs in regard to administration of justice in the State of Bihar. An alarmingly large number of men and women, children including, are behind prison bars for years awaiting trial in courts of law. The offences with which some of them are charged are trivial, which, even if proved, would not warrant punishment for more than a few months, perhaps for a year or two, and yet these unfortunate forgotten specimens of humanity are in jail, deprived of their freedom, for periods ranging from three to ten years without even as much as their trial having commenced. It is a crying shame on the judicial system which permits incarceration of men and women for such long periods of time without trial. We are shouting from housetops about the protection and enforcement of human rights. We are talking passionately and eloquently about the maintenance and preservation of basic freedoms. But, are we not denying human rights to these nameless persons who are languishing in jails for years for offences which perhaps they might ultimately be found not to have committed? Are we not withholding basic freedoms from these neglected and helpless human beings who have been condemned to a life of imprisonment and degradation for years on end? Are expeditious trial and freedom from detention not part of human rights and basic freedoms? Many of these unfortunate men and women must not even be remembering when they entered the jail and for what offence. They have over the years ceased to be human beings: they are mere ticket numbers. It is high time that the public conscience is awakened and the Government as well as the judiciary begin to realise that in the dark cells of our prisons there are large numbers of men and women

who are waiting patiently, impatiently perhaps, but in vain, for justice – a commodity which is tragically beyond their reach and grasp. Law has become for them an instrument of injustice and they are helpless and despairing victims of the callousness of the legal and judicial system. The time has come when the legal and judicial system has to be revamped and restructured so that such injustices do not occur and disfigure the fair and otherwise luminous face of our nascent democracy.

2. Though we issued notice to the State of Bihar two weeks ago, it is unfortunate that on February 5, 1979 no one has appeared on behalf of the State and we must, therefore, at this stage proceed on the basis that the allegations contained in the issues of the Indian Express dated January 8 and 9, 1979 which are incorporated in the writ petition are correct. The information contained in these newspaper cuttings is most distressing and it is sufficient to stir the conscience and disturb the equanimity of any socially motivated lawyer or judge. Some of the under-trial prisoners whose names are given in the newspaper cuttings have been in jail for as many as 5, 7 or 9 years and a few of them, even more than 10 years, without their trial having begun. What faith can these lost souls have in the judicial system which denies them a bare trial for so many years and keeps them behind bars, not because they are guilty, but because they are too poor to afford bail and the courts have no time to try them. It is a travesty of justice that many poor accused, "little Indians, are forced into long cellular servitude for little offences" because the bail procedure is beyond their meagre means and trials don't commence and even if they do, they never conclude. There can be little doubt, after the dynamic interpretation placed by this Court on Article 1 in Maneka Gandhi v. Union of India [(1978) 1 SCC 248] that a procedure which keeps such large numbers of people behind bars without trial so long cannot possibly be regarded as "reasonable, just or fair" so as to be in conformity with the requirement of that article. It is necessary, therefore, that the law as enacted by the legislature and as administered by the courts must radically change its approach to pre-trial detention and ensure "reasonable, just and fair" procedure which has creative connotation after Maneka Gandhi case [(1978) 1 SCC 248] .

…

5. There is also one other infirmity of the legal and judicial system which is responsible for this gross denial of justice to the undertrial prisoners and that is the notorious delay in disposal of cases. It is a sad reflection on the legal and judicial system that the trial of an accused should not even commence for a long number of years. Even a delay of one year in the

commencement of the trial is bad enough: how much worse could it be when the delay is as long as 3 or 5 or 7 or even 10 years. Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. It is interesting to note that in the United States, speedy trial is one of the constitutionally guaranteed rights. The Sixth Amendment to the Constitution provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

So also Article 3 of the European Convention on Human Rights provides that:

> "Every one arrested or detained… shall be entitled to trial within a reasonable time or to release pending trial."

We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in Maneka Gandhi v. Union of India [(1978) 1 SCC 248]. We have held in that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that article that some semblance of a procedure should be prescribed by law, but that the procedure should be "reasonable, fair and just". If a person is deprived of his liberty under a procedure which is not "reasonable, fair or just", such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of liberty cannot be "reasonable, fair or just" unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as "reasonable, fair or just" and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21. Would he be entitled to

be released unconditionally freed from the charge levelled against him on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right under Article 21. That is a question we shall have to consider when we hear the writ petition on merits on the adjourned date. But one thing is certain and we cannot impress it too strongly on the State Government that it is high time that the State Government realised its responsibility to the people in the matter of administration of justice and set up more courts for the trial of cases. We may point out that it would not be enough merely to establish more courts but the State Government would also have to man them by competent Judges and whatever is necessary for the purpose of recruiting competent Judges, such as improving their conditions of service, would have to be done by the State Government, if they want to improve the system of administration of justice and make it an effective instrument for reaching justice to the large masses of people for whom justice is today a meaningless and empty word."

IN THE SUPREME COURT OF INDIA

Kadra Pahadiya v. State of Bihar

(1983) 2 SCC 104

P.N. Bhagwati & V. Balakrishna Eradi, JJ.

A large number of prisoners in the State of Bihar had been in jail for more than 12 months after the commitment of their cases to the court of Session. Further, there were a considerable number of prisoners who had been in jail for more than 18 months without any enquiry or trial having commenced in the courts of Magistrates. The Court considered these facts and issued directions to the High Court and the State Government to ensure speedy trial.

"Order: 1. … Now ordinarily, we would not have proceeded further with the matter after the immediate relief which was sought by the petitioners was obtained and they were acquitted but the statements which have been placed before us by the State of Bihar and the High Court disclose an alarming state of affairs so far as administration of justice in the State of Bihar is concerned. We had occasion to make observations in regard to the highly disturbing situation which prevails in the justice system in the State of Bihar when we made interim orders in Hussainara Khatoon case [Hussainara Khatoon (I) v. Home Secretary, State of Bihar, (1980) 1 SCC 81] last year but despite the observations made by us it does not seem that any improvement has taken place. The position continues to be very distressing and there are large number of prisoners still languishing in jail without their trial having commenced. The figures furnished by the State of Bihar and the High Court are sufficient to shock the conscience of any Judge or for that matter even of any citizen of this country because we find that 18133 sessions cases are pending in different Sessions Courts in the State of Bihar as on December 31, 1980 where the commitment was made more than 12 months ago and the sessions trial have not yet commenced. We are not mentioning here the number of prisoners who are awaiting enquiry or trial before the Magistrate in different courts in State of Bihar because the list is very long and the number is very large. We fail to understand why necessary steps are not being taken by the authorities concerned whether they be State Government or the

High Court for the purpose of remedying this most unsatisfactory state of affairs. …It is incomprehensible to our mind as to how sessions cases could remain pending in the Sessions Court in the State of Bihar for five to seven years after commitment. …even committal enquiries have not been held in the cases of these 99 prisoners for about five to seven years. They have been in jail for such a long period even before commitment and we shudder to think how much more they would have to remain in jail after commitment before trial is commenced and brought to an end. It is obvious that some drastic steps are necessary to be taken in order to set right this distressing state of affairs. We would, therefore, direct the Sessions Courts where these cases are pending trial after commitments made prior to December 31, 1976 to take up these cases for trial at the earliest date and to proceed with the trial of the cases from day-to-day and dispose of these cases as early as possible and in any event not later than six months from today. Whatever steps are necessary to be taken by the prosecution for the purpose of day-to-day trial of these cases shall be adopted and the trial of these prisoners shall not be delayed on any such count. If any of these prisoners is unrepresented in court he shall be intimated that he is entitled to legal aid for the purpose of his defence and he shall be provided with a lawyer at State cost for which the State will put the court in funds. So far as the prisoners awaiting commitment since prior to December 31, 1976 are concerned, the Magistrates before whom their cases are pending will immediately proceed with the enquiry against them in accordance with law and complete the proceedings within three months from today. These prisoners also will be provided with legal aid if they are not represented by a lawyer of their choice and the State will make the necessary funds available to the courts of Magistrates for this purpose.

2. We have already held in Hussainara Khatoon case [Hussainara Khatoon (I) v. Home Secretary, State of Bihar, (1980) 1 SCC 81] that speedy trial is a fundamental right implicit in the guarantee of life and personal liberty enshrined in Article 21 of the Constitution and any accused who is denied this right of speedy trial is entitled to approach this Court for the purpose of enforcing such right and this Court in discharge of its constitutional obligation has the power to give necessary directions to the State Governments and other appropriate authorities for securing this right to the accused. We would, therefore, in order to enable us to exercise this power and make this fundamental right meaningful to the prisoners in the State of Bihar request the High Court to inform us as to how many Sessions Judges, Additional Sessions Judges and Assistant Sessions Judges are there in

each district in State of Bihar and what is the number of cases year wise pending before each of them. We should also like the High Court to inform us as to what are the norms of disposals which it has fixed for Sessions Judges, Additional Sessions Judges and Assistant Sessions Judges and whether the disposal of Sessions Judges, Additional Sessions Judges and Assistant Sessions Judges in the State conform to the norms of disposal laid down by the High Court and what steps, if any, are being taken by the High Court to ensure conformity with the norms The High Court will also supply information to this Court as to whether having regard to the pending files before the Sessions Judges, Additional Sessions Judges and Assistant Sessions Judges and the norms of disposal fixed by the High Court there is need for any additional courts in any of the districts and if there is such need whether steps have been taken by the High Court for establishing such additional courts. If no steps have been taken so far, the High Court may immediately address a communication to the State Government stressing the need for creation of additional courts and requesting the State Government to take necessary action for setting up such courts and appointing Judges to man such courts and the State Government, we are sure, will take the necessary steps for this purpose. We hope and trust that this exercise will be carried out and necessary steps in that behalf will be taken before the writ petition comes up for further hearing on the reopening of the Court after summer vacation.

3. We may also point out that in the statements which have been submitted to us by the State Government giving the names of prisoners who have been in jail for more than 12 months after committal of their cases to the Court of Session there are a large number of instances where the dates of admission to the jail have not been given and it is, therefore, not possible for the Court to find out as to how long they have been in jail before their cases were committed to the Court of Session. We would, therefore, direct the State Government to ascertain from each jail the date of admission of these prisoners whose names are given in the list and to inform us as to when they were admitted to the jail. We may also point out that so far as prisoners who are awaiting commitment since before December 31, 1976 and whose particulars have been given to us by Mr Mudgal in the list submitted by him are concerned, the Magistrates may consider whether they should not be released on bail in appropriate cases. This may be considered by the Magistrates when these prisoners are produced before them either for the purpose of remand or at the time of holding the enquiry. So also if there are any other under-trial prisoners who are

awaiting commitment or against whom trials have not commenced in the courts of Magistrates the question of granting bail to them may also be considered suo motu by the Magistrates and if they are eligible to be released on bail in accordance with the principles laid down by this Court in Hussainara Khatoon case [Hussainara Khatoon (I) v. Home Secretary, State of Bihar, (1980) 1 SCC 81] they may be released on bail. Action in this regard should be taken by the Magistrates at the time when such prisoners are next produced before the Magistrates. We hope and trust that the principles laid down and the directions given by us in the various judgments delivered in Hussainara Khatoon case [Hussainara Khatoon (I) v. Home Secretary, State of Bihar, (1980) 1 SCC 81] will be strictly and scrupulously observed by the Magistrates and Sessions Judges in the State of Bihar. We would suggest that copies of these judgments may be supplied to the Magistrates and Sessions Judges in the State of Bihar by the High Court with a direction that the law laid down in these judgments shall be followed by the Magistrates and Sessions Judges."

IN THE HIGH COURT OF PATNA

State v. Maksudan Singh

AIR 1986 Pat. 38

S.S. Sandhawalia, C.J., P.S. Sahay & S. Shamsul Hasan, JJ.

The Court had to decide what remedy the accused person is entitled to upon infringement of his fundamental right to a speedy trial. While upholding a judgment of a Division Bench of the same court in Ramdaras Ahir's case [1985 Cri LJ 584], the Court held that upon such infringement the charges levelled against the accused would fall and he would be entitled to an unconditional release.

S.S. Sandhawalia, C.J. (Majority view): "Is the constitutional right of the accused to a speedy and public trial in all criminal prosecutions now flowing from Art. 21 of our Constitution, by virtue of precedential mandate, identical in content with the express constitutional guarantee inserted by the Sixth Amendment in the American Constitution? What is the inevitable legal consequence if the accused person is denied this constitutional right? Would American precedents on the Sixth Amendment be attracted and applicable in this context in India as well? Would inordinately long and callous delays in concluding a criminal trial on a capital charge by the prosecution be per se prejudicial to the accused? These are the significant questions which have come to the fore in this reference to the Full Bench. Primarily in issue is a frontal challenge to the reasoning and ratio of the Division Bench judgment in *State of Bihar* v.*Ramdaras Ahir*, 1984 BBCJ 749 : (1985 Cri LJ 584).

…

5. Since the whole debate herein has centred on the foundational base of the ratio of Ramdaras Ahir's case, (1985 Cri LJ 584) the discussion hereinafter is inevitably rested on what has been held in that case without wastefully repeating the same. In a way the judgment in Ramdaras Ahir's case must be deemed as an integral part of the present one, nevertheless it becomes necessary to notice the salient holdings arrived at therein. It has been held–

(i) That now by precedential mandate the basic human right to speedy trial has been expressly written as if with pen and ink

into the constitutional right relating to the right of life and liberty guaranteed by Art. 21 of our Constitution.

(ii) That the constitutional right of speedy trial envisages an equally expeditious conclusion of a substantive appeal and not merely a technical completion of the proceeding in the original court alone.

(iii) That a grave, inordinate delay in reversing an acquittal on a capital charge, though not identical, is yet in a way akin to similar delay in the execution of a capital sentence.

(iv) That a horrendous delay, extending beyond a decade in a criminal trial (including a substantive appeal) on a capital charge, involving the reversal of a double presumption of innocence, would violate the constitutional guarantee of a fair, just and reasonable procedure, and, equally infract the fundamental right to a speedy trial vested in an accused under Art. 21.

(v) That American decisions on the Sixth Amendment to the American Constitution with regard to accused's right to speedy and public trial would now have a direct bearing under Art. 21 of our Constitution:

(vi) That once a constitutional guarantee to speedy trial and the right to a fair, just and reasonable procedure has been violated, then the accused is entitled to unconditional release and the charges against him would fall to the ground:

(vii) That a callous and inordinately prolonged delay of 10 years or more, which, in no way arises from the accused's default (or is otherwise not occasioned due to any extraordinary and exceptional reasons), in the context of the reversal of a clean acquittal on a capital charge, would plainly violate the constitutional guarantee of a speedy trial under Art. 21.

6. Mr. Pandey, the learned counsel for the appellant, State of Bihar, assailed the foundational premise of *Ramdaras Ahir's case*, namely, that the accused's right to speedy and public trial flowing from Art. 21 of our Constitution is identical in import with the expressly guaranteed constitutional right in the Sixth Amendment of the American Constitution. The ingenious submission made was that even though the right of speedy and public trial may now be deemed to be implicit in Art. 21 by virtue of the precedents of the final Court, yet such a right in India was lesser in content and effect from what it would be in America, where it was a part

of the constitution in express terms. It was submitted that the language of the Sixth Amendment to the American Constitution was conspicuous by its absence in Art. 21 and has been adopted only by way of analogy by precedent. On this hypothesis it was argued that such a right in India rests on a pedestal much lower than that under the American Constitution.

…

8. The question now is whether the enlarged and broadened concept of Art. 21 would include within its wide sweep the renowned right to speedy and public trial which, indeed, is a basic human right as well. Undoubtedly, an expeditious trial is the very soul and essence of criminal justice and there can be no manner of doubt that notorious delays in such trials, if occasioned entirely by the default of the prosecution, would by themselves constitute a denial of justice. It is in recognition of this fundamental principle that way back in 1790, the Sixth Amendment to the United States Constitution had provided as follows:–

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence."

Though it is literally true that the aforesaid words have not been specifically enumerated in terms in our Art. 21, yet it is now well settled that the identical right is implicit in the broad sweep and content of Art. 21 as authoritatively interpreted by the Supreme Court. Therefore, for our purpose, it is necessary to examine this on principle because it seems to me as settled beyond cavil by binding precedents. In Hussainara Khatoon v. State of Bihar, (1980) 1 SCC 81, which was yet one of the series of cases from our own State arising from the notorious and heart rending delays in the context of undertrials Bhagwati, J. has categorically held as follows:–

> "Even a delay of one year in the commencement of the trial is bad enough; how much worse could it be when the delay is as long as 3 or 5 or 7 or even 10 years. Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. It is interesting

> to note that in the United States, speedy trial is one of the constitutionally guaranteed rights. The Sixth Amendment to the Constitution provides that:
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> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

So also Article 3 of the European Convention on Human Rights provides that:

> 'Everyone arrested or detained shall be entitled to trial within a reasonable time or to release pending trial.'
>
> We think that even under our Constitution though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this court in Maneka Gandhi v. Union of India (AIR 1978 SC 597). We have held in that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that Article that some semblance of a procedure should be prescribed by law, but that the procedure should be 'reasonable, fair and just'. If a person is deprived of his liberty under a procedure which is not 'reasonable, fair or just', such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of his liberty cannot be 'reasonable, fair or just' unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21".

In the succeeding case of the series Hussainara Khatoon v. State of Bihar, (1980) 1 SCC 81, it was again reiterated as under:

> "Speedy trial is, as held by us in our earlier judgment dated 26th February, 1979, an essential ingredient of 'reasonable, fair and just' procedure guaranteed by Article 21 and it is the constitutional obligation of the State to devise such a procedure as would ensure speedy trial of the accused."

The aforesaid view was reiterated by Chinnappa Reddy, J. speaking for the Court in State of Maharashtra v. Champalal Punjaji Shah, (1981) 3 SCC 610. Yet again in T.V. Vatheeswaran v. State of Tamil Nadu, (1983) 2 SCC 68, it was observed as follows:

> "The fiat of Article 21, as explained is that any procedure which deprives a person of his life or liberty must be just, fair and reasonable. Just, fair and reasonable procedure implies a right to free legal services where he cannot avail them. It implies a right to a speedy trial. It implies humane conditions of detention, preventive or punitive. 'Procedure established by law' does not end with the pronouncement of sentence; it includes the carrying out of sentence. That is as far as we have gone so far."

In the light of the aforesaid long line of unbroken precedents of the final court itself, it is not possible for one to hold that even though it has been declared now in categorical terms that the right of speedy and public trial is as much a constitutional right in India under Article 21 as it is in America under the Sixth Amendment to the Constitution, yet here its content or effect would be in a way different or lesser. That no qualification or precondition has been laid out by their Lordships of the Supreme Court whilst unreservedly importing the Sixth Amendment within the sweep of Article 21 seems manifest. On the doctrine of binding precedent, therefore, it must be held that the basic human right of speedy trial is virtually written with pen and ink into the constitutional right relating to the right to life and liberty guaranteed by our Art. 21.

…

10. To conclude on this aspect, the answer to the question posed at the very outset is rendered in the affirmative and it is held that the constitutional right of the accused to a speedy and public trial in all criminal prosecutions now flowing from Art. 21 of the Constitution by virtue of precedential mandate is identical in content with the express constitutional guarantee inserted by the Sixth Amendment in the American Constitution.

11. The learned Advocate-General, Mr. Ram Balak Mahto, with his usual lucidity had confined himself to lay challenge to only two of the propositions in Ramdaras Ahir's case (1985 Cri LJ 584). With regard to what would be the inevitable legal consequences of the infraction of the constitutional right to speedy and public trial, he took the stand that these consequences pertain to the realm of sentence alone, and not to total dismissal of the charge of the vacation of the sentence imposed. Herein the learned Advocate General highlighted the fact that the right of the accused to a speedy and public trial was counter balanced by the obligation of the State to expeditiously try serious offenders and bring them to book. Herein he emphasised that a balance must be maintained betwixt the right of the accused, on the one hand, and the State's duty, on the other. The golden mean, according to Mr. Mahto, was that even the grossest delays involve in effect the question of sentence alone, and not that of conviction. This submission was equally espoused by Mr. Pandey on behalf of the appellant State.

12. The aforesaid submission must necessarily break down on a closer analysis, both for logical reasons as also on the ground of weighty persuasive precedents. It is plain that the right of speedy and public trial does not arise or depend on the conviction and sentence of the accused. Barring exceptions (where it may be invoked even after conviction), such right indeed arises normally before any conviction or sentence is recorded. An accused person on the ground of inordinate delay should claim the right long before the conclusion of the trial and before the stage of holding him guilty or otherwise arises. The assumption that he must be first convicted before he can invoke such a right, and only, thereafter, he can claim some leniency in the quantum of sentence at the stage of its imposition or later in the appellate forum has, therefore, to be categorically rejected. In the case of gross and inordinate delay in trial Court itself, it is open to the accused to invoke the claim that the trial should be halted in its tracks because his constitutional right stands plainly infracted. It is not open to the prosecution to suggest that despite the violation of the constitutional guarantee, the belated trial must continue and on the outlying chance of a conviction being recorded, some benefit in the imposition of sentence be given for violating the right which has been declared as both a human right and a constitutional one. Plainly enough, therefore, the ingenuous argument of merely compensating the constitutional right of speedy and public trial by some leniency on the point of sentence must logically break down.

13. In India, there appears to be an acute and, indeed total paucity of precedents on the point of legal consequences that must flow in the wake of violation of the constitutional guarantee of speedy and public trial. The question was pointedly raised in Hussainara Khatoon's case (1980) 1 SCC

81, but was not answered in terms. However, the possibility of the accused being entitled to be released unconditionally from the charge levelled against him was distinctly visualised and seems to have been implicitly recognised. However, the issue has been the subject-matter of consideration in the American Courts, and as would be shown later, these precedents on the Sixth Amendment would be applicable and attracted to the situation. The question in a way (though not frontally) came to be considered by the United States Supreme Court in Willie Mae Barker v. John W. Wingo (1972) 33 Law ed 2d 101, itself. However, the later authoritative enunciation of the United States Supreme Court in Clarence Eugene Strunk v. United States (1973) 37 Law ed 2d 56 concluded the matter in the following terms:

> "The Government's reliance on Barker to support the remedy fashioned by the Court of Appeals is further undermined when we examine the Court's opinion in that case as a whole. It is true that Barker described dismissal of an indictment for denial of a speedy trial as an 'unsatisfactorily severe remedy'. Indeed, in practice,' it means that a defendant who may be guilty of a serjous crime will go agog (free?), without having been tried. (1972) 407 US 514 at p. 522 : 33 Law ed 2d 101. But such severe remedies are not unique in the application of constitutional standards. In light of the policies which underlie the right to a speedy trial, dismissal must remain, as Barker noted, the only possible remedy. Ibid".

14. To summarise on this aspect, the appellant State's stand that the violation of the right of speedy and public trial pertain to the realm of sentence alone must be rejected, both on principle and precedents. It must be held that once the constitutional guarantee of speedy trial and the right to a fair, just and reasonable procedure under Art. 21 has been violated, then the accused is entitled to an unconditional release and the charges levelled against him would fall to the ground.

…

20(b). [I]t must, therefore, be held that inordinately prolonged and callous delay of ten years or more occasioned entirely by the prosecutions default, in the context of reversal of clean acquittal on a capital charge, would be per se prejudicial to the accused.

…

24. … Ramdaras Ahir's case must not be misunderstood or misconstrued to mean that a delay of less than ten years would not in any case amount to prejudice. Indeed what it lays down is the extreme outer limit of time,

whereafter grave prejudice to the accused must be presumed and the infraction of the constitutional right would be plainly established. It does not even remotely lay down that in a lesser period than ten years an accused person would not be able to show the circumstances pointing to the patent prejudice which may entitle the invocation of Art. 21. That is a question which can be properly considered and adjudicated wherein it directly arises. Both in Ramdaras Ahir's case and the present one, the delay is admittedly far beyond the outer limit of ten years.

…

26. To finally conclude, it is held –

(i) That the constitutional right of the accused to a speedy and public trial in all criminal prosecutions now flowing from Art. 21 of the Constitution by virtue of precedential mandate is identical in content with the express constitutional guarantee inserted by the Sixth Amendment in the American Constitution;

(ii) That once the constitutional guarantee of a speedy trial and the right to a fair, just and reasonable procedure under Art. 21 have been violated then the accused is entitled to an unconditional release and the charges levelled against him would fall to the ground;

(iii) That the American precedents on the Sixth Amendment of their Constitution would be equally attracted and applicable as persuasive on this facet of Art. 21 of our Constitution as well;

(iv) That inordinately prolonged and callous delays of 10 years or more entirely because of the prosecution's default in the context of the reversal of a clean acquittal on a capital charge would be per se prejudicial to the accused; and

(v) That the ratio and the reasoning of Ramdaras Ahir's case is hereby affirmed."

…

S. Shamsul Hasan, J. (Majority view): "36. Speedy trial of a person facing prosecution on any charge and more so on a capital charge is the inherent right of such a person. The entire scheme of the Code of Criminal Procedure and its amendment is patently striving to achieve this. To dilute this situation on the basis of legalistic and constitutional alibi would be a concept alien to the modern and progressive criminal jurisprudence. This inherent right has now been strengthened by precedential support of the Supreme Court of India which has imported the concept of American Constitution as spelt out in the Sixth Amendment to that Constitution and

in view of Art. 141 of our Constitution it must now be treated as a law of the land. Even agreeing with Hon'ble P.S. Sahay, J. to the extent that we must confine ourselves to our own Constitution, a question emerges that, has not the American concept, as embodied in the Sixth Amendment, become a part of our Constitution also. In my view, as held by Hon'ble the Chief Justice, reiterating the decision of the Supreme Court it certainly has and now it devolves upon the Court of law from the initial to the ultimate stage to ensure that this aspect is treated as a golden thread in the web enmeshing the criminal procedure.

37. I also agree with Hon'ble the Chief Justice that the American decisions relevant to the matter in issue can now be looked into and, in my view, certainly as a work of scholarship as we would examine a text book in order to apply the principles embodied in them to our situations.

38. Coming to the question of the period of ten years, as has been fixed by Hon'ble the Chief Justice in his judgment, I am inclined to agree with the submission of Mr. Rash Bihari Singh that it should have been fixed at two years. I do not agree with Hon'ble P.S. Sahay, J. that the conditions prevailing in this country and Courts render this suggestion of two years ridiculous. The situation in Court cannot tend to deprive an affected person of his valuable and constitutional right of getting his prosecution speedily disposed of nor can the constitutional mandate be diluted by exigencies of the situation caused by the absence of an adequate infrastructure at the instance of the State for speedy disposal. If necessary infrastructure is not provided, the person facing criminal prosecution should not be made the victim of the situation and the State is alone to be blamed for it. It is well-known that time limit has been fixed in various situations particularly when capital punishment is involved, in commuting them. Even the Supreme Court has in many cases commuted death sentences after two years and in some because of the attitude of the appellant accused five years was not sufficient. Frankly speaking much lesser period should have been fixed but that would not have received the approbation of those who are oblivious of the hardship caused and the mental agony inflicted by the delay to a person who may ultimately be acquitted of all charges. The submission of the Advocate General that delay should only be taken into consideration for inflicting lesser punishment is only to be stated to be rejected. This submission forgets that no lesser sentence than imprisonment for life can be imposed if a person is convicted on a capital charge. His submission, therefore, only means this that if a person is sentenced to death, that sentence can be reduced to imprisonment for life. For such commutation 2 or 3 years has been found to be enough in a lot of cases and in any event when capital sentence is inflicted the likelihood of its delayed disposal is very rare. In most cases, therefore,

we are concerned with the persons sentenced with the imprisonment for life or likely to be sentenced to death or imprisonment for life if an appeal by the State succeeds. Can it be said that after 10-15 years if a person is found guilty of capital charge in a Government Appeal, then because of the delay instead of imposing death sentence imprisonment for life is inflicted, thus mitigating the delay in disposal of the case. In my view, 'no' because at that stage life imprisonment may amount to be inflicting a punishment which would be far harsher than death sentence because the accused would be passing through a "living death". Due process of law does not mean that the process itself becomes punitive before a penalty is inflicted. Due process is synonymous with the process being exhaustive with greatest of speed.

39. As regards application of the aforesaid principle to the trial for lesser offences Hon'ble the Chief Justice has rightly not entered into any discussion in this appeal. I may, however, add that if a situation arises, then within the ambit of those sections the principle of speedy trial can certainly be applicable but that will be for some other occasion.

…

41. I may also state that notoriety of a particular incident should be of no consequence to the Court trying to indicted of that occurrence. What is important is the value of the evidence brought on the record and if that is not brought speedily, then the travesty of justice will be patent and writ large.

42. This situation must be kept in mind by Courts at all levels – whether it be at the trial stage or at the appellate stage. In the post death sentence had been commuted on the ground of delay in culmination of the proceeding up to the appellate stage. It is time now that appellants are also granted bail if the hearing of the appeals is delayed by 2 years or if an appellant has languished in jail for a considerable period of time prior to appeal. This is the dictum of the Supreme Court and is well recognised form of relief against protracted delay in hearing the appeal while the appellant is languishing in jail running the sentence detrimentally affected which cannot be reversed if an acquittal takes place.

43. While parting I may add that a day may come and that too sooner than later that the period of less than ten years also will be treated as unjustified delay and it will be brought down to two years. It will be only then that the interest of justice will be served. I also hope that Courts everywhere and at all levels will be conscious of the right of the indicted person to get speedy disposal of his indictment and consequently the hardship that delay beyond the control of the accused causes."

IN THE SUPREME COURT OF INDIA

Madhu Mehta v. Union of India

(1989) 4 SCC 62

Sabyasachi Mukharji & B.C. Ray, JJ.

This habeas corpus petition was in respect of a person who had been awaiting a response to his mercy petition for over 8 years. The Court examined whether the death sentence was liable to be set aside.

Sabyasachi Mukharji, J.: "2. The learned District and Sessions Judge, Jhansi had, in the meantime, visited the said convict Gyasi Ram in jail on 22-5-1988 and had sent a report to the Inspector General of Prisons stating "Gyasi's mental state is such that he might commit suicide by banging his head on the iron grill of his cell if a decision on his petition is not taken soon. If he is to be hanged, it should be done without any delay or he should be released." The Inspector General's Office further sent an official to Delhi to expedite the case. Thereafter, this petition was filed for the condemned prisoner. Gyasi Ram, until the orders of this Court passed in these proceedings on 3-5-1989, was kept in the Death Cell and it is only pursuant to the orders of this Court that the prisoner was allowed to stay in the ordinary cell during the daytime. The petitioner moved this Court on 11-4-1989 and the notice was issued returnable on 19-4-1989. Time was taken to file affidavit and the order of this Court dated 3-5-1989 was passed. The matter was adjourned for three months. Affidavits have been filed but his mercy petition still remains undisposed of. The question is: what is to be done? This question of delay in these matters has been examined by this Court from time to time, and how far delay in execution of death sentence necessitates the commutation of the death sentence or release of the condemned prisoner has been a matter of some controversy and debate. …

3. ... It is well settled now that undue long delay in execution of the sentence of death would entitle the condemned person to approach this Court or to be approached under Article 32 of the Constitution, but this Court would only examine the nature of delay caused and circumstances that ensued after sentence was finally confirmed by the judicial process and

will have no jurisdiction to reopen the conclusions reached by the Court while finally maintaining the sentence of death. But the court is entitled and indeed obliged to consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay can be considered to be decisive. It has been emphasised that Article 21 is relevant in all stages. Speedy trial in criminal cases though may not be fundamental right, is implicit in the broad sweep and content of Article 21. Speedy trial is part of one's fundamental right to life and liberty. This principle is no less important for disposal of mercy petition. It has been universally recognised that a condemned person has to suffer a degree of mental torture even though there is no physical mistreatment and no primitive torture. See the observations of Shetty, J., in Triveniben case [(1989) 1 SCC 678] at pp. 713-14 of the report, where it has been observed that as between funeral fire and mental worry, it is the latter which is more devastating, for, funeral fire burns only the dead body while the mental worry burns the living one. In the instant case, Gyasi Ram has suffered a great deal of mental agony for over eight years. It is not disputed that there has been long delay. We do not find reasons sufficiently commensurate to justify such long delay. The convict has suffered mental agony of living under the shadow of death for long, far too long. He should not suffer that agony any longer.

4. In the aforesaid facts and the circumstances of the case, therefore, we direct that the death sentence should not be carried out and the sentence imposed upon him be altered to imprisonment for life. We order accordingly."

IN THE SUPREME COURT OF INDIA

Abdul Rehman Antulay v. R.S. Nayak

(1992) 1 SCC 225

K.N. Singh, C.J., P.B. Sawant, N.M. Kasliwal, B.P. Jeevan Reddy & G.N. Ray, JJ.

The Court was required to decide the scope of remedy that must be granted to a person whose right to speedy trial has been violated. The Court laid down a set of general propositions to be followed by courts in dealing with this issue.

B.P. Jeevan Reddy, J.: "It is more than 12 years since this Court declared in Hussainara Khatoon [Hussainara Khatoon (I) v. Home Secretary, State of Bihar, (1980) 1 SCC 81] that right to speedy trial is implicit in the broad sweep and content of Article 21. Many a decision thereafter re-affirmed the principle. There has never been a dissenting note. It is held that violation of this right entails quashing of charges and/or conviction. It is, however, contended now before us that no such fundamental right flows from Article 21. At any rate, it is argued, it is only a facet of a fair and reasonable procedure guaranteed by Article 21 and nothing more. It is also argued that violation of this right does not result in quashing of the charges and/or conviction. It is submitted that the right, if at all there is one, is an amorphous one, a right which is something less than other fundamental rights guaranteed by our Constitution. On the other hand, proponents of the right want us to go a step forward and prescribe a time-limit beyond which no criminal proceeding should be allowed to go on. Without such a limit, they say, the right remains a mere illusion and a platitude. Proponents of several viewpoints have put forward their respective contentions. We had the benefit of elaborate arguments addressed by counsel on both sides of the spectrum. A large number of cases have been cited. Different viewpoints have been presented. We shall refer to them at the appropriate stage.

…

35. Right to speedy trial is not enumerated as one of the fundamental rights in the Constitution of India, unlike the Sixth Amendment to the U.S. Constitution which expressly recognises this right. The Sixth Amendment

declares inter alia that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial". This is in addition to the Fifth Amendment which inter alia declares that "no persons shall … be deprived of life, liberty or property, without due process of law", which corresponds broadly to Article 21 (and clause (1) of Article 31, since deleted). This omission and the holding in A.K. Gopalan v. State of Madras [1950 SCR 88] probably explains why this right was not claimed or recognised as a fundamental right flowing from Article 21 so long as Gopalan [1950 SCR 88] held the field. Once Gopalan [1950 SCR 88] was overruled in R.C. Cooper [R.C. Cooper v. Union of India, (1970) 1 SCC 248] and its principle extended to Article 21 in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] Article 21 got unshackled from the restrictive meaning placed upon it in Gopalan [1950 SCR 88]. It came to acquire a force and vitality hitherto unimagined. A burst of creative decisions of this Court fast on the heels of Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] gave a new meaning to the article and expanded its content and connotation. While this is not the place to enumerate all those decisions, it is sufficient to say that the opinions of this court in Hussainara Khatoon cases [Hussainara Khatoon (I) v. Home Secretary, State of Bihar, (1980) 1 SCC 81.] decided in the year 1979, declaring that right to speedy trial is implicit in Article 21 and thus constitutes a fundamental right of every persons accused of a crime, is one among them.

…

39. [Maneka Gandhi establishes] in unmistakable terms that the law and procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Articles 19 and 14. It establishes that the procedure prescribed by law within the meaning of Article 21 must be right and just and fair and not arbitrary, fanciful or oppressive. It is this principle of fairness and reasonableness which was construed as taking within its purview the right to speedy trial. In the first Hussainara Khatoon decision [HussainaraKhatoon (I) v. Home Secretary, State of Bihar, (1980) 1 SCC 81.] Bhagwati, J. observed as follows: (SCC pp. 88-89, para 5)

> "We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] . We have held in

> that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the requirement of that article that some semblance of a procedure should be prescribed by law, but that the procedure should be 'reasonable, fair and just'. If a person is deprived of his liberty under a procedure which is not 'reasonable, fair or just', such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of his liberty cannot be 'reasonable, fair or just' unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right of life and liberty enshrined in Article 21."

40. The learned Judge, however, posed a question which he left to be answered at a later stage. The question posed was: What is the consequence of denial of this right? Does it necessarily entail the consequence of quashing of charges/trial? That question we shall consider separately but what is of significance is, this decision does establish the following propositions:

(1) Right to speedy trial is implicit in the broad sweep and content of Article 21.

(2) That unless the procedure prescribed by law ensures a speedy trial it cannot be said to be reasonable, fair or just. Expeditious trial and freedom from detention are part of human rights and basic freedoms and that a judicial system which allow incarceration of men and women for long periods of time without trial must be held to be denying human rights to such undertrials.

41. Learned counsel for the accused particularly relied upon the following passage from the opinion of Bhagwati, J.: (SCC p. 88, para 5)

> "There is also one other infirmity of the legal and judicial system which is responsible for this gross denial of justice to the undertrial prisoners and that is the notorious delay in disposal of cases. It is a sad reflection on the legal and judicial system that the trial of an accused should not even commence for a long number of years. Even a delay of one year in the commencement of the trial is bad enough; how much worse could it be when the delay is as long as 3 or 5 or 7 or even 10 years. Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice."

…

81. Article 21 declares that no person shall be deprived of his life or liberty except in accordance with the procedure prescribed by law. The main procedural law in this country is the Code of Criminal Procedure, 1973. Several other enactments too contain many a procedural provision. After Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248], it can hardly be disputed that the 'law' [which has to be understood in the sense the expression has been defined in clause (3)(a) of Article 13 of the Constitution] in Article 21 has to answer the test of reasonableness and fairness inherent in Articles 19 and 14. In other words, such law should provide a procedure which is fair, reasonable and just. Then alone, would it be in consonance with the command of Article 21. Indeed, wherever necessary, such fairness must be read into such law. Now, can it be said that a law which does not provide for a reasonably prompt investigation, trial and conclusion of a criminal case is fair, just and reasonable? It is both in the interest of the accused as well as the society that a criminal case is concluded soon. If the accused is guilty, he ought to be declared so. Social interest lies in punishing the guilty and exoneration of the innocent but this determination (of guilt or innocence) must be arrived at with reasonable despatch– reasonable in all the circumstances of the case. Since it is the accused who is charged with the offence and is also the person whose life and/or liberty is at peril, it is but fair to say that he has a right to be tried speedily. Correspondingly, it is the obligation of the State to respect and ensure this right. It needs no emphasis to say, the very fact of being accused of a crime is cause for concern. It affects the reputation and the standing of the person among his colleagues and in the society. It is a cause for worry and expense. It is more so, if he is arrested. If it is a

serious offence, the man may stand to lose his life, liberty, career and all that he cherishes.

82. The provisions of the Code of Criminal Procedure are consistent with and indeed illustrate this principle. They provide for an early investigation and for a speedy and fair trial. The learned Attorney General is right in saying that if only the provisions of the Code are followed in their letter and spirit, there would be little room for any grievance. The fact however, remains unpleasant as it is, that in many cases, these provisions are honoured more in breach. Be that as it may, it is sufficient to say that the constitutional guarantee of speedy trial emanating from Article 21 is properly reflected in the provisions of the Code.

83. But then speedy trial or other expressions conveying the said concept– are necessarily relative in nature. One may ask – speedy means, how speedy? How long a delay is too long? We do not think it is possible to lay down any time schedules for conclusion of criminal proceedings. The nature of offence, the number of accused, the number of witnesses, the workload in the particular court, means of communication and several other circumstances have to be kept in mind. For example, take the very case in which Ranjan Dwivedi (petitioner in Writ Petition No. 268 of 1987) is the accused. 151 witnesses have been examined by the prosecution over a period of five years. Examination of some of the witnesses runs into more than 100 typed pages each. The oral evidence adduced by the prosecution so far runs into, we are told, 4000 pages. Even though, it was proposed to go on with the case five days of a week and week after week, it was not possible for various reasons viz., non-availability of the counsel, non-availability of accused, interlocutory proceedings and other systemic delays. A murder case may be a simple one involving say a dozen witnesses which can be concluded in a week while another case may involve a large number of witnesses, and may take several weeks. Some offences by their very nature e.g., conspiracy cases, cases of misappropriation, embezzlement, fraud, forgery, sedition, acquisition of disproportionate assets by public servants, cases of corruption against high public servants and high public officials take longer time for investigation and trial. Then again, the workload in each court, district, region and State varies. This fact is too well known to merit illustration at our hands. In many places, requisite number of courts are not available. In some places, frequent strikes by members of the bar interferes with the work schedules. In short, it is not possible in the very nature of things and present day circumstances to draw a time-limit beyond which a criminal

proceeding will not be allowed to go. Even in the USA, the Supreme Court has refused to draw such a line. Except for the Patna Full Bench decision under appeal, no other decision of any High Court in this country taking such a view has been brought to our notice. Nor, to our knowledge, in United Kingdom. Wherever a complaint of infringement of right to speedy trial is made the court has to consider all the circumstances of the case including those mentioned above and arrive at a decision whether in fact the proceedings have been pending for an unjustifiably long period. In many cases, the accused may himself have been responsible for the delay. In such cases, he cannot be allowed to take advantage of his own wrong. In some cases, delays may occur for which neither the prosecution nor the accused can be blamed but the system itself. Such delays too cannot be treated as unjustifiable – broadly speaking. Of course, if it is a minor offence – not being an economic offence – and the delay is too long, not caused by the accused, different considerations may arise. Each case must be left to be decided on its own facts having regard to the principles enunciated hereinafter. For all the above reasons, we are of the opinion that it is neither advisable nor feasible to draw or prescribe an outer time-limit for conclusion of all criminal proceedings. It is not necessary to do so for effectuating the right to speedy trial. We are also not satisfied that without such an outer limit, the right becomes illusory.

84. We may next deal with, what is called the 'demand' rule. The contention is that an accused who does not demand a speedy trial, who stands by and acquiesces in the delays cannot suddenly turn round after a lapse of period and complain of infringement of his right to speedy trial. It is not possible to accede to this contention either. An accused does not prosecute himself. The State or complainant prosecutes him. It is, thus, the obligation of the State or the complainant, as the case may be, to proceed with the case with reasonable promptitude. Particularly, in this country, where the large majority of accused come from poorer and weaker sections of the society, not versed in the ways of law, where they do not often get competent legal advice, the application of the said rule is wholly inadvisable. Of course, in a given case, if an accused demands speedy trial and yet he is not given one, may be a relevant factor in his favour. But we cannot disentitle an accused from complaining of infringement of his right to speedy trial on the ground that he did not ask for or insist upon a speedy trial.

85. Another question seriously canvassed before us related to the consequence flowing from an infringement of right to speedy trial. Counsel for accused argued on the basis of the observations in Sheela Barse

[(1986) 3 SCC 632] and Strunk [37 L Ed 2d 56] that the only consequence is quashing of charges and/or conviction, as the case may be. Normally, it may be so. But we do not think that that is the only order open to court. In a given case, the facts – including the nature of offence – may be such that quashing of charges may not be in the interest of justice. After all, every offence – more so economic offences, those relating to public officials and food adulteration – is an offence against society. It is really the society – the State – that prosecutes the offender. We may in this connection recall the observations of this court in Champalal Punjaji Shah [(1981) 3 SCC 610] . In cases, where quashing of charges/convictions may not be in the interest of justice, it shall be open to the court to pass such appropriate orders as may be deemed just in the circumstances of the case. Such orders may, for example, take the shape of order for expedition of trial and its conclusion within a particular prescribed period, reduction of sentence when the matter comes up after conclusion of trial and conviction, and so on.

86. In view of the above discussion, the following propositions emerge, meant to serve as guidelines. We must forewarn that these propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules. These propositions are:

(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the social interest also, does not make it any the less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial. That is how, this Court has understood this right and there is no reason to take a restricted view.

(3) The concerns underlying the right to speedy trial from the point of view of the accused are:

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.

(4) At the same time, one cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, "delay is a known defence tactic". Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the right to speedy trial is alleged to have been infringed, the first question to be put and answered is – who is responsible for the delay? Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that an application/petition is admitted and an order of stay granted by a superior court is by itself no proof that the proceeding is not frivolous. Very often these stays are obtained on ex parte representation.

(5) While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on – what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

(6) Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by Powell, J. in Barker [33 L Ed 2d 101] "it cannot be said how long a delay is too long in a system where justice is supposed to be swift but deliberate". The same idea has been stated by White, J. in U.S. v. Ewell [15 L Ed 2d 627] in the following words:

> '… the Sixth Amendment right to a speedy trial is necessarily relative, is consistent with delays, and has orderly expedition, rather than mere speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances.'

However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case.

(7) We cannot recognize or give effect to, what is called the 'demand' rule. An accused cannot try himself; he is tried by the court at the behest of the prosecution. Hence, an accused's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non-asking for a speedy trial cannot be put against the accused. Even in USA, the relevance of demand rule has been substantially watered down in Barker [33 L Ed 2d 101] and other succeeding cases.

(8) Ultimately, the court has to balance and weigh the several relevant factors –'balancing test' or 'balancing process'– and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed

the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order – including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded – as may be deemed just and equitable in the circumstances of the case.

(10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit ineffectuates the guarantee of right to speedy trial.

(11) An objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis."

IN THE SUPREME COURT OF INDIA

Pankaj Kumar v. State of Maharashtra

(2008) 16 SCC 117

C.K. Thakker & D.K. Jain, JJ.

For an offence committed in the year 1981, the FIR was registered in 1987 and the chargesheet was filed in 1991. The Court went into the question of whether upon infringement of the right to speedy trial the Court may quash proceedings against the accused or, alternatively, provide a time-frame for completion of the proceedings.

D.K. Jain, J.: "17. Time and again this Court has emphasised the need for speedy investigations and trial as both are mandated by the letter and spirit of the provisions of the Criminal Procedure Code [in particular, Sections 197, 173, 309, 437(6) and 468, etc.] and the constitutional protection enshrined in Article 21 of the Constitution. Inspired by the broad sweep and content of Article 21 as interpreted by a seven-Judge Bench of this Court in *Maneka Gandhi* v. *Union of India* [(1978) 1 SCC 248], in *Hussainara Khatoon (1)* v. *Home Secy., State of Bihar* [(1980) 1 SCC 81 : 1980 SCC (Cri) 23] , this Court had said that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except according to procedure established by law; that such procedure is not some semblance of a procedure but the procedure should be "reasonable, fair and just"; and therefrom flows, without doubt, the right to speedy trial. It was also observed that no procedure which does not ensure a reasonably quick trial can be regarded as "reasonable, fair or just" and it would fall foul of Article 21. The Court clarified that speedy trial means reasonably expeditious trial which is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.

18. The exposition of Article 21 in *Hussainara Khatoon (1) case* [(1980) 1 SCC 81 : 1980 SCC (Cri) 23] was exhaustively considered afresh by the Constitution Bench in *Abdul Rehman Antulay* v. *R.S. Nayak* [(1992) 1 SCC 225 : 1992 SCC (Cri) 93] . Referring to a number of decisions of this Court and the American precedents on the Sixth Amendment of their Constitution, making the right to a speedy and public trial a constitutional guarantee, the Court formulated as many as eleven propositions with a note of caution that these were not exhaustive and were meant only

to serve as guidelines. For the sake of brevity, we do not propose to reproduce all the said propositions and it would suffice to note the gist thereof. These are: (*i*) fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily; (*ii*) the right to speedy trial flowing from Article 21 encompasses all the stages, namely, the stage of investigation, inquiry, trial, appeal, revision and retrial; (*iii*) in every case where the speedy trial is alleged to have been infringed, the first question to be put and answered is—who is responsible for the delay?; (*iv*) while determining whether undue delay has occurred (resulting in violation of right to speedy trial) one must have regard to all the attendant circumstances, including the nature of offence, the number of accused and witnesses, the work load of the court concerned, prevailing local conditions and so on—what is called, the systemic delays; (*v*) each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of the accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case; (*vi*) ultimately, the court has to balance and weigh several relevant factors—"balancing test" or "balancing process"—and determine in each case whether the right to speedy trial has been denied; (*vii*) ordinarily speaking, where the court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open and having regard to the nature of offence and other circumstances when the court feels that quashing of proceedings cannot be in the interest of justice, it is open to the court to make appropriate orders, including fixing the period for completion of trial; (*viii*) it is neither advisable nor feasible to prescribe any outer time-limit for conclusion of all criminal proceedings. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint; (*ix*) an objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in the High Court must, however, be disposed of on a priority basis.

19. Notwithstanding elaborate enunciation of Article 21 of the Constitution in *Abdul Rehman Antulay* [(1992) 1 SCC 225 : 1992 SCC (Cri) 93] and

rejection of the fervent plea of proponents of the right to speedy trial for laying down time-limits as bar beyond which a criminal trial shall not proceed, pronouncements of this Court in *"Common Cause", A Registered Society* v. *Union of India* [(1996) 4 SCC 33 : 1996 SCC (Cri) 589] , *"Common Cause", A Registered Society* v. *Union of India* [(1996) 6 SCC 775 : 1997 SCC (Cri) 42] , *Raj Deo Sharma* v. *State of Bihar* [(1998) 7 SCC 507 : 1998 SCC (Cri) 1692] and *Raj Deo Sharma (II)* v. *State of Bihar* [(1999) 7 SCC 604 : 1999 SCC (Cri) 1324] gave rise to some confusion on the question whether an outer time-limit for conclusion of criminal proceedings could be prescribed whereafter the trial court would be obliged to terminate the proceedings and necessarily acquit or discharge the accused.

20. The confusion on the issue was set at rest by a seven-Judge Bench of this Court in *P. Ramachandra Rao* v. *State of Karnataka* [(2002) 4 SCC 578 : 2002 SCC (Cri) 830] . Speaking for the majority, R.C. Lahoti, J. (as His Lordship then was) while affirming that the dictum in *A.R. Antulay case* [(1992) 1 SCC 225: 1992 SCC (Cri) 93] is correct and still holds the field and the propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in the said case adequately take care of the right to speedy trial, it was held that guidelines laid down in *A.R. Antulay case* [(1992) 1 SCC 225 : 1992 SCC (Cri) 93] are not exhaustive but only illustrative. They are not intended to operate as hard-and-fast rules or to be applied like a straitjacket formula. Their applicability would depend on the fact situation of each case as it is difficult to foresee all situations and no generalisation can be made.

21. It has also been held that it is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. Nonetheless, the criminal courts should exercise their available powers such as those under Sections 309, 311 and 258 CrPC to effectuate the right to speedy trial. In appropriate cases, jurisdiction of the High Court under Section 482 CrPC and Articles 226 and 227 of the Constitution can be invoked seeking appropriate relief or suitable directions. The outer limits or power of limitation expounded in the aforenoted judgments were held not to be in consonance with the legislative intent.

22. It is, therefore, well settled that the right to speedy trial in all criminal prosecutions is an inalienable right under Article 21 of the Constitution. This right is applicable not only to the actual proceedings in court but also includes within its sweep the preceding police investigations as well. The

right to speedy trial extends equally to all criminal prosecutions and is not confined to any particular category of cases.

23. In every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into consideration all the attendant circumstances, enumerated above, and determine in each case whether the right to speedy trial has been denied in a given case. Where the court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, may be quashed unless the court feels that having regard to the nature of offence and other relevant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the court to make an appropriate order as it may deem just and equitable including fixation of time for the conclusion of trial.

24. Tested on the touchstone of the broad principles, enumerated above, we are of the opinion that in the instant case, the appellant's constitutional right recognised under Article 21 of the Constitution stands violated. It is common ground that the first information report was recorded on 12-5-1987 for the offences allegedly committed in the year 1981, and after unwarranted prolonged investigations, involving aforestated three financial irregularities; the charge-sheet was submitted in court on 22-2-1991. Nothing happened till April 1999, when the appellant and his deceased mother filed criminal writ petition seeking quashing of proceedings before the trial court.

25. Though, it is true that the plea with regard to inordinate delay in investigations and trial has been raised before us for the first time but we feel that at this distant point of time, it would be unfair to the appellant to remit the matter back to the High Court for examining the said plea of the appellant. Apart from the fact that it would further protract the already delayed trial, no fruitful purpose would be served as learned counsel for the State very fairly stated before us that he had no explanation to offer for the delay in investigations and the reason why the trial did not commence for eight long years. Nothing, whatsoever, could be pointed out, far from being established, to show that the delay was in any way attributable to the appellant.

26. Moreover, having regard to the nature of the accusations against the appellant, briefly referred to above, who was a young boy of about eighteen years of age in the year 1981, when the acts of omission and

commission were allegedly committed by the concerns managed by his parents, who have since died, we feel that the extreme mental stress and strain of prolonged investigation by the Anti-Corruption Bureau and the sword of Damocles hanging perilously over his head for over fifteen years must have wrecked his entire career.

27. Be that as it may, the prosecution has failed to show any exceptional circumstance, which could possibly be taken into consideration for condoning the prolongation of investigation and the trial. The lackadaisical manner of investigation spread over a period of four years in a case of this type and inordinate delay of over eight years (excluding the period when the record of the trial court was in the High Court), is manifestly clear.

28. Thus, on facts in hand, we are convinced that the appellant has been denied his valuable constitutional right to a speedy investigation and trial and, therefore, criminal proceedings initiated against him in the year 1987 and pending in the Court of the Special Judge, Latur, deserve to be quashed on this short ground alone."

IN THE SUPREME COURT OF INDIA

Vakil Prasad Singh v. State of Bihar

(2009) 3 SCC 355

D.K. Jain & R.M. Lodha, JJ.

A criminal case against the accused was pending on for nearly 28 years, and the trial was yet to commence. The petition sought quashing of the chargesheet in the case. The Court analyzed whether the given circumstances were enough to quash criminal proceedings against the accused.

D. K. Jain, J.: "24. It is…well settled that the right to speedy trial in all criminal persecutions (sic prosecutions) is an inalienable right under Article 21 of the Constitution. This right is applicable not only to the actual proceedings in court but also includes within its sweep the preceding police investigations as well. The right to speedy trial extends equally to all criminal prosecutions and is not confined to any particular category of cases. In every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into consideration all the attendant circumstances, enumerated above, and determine in each case whether the right to speedy trial has been denied in a given case.

25. Where the court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, may be quashed unless the court feels that having regard to the nature of offence and other relevant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the court to make an appropriate order as it may deem just and equitable including fixation of time-frame for conclusion of trial.

…

29. We have no hesitation in holding that at least for the period from 7-12-1990 till 28-2-2007 there is no explanation whatsoever for the delay in investigation. Even the direction issued by the High Court seems to have had no effect on the prosecution and they slept over the matter for almost seventeen years. Nothing could be pointed out by the State, far from

being established to show that the delay in investigation or trial was in any way attributable to the appellant. The prosecution has failed to show any exceptional circumstance which could possibly be taken into consideration for condoning a callous and inordinate delay of more than two decades in investigations and the trial. The said delay cannot, in any way, be said to be arising from any default on the part of the appellant.

30. Thus, on the facts in hand, in our opinion, the stated delay clearly violates the constitutional guarantee of a speedy investigation and trial under Article 21 of the Constitution. We feel that under these circumstances, further continuance of criminal proceedings, pending against the appellant in the Court of the Special Judge, Muzaffarpur, is unwarranted and despite the fact that allegations against him are quite serious, they deserve to be quashed."

IN THE SUPREME COURT OF INDIA

Thana Singh v. Central Bureau of Narcotics

(2013) 2 SCC 590

D.K. Jain & J.S. Khehar, JJ.

The accused, who had been in prison for more than 12 years awaiting the commencement of his trial for an offence under the NDPSA was consistently denied bail, even by the High Court. The maximum punishment for the offence the accused was incarcerated for was 20 years. Hence, the undertrial had remained in detention for a period exceeding one-half of the maximum period of imprisonment. The Court issued detailed directions to ensure time-bound trials in NDPS cases

Order:- 4. The laxity with which we throw citizens into prison reflects our lack of appreciation for the tribulations of incarceration; the callousness with which we leave them there reflects our lack of deference for humanity. It also reflects our imprudence when our prisons are bursting at their seams. For the prisoner himself, imprisonment for the purposes of trial is as ignoble as imprisonment on conviction for an offence, since the damning finger and opprobrious eyes of society draw no difference between the two. The plight of the undertrial seems to gain focus only on a solicitous inquiry by this Court, and soon after, quickly fades into the backdrop.

5. Therefore, bearing in mind the aforesaid imperatives, after granting the deserved bail in that case, we decided to take cognizance of status quo and gain a first-hand account about the state of trials in such like cases pending in all the States. Accordingly, vide order dated 30-8-2010 [*Thana Singh* v. *Central Bureau of Narcotics*, (2013) 2 SCC 603] , we issued notice to all the States through their Chief Secretaries to file affidavits furnishing information of all cases under the NDPS Act where the undertrial has been incarcerated for a period exceeding five years…

6. We lay down the directions and guidelines specified hereinafter for due observance by all concerned as the law declared by this Court under Article 141 of the Constitution of India. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of fundamental rights, especially the cluster of fundamental rights incorporated under Article 21, which stand flagrantly violated due to the state of affairs

of trials under the NDPS Act. We would like to clarify that these directions are restricted only to the proceedings under the NDPS Act.

Directions

A. Adjournments

7. The lavishness with which adjournments are granted is not an ailment exclusive to narcotics trials; courts at every level suffer from this predicament. The institutionalisation of generous dispensation of adjournments is exploited to prolong trials for varied considerations.

8. Such a practice deserves complete abolishment. The legislature enacted a crucial amendment in the form of a fourth proviso to Section 309(2) of the Code of Criminal Procedure, 1973 [through Section 21(b) of Act 5 of 2009] to tackle the problem, but the same awaits notification. Once notified, Section 309 will read as follows:

> "309. Power to postpone or adjourn proceedings.—(1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.
>
> (2) If the court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:
>
> Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:
>
> Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

> Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him:
>
> Provided also that—
>
> (a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;
>
> (b) the fact that the pleader of a party is engaged in another court, shall not be a ground for adjournment;
>
> (c) where a witness is present in court but a party or his pleader is not present or the party or his pleader though present in court, is not ready to examine or cross-examine the witness, the court may, if it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.
>
> Explanation 1.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.
>
> Explanation 2.—The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused." (emphasis supplied)

The fourth proviso deserves immediate notification. In lieu of the lacuna created by its conspicuous absence, which is interfering with the fundamental right of speedy trial [see Hussainara Khatoon (1) v. State of Bihar [(1980) 1 SCC 81 : 1980 SCC (Cri) 23]], something this Court is duty-bound to protect and uphold, and till the statutory provisions are in place, we direct that no NDPS court would grant adjournments at the request of a party except where the circumstances are beyond the control of the party. This exception must be treated as an exception, and must

not be allowed to swallow the generic rule against grant of adjournments. Further, where the date for hearing has been fixed as per the convenience of the counsel, no adjournment shall be granted without exception. Adherence to this principle would go a long way in cutting short that queue to the doors of justice.

9. Perhaps, a provision analogous to Section 22(c) of the Prevention of Corruption Act, 1988 may be seriously considered by the legislature for trials under the NDPS Act. It reads as follows:

> "22. The Code of Criminal Procedure, 1973 to apply subject to certain modifications.—The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall in their application to any proceeding in relation to an offence punishable under this Act have effect as if—
>
> ***
>
> (c) after sub-section (2) of Section 317, the following sub-section had been inserted, namely—
>
> '(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), the Judge may, if he thinks fit and for reasons to be recorded by him, proceed with inquiry or 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.'"

B. Examination of witnesses

10. Between harmonising the rights and duties of the accused and the victim, the witness is often forgotten. No legal system can render justice if it is not accompanied with a conducive environment that encourages and invites witnesses to give testimony. The web of antagonistic litigation with its entangled threads of investigation, cross-examination, dealings with the police, etc. as it is, lacks the ability to attract witnesses to participate in a process of justice; it is baffling that nonetheless, systems of examination that sprout more disincentives for a witness to take the stand are established. Often, conclusion of examination alone, keeping aside cross-examination of witnesses, takes more than a day. Yet, they are not examined on consecutive days, but on different dates spread out over months. This practice serves as a huge inconvenience to a witness since

he is repeatedly required to incur expenditure on travel and logistics for appearance in hearings over a significant period of time. Besides, it often causes unnecessary repetition in terms of questioning and answering, and also places greater reliance on one's ever-fading memory, than necessary. All these factors together cause lengthier examinations that compound the duration of trials.

11. It would be prudent to return to the erstwhile method of holding "sessions trials" i.e. conducting examination and cross-examination of a witness on consecutive days over a block period of three to four days. This permits a witness to take the stand after making one-time arrangements for travel and accommodation, after which, he is liberated from his civil duties qua a particular case. Therefore, this Court directs the courts concerned to adopt the method of "sessions trials" and assign block dates for examination of witnesses.

12. The Narcotics Control Board also pointed out that since operations for prevention of crimes related to narcotic drugs and substances demands coordination of several different agencies viz. Central Bureau of Narcotics (CBN), Narcotics Control Bureau (NCB), Department of Revenue Intelligence (DRI), Department of Customs and Central Excise, State Law Enforcement Agency, State Excise Agency to name a few, procuring attendance of different officers of these agencies becomes difficult. On the completion of investigation for instance, investigating officers return to their parent organisations and are thus, often unavailable as prosecution witnesses. In the light of the recording of such official evidence, we direct the courts concerned to make most of Section 293 of the Code of Criminal Procedure, 1973 and save time by taking evidence from official witnesses in the form of affidavits.

13. The relevant section reads as follows:

> "293. Reports of certain government scientific experts.—(1) Any document purporting to be a report under the hand of a government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.
>
> (2) The court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by the Court and he is unable to attend personally, he may, unless the court has expressly directed him to appear personally, depute any responsible officer working with him to attend the court, if such officer is conversant with the facts of the case and can satisfactorily depose in court on his behalf.

(4) This section applies to the following government scientific experts, namely,—

(a) any Chemical Examiner or Assistant Chemical Examiner to the Government;

(b) the Chief Controller of Explosives;

(c) the Director of the Fingerprint Bureau;

(d) the Director, Haffkeine Institute, Bombay;

(e) the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government;

(g) any other government scientific expert specified, by notification, by the Central Government for this purpose."

C. Workload

14. The courts are unduly overburdened, an outcome of the diverse repertoire of cases they are expected to handle. We are informed by the Narcotics Control Board that significant time of the NDPS Court is expended in dealing with bail and other criminal matters. Besides, many States do not even have the necessary NDPS courts to deal with the volume of NDPS cases.

15. Therefore, we issue the following directions in this regard:

15.1. Each State, in consultation with the High Court, particularly the States of Uttar Pradesh, West Bengal and Jammu & Kashmir

(where the pendency of cases over five years is stated to be high), is directed to establish special courts which would deal exclusively with offences under the NDPS Act.

15.2. The number of these courts must be proportionate to, and sufficient for, handling the volume of pending cases in the State.

15.3. Till exclusive courts for the purpose of disposing of NDPS cases under the NDPS Act are established, these cases will be prioritised over all other matters; after the setting up of the special courts for NDPS cases, only after the clearance of matters under the NDPS Act will an NDPS court be permitted to take up any other matter.

D. Narcotics Laboratories

16. Narcotics laboratories at the national level identify drugs for abuse and their accompanying substances in suspected samples, determine the purity and the possible origin of illicit drugs, carry out drug-related research, particularly on new sources of drugs liable to abuse, and, when required by the police or courts of law, provide supportive expertise in drug trafficking cases. Their role in the effective implementation of the mandate of the NDPS Act is indispensible which is why every State or region must have proximate access to these laboratories so that samples collected for the purposes of the Act may be sent on a timely basis to them for scrutiny. These samples often form primary and clinching evidence for both the prosecution and the defence, making their evaluation by narcotics laboratories a crucial exercise.

…

19. A qualitative and quantitative overhaul of these laboratories is necessary for ameliorating the present state of affairs, for which, we are issuing the following directions:

19.1. The Centre must ensure equal access to CFSLs from different parts of the country. The current four CFSLs only cater to the needs of northern and some areas of western and eastern parts of the country. Therefore, besides the three in the pipeline, more CFSLs must be established, especially to cater to the needs of southern and eastern parts of the country.

19.2. Analogous directions are issued to the States. Several States do not possess any existing infrastructure to facilitate analysis of samples and are hence, compelled to send them to laboratories in other parts of the country for scrutiny. Therefore, each State is required to establish State-level and regional-level forensic science laboratories. However, the decision as to the numbers of such laboratories would depend on the backlog of cases in the State.

20. The abovementioned authorities must ensure adequate employment of technical staff and provision of facilities and resources for the purposes of proper, smooth and efficient running of the facilities of forensic science laboratories under them and the laboratories should furnish their reports expeditiously to the agencies concerned.

21. The Directorate of Forensic Science Services, Ministry of Home Affairs, must take special steps to ensure standardisation of equipment across the various forensic laboratories to prevent vacillating results and disallow a litigant an opportunity to challenge test results on that basis.

E. Personnel

22. … Shortage of staff is bound to hamper with the smooth functioning of these laboratories, and hence, we direct the Directorate of Forensic Science Services, Ministry of Home Affairs to address the same on an urgent basis.

23. Further, steps must be taken by the departments concerned to improve the quality and expertise of the technical staff, equipment and testing laboratories.

F. Re-testing provisions

24. The NDPS Act itself does not permit re-sampling or re-testing of samples. Yet, there has been a trend to the contrary; NDPS Courts have been consistently obliging to applications for re-testing and re-sampling. These applications add to delays as they are often received at advanced stages of trials after significant elapse of time. NDPS Courts seem to be permitting re-testing nonetheless by taking resort to either some High Court judgments [see State of Kerala v. Deepak P. Shah [2001 Cri LJ 2690 (Ker)] and Nihal Khan v. State (Govt. of NCT of Delhi) [2007 Cri LJ 2074 (Del)]] or perhaps to Sections 79 and 80 of the NDPS Act which permit application of the Customs Act, 1962 and the Drugs and Cosmetics

Act, 1940. While re-testing may be an important right of an accused, the haphazard manner in which the right is imported from other legislations without its accompanying restrictions, however, is impermissible. Under the NDPS Act, re-testing and re-sampling is rampant at every stage of the trial contrary to other legislations which define a specific time-frame within which the right may be available. Besides, reverence must also be given to the wisdom of the legislature when it expressly omits a provision, which otherwise appears as a standard one in other legislations. The legislature, unlike for the NDPS Act, enacted Section 25(4) of the Drugs and Cosmetics Act, 1940, Section 13(2) of the Prevention of Food Adulteration Act, 1954 and Rule 56 of the Central Excise Rules, 1944, permitting a time period of thirty, ten and twenty days respectively for filing an application for re-testing.

25. Hence, it is imperative to define re-testing rights, if at all, as an amalgamation of the abovestated factors. Further, in the light of Section 52-A of the NDPS Act, which permits swift disposal of some hazardous substances, the time-frame within which any application for re-testing may be permitted ought to be strictly defined."

CHAPTER 2
FAIR TRIAL

Fair Trial

Courts have laid down various important principles with respect to fair trial. In **State of Punjab v. Baldev Singh**,[1] the Court held that any illicit articles obtained through a search conducted in violation of the mandatory provisions of Section 50 of the NDPS Act have less evidentiary value cannot be the sole ground for conviction, as the same would violate the principle of fair trial. In **Naval Kishore v. State of Bihar**,[2] the Court observed that if proceedings under Section 313 CrPC were conducted in a slipshod manner, it would amount to violation of fair trial. In **Manu Sharma v. State (NCT of Delhi)**,[3] the Court discussed the scope of the right of the accused to disclosure of inculpatory (and exculpatory) evidence.It held that a document which has been obtained *bona fide* and has bearing on the case of the prosecution should be disclosed to the accused in the interest of justice, and fair investigation and trial. This approach was followed in **V.K. Sasikala v. State**,[4] where the Supreme Court held that all documents that are part of the police report must be made available for inspection to the accused, irrespective of whether they were relied on by the prosecution.

In **Selvi v. State of Karnataka**,[5] the Court questioned the constitutionality of Polygraph, Narcoanalysis and other such tests. Administration of such tests was said to vitiate the concept of 'fair trial' on two grounds. First, since the right to counsel would be violated and second as the results of these tests can lead to the creation of public pressure. In **M.H. Hoskot v. State of Maharashtra**,[6] the Apex Court held that 'procedure established by law' in Article 21 of the Constitution, includes the right to appeal and the right to counsel. In **Kalyani Bhaskar v. M.S. Sampoornam**,[7]the Supreme Court held that fair trial includes allowing the defence to avail of fair and

1 (1999) 6 SCC 172
2 (2004) 7 SCC 502
3 (2010) 6 SCC 1
4 (2012) 9 SCC 771
5 (2010) 7 SCC 263
6 (1978) 3 SCC 544
7 (2007) 2 SCC 258

proper opportunities permitted by the law to prove his/her innocence. It held that adducing evidence in support of the defence is a valuable right, and that denial of that right implies denial of fair trial.

In **Sahara India Real Estate Corporation v. SEBI**,[8] the Court decided on the conflict between free speech principles and the fair trial doctrine when it comes to publishing information about court proceedings in matters sub-judice, and held that a postponement order in the interest of fair trial would be a reasonable restriction on the right to freedom of speech and expression that is guaranteed by Article 19(1)(a) of the Constitution. In **Chaluvegowda v. State**,[9] an amicus curiae was appointed as lawyer for the accused, but sufficient time was not given to her to prepare and present the case. This was held to be in violation of fair trial principles. In **Mohd. Hussain @ Julfikar Ali v. State (Government of NCT of Delhi)**,[10] a *de novo* trial was ordered by the Supreme Court while observing that the consequence of a failure to provide a fair trial is different from the consequence of not being able to provide a speedy trial to the accused person. In **Natasha Singh v. CBI,**[11] the Court held that while exercising discretion under Section 311 CrPC, the determinative factor should be whether not summoning or recalling of the said witnesses would in fact be prejudicial to the just decision of the case.

The issue of fair trial has been discussed by the Supreme Court in the context of transfer petitions. The cases before the Court involved a party seeking transfer of the case from one jurisdiction to another on the grounds that they would not get a fair trial in the place where the case was originally filed/registered. Reasons for seeking transfer ranged from a hostile environment in court, to the inability to find counsel due to an uncooperative Bar. **Maneka Sanjay Gandhi v. Rani Jethmalani**,[12] was one such case. The Courtexamined and reiterated the principles of fair trial, although on facts, it did not transfer the case, In **K. Anbazhagan v. Superintendent of Police**,[13] it was argued that the prosecution was acting hand in glove with the accused and for this reason, the case was sought to be transferred to another state. In permitting transfer, the Court held that reasonable apprehension in the minds of the public, and the

8 (2012) 10 SCC 603
9 (2012) 13 SCC 538
10 (2012) 9 SCC 408
11 (2013) 5 SCC 741
12 (1979) 4 SCC 167
13 (2004) 3 SCC 767

petitioner in specific, that there is likelihood of failure of justice, was ground for transferring the case. In **Zahira Habibulla Sheikh v. State of Gujarat**,[14] the Court described the meaning and scope of fair trial. It ruled that a fair trial entailed a trial before an impartial judge, the presence of a fair prosecutor and an atmosphere of judicial calm. There should be no bias or prejudice for or against the accused, the witnesses, or the cause which is being tried. Noting that witnesses were being threatened and coerced into giving false statements, the Court ordered a retrial and transferred the case to Maharashtra for the retrial.

However, in **Jahid Shaikh v. State of Gujarat**,[15] the Court noted that the principle that needs to be kept in mind while deciding whether to transfer a case is "justice should not only be done, but also appear to be done." In the facts of the case, the Court noted that the circumstances which had necessitated the request for transfer of the case did not exist anymore, and hence, there was no need to transfer the case. It also noted the inconvenience that would be caused to the prosecution, and to the witnesses by such transfer. Finally, in **J. Jayalalithaa v. State of Karnataka**,[16] the Court considered whether the withdrawal of appointment of the special public prosecutor by the State Government without giving any reasons for the same was in violation of the right to fair trial of the accused, and found in the affirmative. In doing so, it discussed the scope and importance of providing a fair trial to the accused.

14 (2004) 4 SCC 158
15 (2011) 7 SCC 762
16 (2014) 2 SCC 401

IN THE SUPREME COURT OF INDIA

M.H. Hoskot v. State of Maharashtra

(1978) 3 SCC 544

V.R. Krishna Iyer, D.A. Desai & O. Chinnappa Reddy, JJ.

In this case, the Apex Court interpreted Article 21 to mean procedure which is fair and reasonable which includes the right to appeal and the right to counsel. The issue of non-availability of a counsel to a prisoner for legal representation and delay in availability of copies of judgments was discussed.

V.R. Krishna Iyer, J.: "10. Freedom is what freedom does, and here we go straight to Article 21 of the Constitution, where the guarantee of personal liberty is phrased with superb amplitude:

> "Article 21. Protection of life and personal liberty.— No person shall be deprived of his life or personal liberty except according to procedure established by law." (emphasis added)

"Procedure established by law" are words of deep meaning for all lovers of liberty and judicial sentinels. Amplified, activist fashion "procedure" means "fair and reasonable procedure" which comports with civilised norms like natural justice rooted firm in community consciousness — not primitive processual barbarity nor legislated normative mockery. In a landmark case, Maneka Gandhi [(1978) 1 SCC 248, 277 at 281 and 284] Bhagwati, J. (on this point the court was unanimous) explained: (paras 4, 5, 7 & 8)

> "Does Article 21 merely require that there must be some semblance of procedure, howsoever arbitrary or fanciful, prescribed by law before a person can be deprived of his personal liberty or that the procedure must satisfy certain requisites in the sense that it must be fair and reasonable? Article 21 occurs in Part III of the Constitution which confers certain fundamental rights.
>
> Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements? Obviously, the procedure cannot be

> arbitrary, unfair or unreasonable. This indeed was conceded by the learned Attorney-General who with his usual candour frankly stated that it was not possible for him to contend that any procedure howsoever arbitrary, oppressive or unjust may be prescribed by the law.
>
> The principle of reasonableness which legally, as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.
>
> Any procedure which permits impairment of the constitutional right to go abroad without giving reasonable opportunity to show-cause cannot but be condemned as unfair and unjust and hence, there is in the present case clear infringement of the requirement of Article 21."

One of us in this separate opinion there observed [Krishna Iyer, J., 337, 338] :(Paras 81, 82, 84 and 85)

> " 'Procedure established by law', with its lethal potentiality, will reduce life and liberty to a precarious plaything if we do not ex necessitate import into those weighty words an adjectival rule of law, civilised in its soul, fair in its heart and fixing those imperatives of procedural protection absent which the processual tail will wag the substantive head. Can the sacred essence of the human right to secure which the struggle for liberation, with 'do or die' patriotism, was launched be sapped by formalistic and pharisaic prescriptions, regardless of essential standards? An enacted apparition is a constitutional illusion. Processual justice is writ patently on Article 21.
>
> Procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive

> right itself. Thus understood, 'procedure' must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilised processes.... What is fundamental is life and liberty. What is procedural is the manner of its exercise. This quality of fairness in the process is emphasised by the strong word 'established' which means 'settled firmly' not wantonly or whimsically. If it is rooted in the legal consciousness of the community it becomes 'established' procedure. And 'law' leaves little doubt that it is normally regarded as just since law is the means and justice is the end.
>
> Procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is largely the history of procedural safeguards and right to a hearing has a human-right ring. In India, because of poverty and illiteracy, the people are unable to protect and defend their rights; observance of fundamental rights is not regarded as good politics and their transgression as bad politics.
>
> To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece."

11. One component of fair procedure is natural justice. Generally speaking and subject to just exceptions, at least a single right of appeal on facts, where criminal conviction is fraught with long loss of liberty, is basic to civilized jurisprudence. It is integral to *fair* procedure, natural justice and normative universality save in special cases like the original tribunal being a high bench sitting on a collegiate basis. In short, a first appeal from the Sessions Court to the High Court, as provided in the Criminal Procedure Code, manifests this value upheld in Article 21.

12. What follows from this appellate imperative? Every step that makes the right of appeal fruitful is obligatory and every action or inaction which stultifies it is unfair and, ergo, unconstitutional. (In a sense even Article 19 may join hands with Article 21, as the *Maneka Gandhi* reasoning discloses). Pertinent to the point before us are two requirements: **(***i*) service of a copy of the judgment to the prisoner in time to file an appeal and (*ii*) provision of free legal services to a prisoner who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service. Both these are State responsibilities under Article 21. Where the

procedural law provides for further appeals what we have said regarding first appeals will similarly apply.

...

14. The other ingredient of fair procedure to a prisoner, who has to seek his liberation through the court process is lawyer's services. Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law. Free legal services to the needy is part of the English criminal justice system. And the American jurist, Prof. Vance of Yale, sounded sense for India too when he said: [Justice and Reform, Earl Johnson, Jr. p. 11]

> "What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is? Or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay the admission fee?"

15. Gideon's trumpet has been heard across the Atlantic. Black, J. there observed: [Processual Justice to the People, (May 1973) p. 69 (*Gideon* v. *Wainwright* 372 US 335 at p. 344 : 9 L Ed 2d 799 at p. 805)]

> "Not only those precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime who fail to hire the best lawyers they can get to prepare and present their defences. That Government hires lawyers to prosecute and defendants who have the money hires lawyers

> to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble idea cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him."

16. The philosophy of legal aid as an inalienable element of fair procedure is evident from Mr Justice Brennan's [Legal Aid and Legal Education, p. 94] well known words:

> "Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness."

17. More recently, the U.S. Supreme Court, in *Raymond Hamlin* has extended this processual facet of Poverty Jurisprudence. Douglas, J. there explicated: [*Jon Richard Argersinger* v. *Raymond Hamlin*, 407 US 25 : 35 L Ed 2d 530 at 535-36 and 554]

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad.

> He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect.
>
> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries but it is in ours. From the very beginning our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. (372 US 335 at p. 344 (1963). 9 L Ed 2d 799 at p. 805, 93 ALR 2d 733.)
>
> Both Powell and Gideon involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty.

…

> The court should consider the probable sentence that will follow if a conviction is obtained. The more serious the likely consequences, the greater is the probability that a lawyer should be appointed .... The court should consider the individual factors peculiar to each case. These, of course would be the most difficult to anticipate. One relevant factor would be the competency of the individual defendant to present his own case."

24. We may follow up the import of *Maneka Gandhi* and crystallise the conclusion. *Maneka Gandhi case* has laid down that personal liberty

cannot be cut out or cut down without *fair* legal procedure. Enough has been set out to establish that a prisoner, deprived of his freedom by court sentence but entitled to appeal against such verdict, can claim, as part of his protection under Article 21 and as implied in his statutory right to appeal, the necessary concomitant of right to counsel to prepare and argue his appeal.

…

27. While dismissing the special leave petition we declare the legal position to put it beyond doubt:

> "1. Courts shall forthwith furnish a free transcript of the judgment when sentencing a person to prison term;
>
> 2. In the event of any such copy being sent to the jail authorities for delivery to the prisoner, by the appellate, revisional or other court, the official concerned shall, with quick despatch, get it delivered to the sentence and obtain written acknowledgement thereof from him;
>
> 3. Where the prisoner seeks to file an appeal or revision, every facility for exercise of that right shall be made available by the Jail Administration;
>
> 4. Where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the Court shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign competent counsel for the prisoner's defence, provided the party does not object to that lawyer.
>
> 5. The State which prosecuted the prisoner and set in motion the process which deprived him of his liberty shall pay to assigned counsel such sum as the court may equitably fix;
>
> 6. These benign prescriptions operate by force of Article 21 (strengthened by Article 19(1)(d) read with sub-article (5) from the lowest to the highest court where deprivation of life and personal liberty is in substantial peril."

IN THE SUPREME COURT OF INDIA

Maneka Sanjay Gandhi v. Rani Jethmalani

(1979) 4 SCC 167

V.R. Krishna Iyer, P.S. Kailasam & A.D. Koshal, JJ.

In a prosecution for defamation, a transfer petition was filed by the accused (the editor of a monthly) on a variety of grounds including location of "main witnesses" i.e. readers, unavailability of legal representation to herself, and absence of a congenial atmosphere for a fair trial etc. The Court considered each ground in light of principles of fair trial to determine whether the transfer petition must be accepted.

V. R. Krishna Iyer, J.: " 2. Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperiling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate when the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances.

3. One of the common circumstances alleged in applications for transfer is the avoidance of substantial prejudice to a party or witnesses on account of logistics or like factors, especially when an alternative venue will not seriously handicap the complainant and will mitigate the serious difficulties of the accused. In the present case the petitioner claims that both the parties reside in Delhi and some formal witnesses belong to Delhi; but the meat of the matter, in a case of defamation is something different. The main witnesses are those who speak to having read the offending matter and

other relevant circumstances flowing therefrom. They belong to Bombay in this case and the suggestion of the petitioner's counsel that Delhi readers may be substitute witnesses and the complainant may content herself with examining such persons is too presumptuous for serious consideration.

4. Now to the next ground. The sophisticated processes of a criminal trial certainly require competent legal service to present a party's case. If an accused person, for any particular reason, is virtually deprived of this facility, an essential aid to fair trial fails. If in a certain court the whole Bar, for reasons of hostility or otherwise, refuses to defend an accused person – an extraordinary situation difficult to imagine, having regard to the ethics of the profession – it may well be put forward as a ground which merits this Court's attention. Popular frenzy or official wrath shall not deter a member of the Bar from offering his services to those who wear unpopular names or unpalatable causes and the Indian advocate may not fail this standard. Counsel has narrated some equivocal episodes which seem to suggest that the services of an efficient advocate may not be easy to procure to defend Mrs Maneka Gandhi. Such glib allegations which involve a reflection on the members of the Bar in Bombay may not be easily accepted without incontestable testimony in that behalf, apart from the ipse dixit of the party. That is absent here. It is difficult to believe that a person of the position of the petitioner who is the daughter-in-law of the former Prime Minister, wife of a consequential person and, in her own right, an editor of a popular magazine, is unable to engage a lawyer to defend her, while, as a fact, she is apparently represented in many legal proceedings quite competently.

5. A more serious ground which disturbs us in more ways than one is the alleged absence of congenial atmosphere for a fair and impartial trial. It is becoming a frequent phenomenon in our country that court proceedings are bring disturbed by rude hoodlums and unruly crowds, jostling, jeering or cheering and disrupting the judicial hearing with menaces, noises and worse. This tendency of toughs and street roughs to violate the serenity of court is obstructive of the course of justice and must surely be stamped out. Likewise, the safety of the person of an accused or complainant is an essential condition for participation in a trial and where that is put in peril by commotion, tumult or threat on account of pathological conditions prevalent in a particular venue, the request for a transfer may not be dismissed summarily. It causes disquiet and concern to the Court of justice if a person seeking justice is unable to appear, present one's case, bring one's witnesses or adduce evidence. Indeed, it is the duty of the court

to assure propitious conditions which conduce to comparative tranquility at the trial. Turbulent conditions putting the accused's life in danger or creating chaos inside the court hall may jettison public justice. If this vice is peculiar to a particular place and is persistent the transfer of the case from that place may become necessary. Likewise, if there is general consternation or atmosphere of tension or raging masses of people in the entire region taking sides and polluting the climate, vitiating the necessary neutrality to hold a detached judicial trial, the situation may be said to have deteriorated to such an extent as to warrant transfer. In a decision cited by the counsel for the petitioner, Bose, J., observed:

> . . . . But we do feel that good grounds for transfer from Jashpurnagar are made out because of the bitterness of local communal feeling and the tenseness of the atmosphere there. Public confidence in the fairness of a trial held in such an atmosphere would be seriously undermined, particularly among reasonable Christians all over India not because the Judge was unfair or biased but because the machinery of justice is not geared to work in the midst of such conditions. The calm detached atmosphere of a fair and impartial judicial trial would be wanting, and even if justice were done it would not be "seen to be done". [GX Francis v. Banke Behari Singh, AIR 1958 SC 309]

6. Accepting this perspective we must approach the facts of the present case without excitement, exaggeration or eclipse of a sense of proportion. It may be true that the petitioner attracts a crowd in Bombay. Indeed, it is true of many controversial figures in public life that their presence in a public place gathers partisans for and against, leading to cries and catcalls or 'jais' or 'zindabads'. Nor is it unnatural that some persons may have acquired, for a time a certain quality of reputation, sometimes notoriety, sometimes glory, which may make them the cynosure of popular attention when they appear in cities even in the Court. And when unkempt crowds press into the Court hall it is possible that some pushing, some nudging, some brash ogling or angry staring may occur in the rough and tumble resulting in ruffled feelings for the victim. This is a far cry from saying that the peace inside the court has broken down, that calm inside the court is beyond restoration, that a tranquil atmosphere for holding the trial is beyond accomplishment or that operational freedom for judge, parties,

advocates and witnesses has ceased to exist. None of the allegations made by the petitioner, read in the pragmatic light of the counter-averments of the respondent and understood realistically, makes the contention of the counsel credible that a fair trial is impossible. Perhaps, there was some rough weather but it subsided, and it was a storm in the tea cup or transient tension to exaggerate which is unwarranted. The petitioner's case of great insecurity or molestation to the point of threat to life is, so far as the record bears out, difficult to accept. The mere word of an interested party is insufficient to convince us that she is in jeopardy or the court may not be able to conduct the case under conditions of detachment, neutrality or uninterrupted progress. We are disinclined to stampede ourselves into conceding a transfer of the case on this score, as things stand now.

7. Nevertheless, we cannot view with unconcern the potentiality of a flare up and the challenge to a fair trial, in the sense of a satisfactory participation by the accused in the proceedings against her. Mob action may throw out of gear the wheels of the judicial process. Engineered fury may paralyse a party's ability to present his case or participate in the trial. If the justice system grinds to a halt through physical maneuvers or sound and fury of the senseless populace the rule of law runs aground. Even the most hated human anathema has a right to be heard without the rage of ruffians or huff of toughs being turned against him to unnerve him as party or witness or advocate. Physical violence to a party, actual or imminent, is reprehensible when he seeks justice before a tribunal. Manageable solutions must not sweep this Court off its feet into granting an easy transfer but uncontrollable or perilous deterioration will surely persuade us to shift the venue. It depends. The frequency of mobbing maneuver in court precincts is a bad omen for social justice in its wider connotation. We, therefore, think it necessary to make a few cautionary observations which will be sufficient, as we see at present, to protect the petitioner and ensure for her a fair trial.

8. The trial court should readily consider the liberal exercise of its power to grant for the accused exemption from personal appearance save on crucial occasions. Shri Tarkunde, for the respondent fairly agreed that it was the right thing to do and explained the special reason for its first rejection. If the application is again made, the Magistrate will deal with it as we have indicated. This will remove much of the unsavoury sensationalism which the hearing may suffer from.

9. The Magistrate is the master of the orderly conduct of court proceedings and his authority shall not hang limp if his business is stalled by brow-beating. It is his duty to clear the Court of confusion, yelling and nerve-racking gestures which mar the serious tone of judicial hearing. The officials whose duty is to keep the public peace shall, on requisition, be at the command of the court to help it run its process smoothly. When the situation gets out of hand the remedy of transfer surgery may be prescribed. Every fleeting rumpus should not lead to a removal of the case as it may prove to be a frequent surrender of justice to commotion. The Magistrate shall take measures to enforce conditions where the court functions free and fair and agitational or muscle tactics yield no dividends. If that fails, the parties have freedom to renew their motion under Section 406 of the Criminal Procedure Code. For, where tranquil court justice is a casualty the collapse of our constitutional order is an inevitability.

10. We dismiss, for the nonce, this transfer petition."

IN THE SUPREME COURT OF INDIA

State of Punjab v. Baldev Singh

(1999) 6 SCC 172

Dr. A.S. Anand, C.J., S.B. Majmudar, Sujata V. Manohar, K. Venkataswami & V.N. Khare, JJ.

The question before the Court was whether illicit articles obtained through a search conducted in violation of the provisions of Section 50 of the NDPSA could be admissible against the accused. The Court discussed the impact of such admissibility on the principles of fair trial.

Dr. A.S. Anand, C.J.: "45. The judgment in Pooran Mal case [(1974) 1 SCC 345] therefore, cannot be understood to have laid down that an illicit article seized during the search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act can be used as evidence of unlawful possession of the illicit article on the person from whom that contraband had been seized during an illegal search. Apart from the position that in Pooran Mal case [(1974) 1 SCC 345] on facts, it was found that the search and seizure conducted in the cases under consideration in that case were not vitiated by any illegality, the import of that judgment, in the present context, can only be to the effect that material seized during search and seizure, conducted in contravention of the provisions of Section 132 of the Income Tax Act cannot be restrained from being used, subject to law, before the Income Tax Authorities in other legal proceedings against the persons, from whose custody that material was seized by issuance of a writ of prohibition. It was not the seized material, in Pooran Mal case [(1974) 1 SCC 345] which by itself could attract any penal action against the assessee. What is implicit from the judgment in Pooran Mal case [(1974) 1 SCC 345] is that the seized material could be used in other legal proceedings against an assessee, before the Income Tax Authorities under the Income Tax Act, dealing with escaped income. It is, therefore, not possible to hold that the judgment in Pooran Mal case [(1974) 1 SCC 345] can be said to have laid down that the "recovered illicit article" can be used as proof of unlawful possession of the contraband seized from the suspect as a result of illegal search and seizure. If Pooran Mal [(1974) 1 SCC 345] judgment is read in the manner in which it has

been construed in State of H.P. v. Pirthi Chand [(1996) 2 SCC 37] (though that issue did not strictly speaking arise for consideration in that case), then there would remain no distinction between recovery of illicit drugs etc. seized during a search conducted "after" following the provisions of Section 50 of the NDPS Act and a seizure made during a search conducted "in breach of" the provisions of Section 50 of the NDPS Act. Prosecution cannot be permitted to take advantage of its own wrong. Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused and cannot be abandoned. While considering the aspect of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors. Courts cannot allow admission of evidence against an accused, where the court is satisfied that the evidence had been obtained by a conduct of which the prosecution ought not to take advantage particularly when that conduct had caused prejudice to the accused. If after careful consideration of the material on record it is found by the court that the admission of evidence collected in search conducted in violation of Section 50 would render the trial unfair then that evidence must be excluded. In R. v. Collins [(1987) 1 SCR 265 (Canada)] the Supreme Court of Canada speaking through Lamer, J. (as his Lordship, Chief Justice of the Supreme Court of Canada then was) opined that the use of evidence collected in violation of the Charter rights of an accused would render a trial unfair and the evidence inadmissible. In the words of the Supreme Court of Canada:

> "The situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial."(emphasis ours)

…

47. The question of admissibility of evidence, which may be relevant to the question in issue, has thus to be decided in the context and the manner in which the evidence was collected and is sought to be used.

48. In view of the provisions of Chapter IV of the NDPS Act, mere unlawful possession of a contraband amounts to an offence and is punishable with

rigorous imprisonment for terms which shall not be less than 10 years but can extend to 20 years or 30 years in addition to a fine which shall not be less than one lakh of rupees but which may extend to two lakhs or three lakhs of rupees. On a charge of possession of a dangerous drug or a psychotropic substance, if it is established that the accused had the contraband in his possession without authority, he is liable to be punished. "Unlawful possession" of the contraband is the sine qua non for recording conviction under the NDPS Act and the most important ingredient of an offence under the NDPS Act.

…

55. We, therefore, hold that an illicit article seized from the person of an accused, during search conducted in violation of the safeguards provided in Section 50 of the Act, cannot by itself be used as admissible evidence of proof of unlawful possession of the contraband on the accused. Any other material/article recovered during that search may, however, be relied upon by the prosecution in other/independent proceedings against an accused notwithstanding the recovery of that material during an illegal search and its admissibility would depend upon the relevancy of that material and the facts and circumstances of that case.

…

57. On the basis of the reasoning and discussion above, the following conclusions arise:

> … (3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or the Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or the Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.
>
> (4) That there is indeed need to protect society from criminals. The societal intent in safety will

suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair."

IN THE SUPREME COURT OF INDIA

P. Ramachandra Rao v. State of Karnataka

(2002) 4 SCC 578

S.P. Bharucha, C.J., Syed Shah Mohammed Quadri, R.C. Lahoti, N. Santosh Hegde, Doraiswamy Raju, Ruma Pal & Arijit Pasayat

A seven judge bench of the Supreme Court of India was constituted to decide on the issue of whether judicially determined limitation periods can be devised to satisfy the mandate of "speedy trial" recognized by the Constitution of India.

R.C. Lahoti, J.: "No person shall be deprived of his life or his personal liberty except according to procedure established by law — declares Article 21 of the Constitution. Life and liberty, the words employed in shaping Article 21, by the founding fathers of the Constitution, are not to be read narrowly in the sense drearily dictated by dictionaries; they are organic terms to be construed meaningfully. Embarking upon the interpretation thereof, feeling the heart-throb of the preamble, deriving strength from the directive principles of State policy and alive to their constitutional obligation, the courts have allowed Article 21 to stretch its arms as wide as it legitimately can. The mental agony, expense and strain which a person proceeded against in criminal law has to undergo and which, coupled with delay, may result in impairing the capability or ability of the accused to defend himself have persuaded the constitutional courts of the country in holding the right to speedy trial a manifestation of fair, just and reasonable procedure enshrined in Article 21. Speedy trial, again, would encompass within its sweep all its stages including investigation, inquiry, trial, appeal, revision and retrial — in short everything commencing with an accusation and expiring with the final verdict — the two being respectively the terminus a quo and terminus ad quem — of the journey which an accused must necessarily undertake once faced with an implication. The constitutional philosophy propounded as right to speedy trial has though grown in age by almost two and a half decades, the goal sought to be achieved is yet a far-off peak. Myriad fact situations bearing testimony to denial of such fundamental right to the accused persons, on account of failure on the

part of prosecuting agencies and the executive to act, and their turning an almost blind eye at securing expeditious and speedy trial so as to satisfy the mandate of Article 21 of the Constitution have persuaded this Court in devising solutions which go to the extent of almost enacting by judicial verdict bars of limitation beyond which the trial shall not proceed and the arm of law shall lose its hold. In its zeal to protect the right to speedy trial of an accused, can the court devise and almost enact such bars of limitation though the legislature and the statutes have not chosen to do so — is a question of far-reaching implications which has led to the constitution of this Bench of seven-Judge strength.

…

8. The width of vision cast on Article 21, so as to perceive its broad sweep and content, by the seven-Judge Bench of this Court in Maneka Gandhiv. Union of India [(1978) 1 SCC 248] inspired a declaration of law, made on 12-2-1979 in Hussainara Khatoon (I) v. Home Secy., State of Bihar [(1980) 1 SCC 81 : 1980 SCC (Cri) 23] that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty, except according to procedure established by law; that such procedure is not some semblance of a procedure but the procedure should be "reasonable, fair and just"; and therefrom flows, without doubt, the right to speedy trial. The Court said (SCC p. 89, para 5)—

> "No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21."

Many accused persons tormented by unduly lengthy trial or criminal proceedings, in any forum whatsoever were enabled, by Hussainara Khatoon (I)[(1980) 1 SCC 81 : 1980 SCC (Cri) 23] statement of law, in successfully maintaining petitions for quashing of charges, criminal proceedings and/or conviction, on making out a case of violation of Article 21 of the Constitution. Right to speedy trial and fair procedure has passed through several milestones on the path of constitutional jurisprudence. In Maneka Gandhi [(1978) 1 SCC 248] this Court held that the several fundamental rights guaranteed by Part III required to be read as components of one integral whole and not as separate channels. The reasonableness

of law and procedure, to withstand the test of Articles 21, 19 and 14, must be right and just and fair and not arbitrary, fanciful or oppressive, meaning thereby that speedy trial must be reasonably expeditious trial as an integral and essential part of the fundamental right of life and liberty under Article 21. Several cases marking the trend and development of law applying Maneka Gandhi [(1978) 1 SCC 248] and Hussainara Khatoon (I) [(1980) 1 SCC 81 : 1980 SCC (Cri) 23] principles to myriad situations came up for the consideration of this Court by a Constitution Bench in Abdul Rehman Antulay v. R.S. Nayak [(1992) 1 SCC 225 : 1992 SCC (Cri) 93] (A.R. Antulay for short). The proponents of right to speedy trial strongly urged before this Court for taking one step forward in the direction and prescribing time-limits beyond which no criminal proceeding should be allowed to go on, advocating that unless this was done, Maneka Gandhi [(1978) 1 SCC 248] and Hussainara Khatoon (I) [(1980) 1 SCC 81 : 1980 SCC (Cri) 23] exposition of Article 21 would remain a mere illusion and a platitude. Invoking of the constitutional jurisdiction of this Court so as to judicially forge two termini and lay down periods of limitation applicable like a mathematical formula, beyond which a trial or criminal proceeding shall not proceed, was resisted by the opponents submitting that the right to speedy trial was an amorphous one, something less than other fundamental rights guaranteed by the Constitution. The submissions made by proponents included that the right to speedy trial flowing from Article 21 to be meaningful, enforceable and effective ought to be accompanied by an outer limit beyond which continuance of the proceedings will be violative of Article 21. It was submitted that Section 468 of the Code of Criminal Procedure applied only to minor offences but the court should extend the same principle to major offences as well. It was also urged that a period of 10 years calculated from the date of registration of crime should be placed as an outer limit wherein shall be counted the time taken by the investigation.

9. The Constitution Bench, in A.R. Antulay case [(1992) 1 SCC 225: 1992 SCC (Cri) 93], heard elaborate arguments. The Court, in its pronouncement, formulated certain propositions, 11 in number, meant to serve as guidelines. It is not necessary for our purpose to reproduce all those propositions. Suffice it to state that in the opinion of the Constitution Bench (i) fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily; (ii) right to speedy trial flowing from Article 21 encompasses all the stages, namely, the stage of investigation, inquiry, trial, appeal, revision and retrial; (iii) who is responsible for the delay and what factors have contributed

towards delay are relevant factors. Attendant circumstances, including nature of the offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on — what is called the systemic delays must be kept in view; (iv) each and every delay does not necessarily prejudice the accused as some delays indeed work to his advantage. Guidelines (8), (9), (10) and (11) are relevant for our purpose and hence are extracted and reproduced hereunder: (SCC pp. 272-73, para 86)

> "(8) Ultimately, the court has to balance and weigh the several relevant factors — 'balancing test' or 'balancing process' — and determine in each case whether the right to speedy trial has been denied in a given case.
>
> (9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order — including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded — as may be deemed just and equitable in the circumstances of the case.
>
> (10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be a qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit ineffectuates the guarantee of right to speedy trial.
>
> (11) An objection based on denial of right to speedy trial and for relief on that account, should first be addressed

> to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis."

10. During the course of its judgment also, the Constitution Bench made certain observations which need to be extracted and reproduced:

> "83. But then speedy trial or other expressions conveying the said concept — are necessarily relative in nature. One may ask — speedy means, how speedy? How long a delay is too long? We do not think it is possible to lay down any time schedules for conclusion of criminal proceedings. The nature of offence, the number of accused, the number of witnesses, the workload in the particular court, means of communication and several other circumstances have to be kept in mind. … it is neither advisable nor feasible to draw or prescribe an outer time-limit for conclusion of all criminal proceedings. It is not necessary to do so for effectuating the right to speedy trial. We are also not satisfied that without such an outer limit, the right becomes illusory." (SCC pp. 268-69, para 83)
>
> "[E]ven apart from Article 21 courts in this country have been cognizant of undue delays in criminal matters and wherever there was inordinate delay or where the proceedings were pending for too long and any further proceedings were deemed to be oppressive and unwarranted, they were put an end to by making appropriate orders." (SCC p. 260, para 65) (emphasis supplied)

…

19. A perception of the cause for delay at the trial and in conclusion of criminal proceedings is necessary so as to appreciate whether setting up bars of limitation entailing termination of trial or proceedings can be justified. The root cause for delay in dispensation of justice in our country is poor judge-population ratio. The Law Commission of India in its 120th Report on Manpower Planning in Judiciary (July 1987), based on

its survey, regretted that in spite of Article 39-A being added as a major directive principle in the Constitution by the Forty-second Amendment (1976), obliging the State to secure such operation of legal system as promotes justice and to ensure that opportunities for securing justice are not denied to any citizen, several reorganisation proposals in the field of administration of justice in India have been basically patchwork, ad hoc and unsystematic solutions to the problem. The judge-population ratio in India (based on the 1971 census) was only 10.5 Judges per million population while such ratio was 41.6 in Australia, 50.9 in England, 75.2 in Canada and 107 in United States. The Law Commission suggested that India required 107 judges per million of the Indian population; however, to begin with, the judge strength needed to be raised to fivefold i.e. 50 judges per million population in a period of five years but in any case, not going beyond ten years. Touch of sad sarcasm is difficult to hide when the Law Commission observed (in its 120th Report,ibid.) that adequate reorganisation of the Indian judiciary is at the one and at the same time everybody's concern and, therefore, nobody's concern. There are other factors contributing to the delay at the trial. In A.R. Antulay case [(1992) 1 SCC 225 : 1992 SCC (Cri) 93] vide para 83, the Constitution Bench has noted that in spite of having proposed to go on with the trial of a case, five days a week and week after week, it may not be possible to conclude the trial for reasons viz. (1) non-availability of the counsel, (2) non-availability of the accused, (3) interlocutory proceedings, and (4) other systemic delays. In addition, the Court noted that in certain cases there may be a large number of witnesses and in some offences, by their very nature, the evidence may be lengthy. In Kartar Singh v. State of Punjab [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] another Constitution Bench opined that the delay is dependent on the circumstances of each case because reasons for delay will vary, such as (i) delay in investigation on account of the widespread ramifications of the crime and its designed network either nationally or internationally, (ii) the deliberate absence of witness or witnesses, (iii) crowded dockets on the file of the court etc. In Raj Deo Sharma (II) [(1999) 7 SCC 604 : 1999 SCC (Cri) 1324] in the dissenting opinion of M.B. Shah, J., the reasons for delay have been summarized as, (1) dilatory proceedings; (2) absence of effective steps towards radical simplification and streamlining of criminal procedure; (3) multitier appeals/ revision applications and diversion to disposal of interlocutory matters; (4) heavy dockets, mounting arrears, delayed service of process; and (5) judiciary, starved by executive by neglect of basic necessities and amenities, enabling smooth functioning.

20. Several cases coming to our notice while hearing appeals, petitions and miscellaneous petitions (such as for bail and quashing of proceedings) reveal, apart from inadequate judge strength, other factors contributing to the delay at the trial. Generally speaking, these are: (i) absence of, or delay in appointment of, Public Prosecutors proportionate with the number of courts/cases; (ii) absence of or belated service of summons and warrants on the accused/witnesses; (iii) non-production of undertrial prisoners in the court; (iv) presiding Judges proceeding on leave, though the cases are fixed for trial; (v) strikes by members of the Bar; and (vi) counsel engaged by the accused suddenly declining to appear or seeking an adjournment for personal reasons or personal inconvenience. It is common knowledge that appointments of Public Prosecutors are politicized. By convention, Government Advocates and Public Prosecutors were appointed by the executive on the recommendation of or in consultation with the head of the judicial administration at the relevant level but gradually the executive has started bypassing the merit-based recommendations of, or process of consultation with, District and Sessions Judges. For non-service of summons/orders and non-production of undertrial prisoners, the usual reasons assigned are shortage of police personnel and police people being busy in VIP duties or law and order duties. These can hardly be valid reasons for not making the requisite police personnel available for assisting the courts in expediting the trial. The members of the Bar shall also have to realize and remind themselves of their professional obligation- legal and ethical, that having accepted a brief for an accused, they have no justification to decline or avoid appearing at the trial when the case is taken up for hearing by the court. All these factors demonstrate that the goal of speedy justice can be achieved by a combined and result-oriented collective thinking and action on the part of the legislature, the judiciary, the executive and representative bodies of members of the Bar.

21. Is it at all necessary to have limitation bars terminating trials and proceedings? Is there no effective mechanism available for achieving the same end? The Criminal Procedure Code, as it stands, incorporates a few provisions to which resort can be had for protecting the interest of the accused and saving him from unreasonable prolixity or laxity at the trial amounting to oppression. Section 309, dealing with power to postpone or adjourn proceedings, provides generally for every inquiry or trial, being proceeded with as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same to be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to

be necessary for reasons to be recorded. Explanation 2 to Section 309 confers power on the court to impose costs to be paid by the prosecution or the accused, in appropriate cases, and putting the parties on terms while granting an adjournment or postponing of proceedings. This power to impose costs is rarely exercised by the courts. Section 258, in Chapter XX CrPC, on trial of summons cases, empowers the Magistrate trying summons cases instituted otherwise than upon complaint, for reasons to be recorded by him, to stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, to pronounce a judgment of acquittal, and in any other case, release the accused, having effect of discharge. This provision is almost never used by the courts. In appropriate cases, inherent power of the High Court, under Section 482 can be invoked to make such orders, as may be necessary, to give effect to any order under the Code of Criminal Procedure or to prevent abuse of the process of any court, or otherwise, to secure the ends of justice. The power is wide and, if judiciously and consciously exercised, can take care of almost all the situations where interference by the High Court becomes necessary on account of delay in proceedings or for any other reason amounting to oppression or harassment in any trial, inquiry or proceedings. In appropriate cases, the High Courts have exercised their jurisdiction under Section 482 CrPC for quashing of first information report and investigation, and terminating criminal proceedings if the case of abuse of process of law was clearly made out. Such power can certainly be exercised on a case being made out of breach of fundamental right conferred by Article 21 of the Constitution. The Constitution Bench in A.R. Antulay case [(1992) 1 SCC 225 : 1992 SCC (Cri) 93] referred to such power, vesting in the High Court (vide paras 62 and 65 of its judgment) and held that it was clear that even apart from Article 21, the courts can take care of undue or inordinate delays in criminal matters or proceedings if they remain pending for too long and putting an end, by making appropriate orders, to further proceedings when they are found to be oppressive and unwarranted.

…

23.Bars of limitation, judicially engrafted, are, no doubt, meant to provide a solution to the aforementioned problems. But a solution of this nature gives rise to greater problems like scuttling a trial without adjudication, stultifying access to justice and giving easy exit from the portals of justice. Such general remedial measures cannot be said to be apt solutions. For two reasons we hold such bars of limitation uncalled for and impermissible:

first, because it tantamounts to impermissible legislation — an activity beyond the power which the Constitution confers on the judiciary, and secondly, because such bars of limitation fly in the face of law laid down by the Constitution Bench in A.R. Antulay case [(1992) 1 SCC 225 : 1992 SCC (Cri) 93] and, therefore, run counter to the doctrine of precedents and their binding efficacy.

…

28. The other reason why the bars of limitation enacted in Common Cause (I) [(1996) 4 SCC 33 : 1996 SCC (Cri) 589] , Common Cause (II)[(1996) 6 SCC 775 : 1997 SCC (Cri) 42] and Raj Deo Sharma (I) [(1998) 7 SCC 507: 1998 SCC (Cri) 1692] and Raj Deo Sharma (II) [(1999) 7 SCC 604 : 1999 SCC (Cri) 1324] cannot be sustained is that these decisions, though two- or three-Judge Bench decisions, run counter to that extent to the dictum of the Constitution Bench in A.R. Antulay case [(1992) 1 SCC 225: 1992 SCC (Cri) 93] and therefore cannot be said to be good law to the extent they are in breach of the doctrine of precedents. The well-settled principle of precedents which has crystallised into a rule of law is that a Bench of lesser strength is bound by the view expressed by a Bench of larger strength and cannot take a view in departure or in conflict therefrom. We have in the earlier part of this judgment extracted and reproduced passages from A.R. Antulay case [(1992) 1 SCC 225 : 1992 SCC (Cri) 93] . The Constitution Bench turned down the fervent plea of proponents of right to speedy trial for laying down time-limits as bar beyond which a criminal proceeding or trial shall not proceed and expressly ruled that it was neither advisable nor practicable (and hence not judicially feasible) to fix any time-limit for trial of offences. Having placed on record the exposition of law as to right to speedy trial flowing from Article 21 of the Constitution, this Court held that it was necessary to leave the rule as elastic and not to fix it in the frame of defined and rigid rules. It must be left to the judicious discretion of the court seized of an individual case to find out from the totality of circumstances of a given case if the quantum of time consumed up to a given point of time amounted to violation of Article 21, and if so, then to terminate the particular proceedings, and if not, then to proceed ahead. The test is whether the proceedings or trial has remained pending for such a length of time that the inordinate delay can legitimately be called oppressive and unwarranted, as suggested in A.R. Antulay [(1992) 1 SCC 225 : 1992 SCC (Cri) 93] . In Kartar Singh case [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] the Constitution Bench while recognising the principle that the denial of an accused's right of speedy trial may result in a decision to dismiss the indictment or in reversing of a conviction, went on to state:

> "92. Of course, no length of time is per se too long to pass scrutiny under this principle nor the accused is called upon to show the actual prejudice by delay of disposal of cases. On the other hand, the court has to adopt a balancing approach by taking note of the possible prejudices 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." (SCC pp. 639-40, para 92)

29. For all the foregoing reasons, we are of the opinion that in Common Cause case (I) [(1996) 4 SCC 33 : 1996 SCC (Cri) 589] [as modified inCommon Cause (II) [(1996) 6 SCC 775 : 1997 SCC (Cri) 42]] and Raj Deo Sharma (I) [(1998) 7 SCC 507 : 1998 SCC (Cri) 1692] and (II) [(1999) 7 SCC 604 : 1999 SCC (Cri) 1324] the Court could not have prescribed periods of limitation beyond which the trial of a criminal case or a criminal proceeding cannot continue and must mandatorily be closed followed by an order acquitting or discharging the accused. In conclusion we hold:

(1) The dictum in A.R. Antulay case [(1992) 1 SCC 225 : 1992 SCC (Cri) 93] is correct and still holds the field.

(2) The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in A.R. Antulay case [(1992) 1 SCC 225 : 1992 SCC (Cri) 93] adequately take care of right to speedy trial. We uphold and reaffirm the said propositions.

(3) The guidelines laid down in A.R. Antulay case [(1992) 1 SCC 225 : 1992 SCC (Cri) 93] are not exhaustive but only illustrative. They are not intended to operate as hard-and-fast rules or to be applied like a straitjacket formula. Their applicability would depend on the fact situation of each case. It is difficult to foresee all situations and no generalization can be made.

(4) It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal

proceedings. The time-limits or bars of limitation prescribed in the several directions made in Common Cause (I) [(1996) 4 SCC 33 : 1996 SCC (Cri) 589], Raj Deo Sharma (I) [(1998) 7 SCC 507: 1998 SCC (Cri) 1692] and Raj Deo Sharma (II) [(1999) 7 SCC 604 : 1999 SCC (Cri) 1324] could not have been so prescribed or drawn and are not good law. The criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in Common Cause case (I) [(1996) 4 SCC 33 : 1996 SCC (Cri) 589], Raj Deo Sharma case (I) [(1998) 7 SCC 507 : 1998 SCC (Cri) 1692] and (II) [(1999) 7 SCC 604 : 1999 SCC (Cri) 1324]. At the most the periods of time prescribed in those decisions can be taken by the courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in A.R. Antulay case [(1992) 1 SCC 225 : 1992 SCC (Cri) 93] and decide whether the trial or proceedings have become so inordinately delayed as to be called oppressive and unwarranted. Such time-limits cannot and will not by themselves be treated by any court as a bar to further continuance of the trial or proceedings and as mandatorily obliging the court to terminate the same and acquit or discharge the accused.

(5) The criminal courts should exercise their available powers, such as those under Sections 309, 311 and 258 of the Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial Judge can prove to be a better protector of such right than any guidelines. In appropriate cases, jurisdiction of the High Court under Section 482 CrPC and Articles 226 and 227 of the Constitution can be invoked seeking appropriate relief or suitable directions.

(6) This is an appropriate occasion to remind the Union of India and the State Governments of their constitutional obligation to strengthen the judiciary — quantitatively and qualitatively — by providing requisite funds, manpower and infrastructure. We hope and trust that the Governments shall act.

We answer the questions posed in the orders of reference dated 19.9.2000 and 26.4.2001 in the abovesaid terms.

32. …[W]e should not, even for a moment, be considered as having made a departure from the law as to speedy trial and speedy conclusion of criminal proceedings of whatever nature and at whichever stage before any authority or the court. It is the constitutional obligation of the State to dispense speedy justice, more so in the field of criminal law, and paucity of funds or resources is no defence to denial of right to justice emanating from Articles 21, 19 and 14 and the preamble of the Constitution as also from the directive principles of State policy. It is high time that the Union of India and the various States realize their constitutional obligation and do something concrete in the direction of strengthening the justice delivery system. We need to remind all concerned of what was said by this Court in Hussainara Khatoon (IV) [Hussainara Khatoon (IV) v.Home Secy., State of Bihar, (1980) 1 SCC 98 : 1980 SCC (Cri) 40] :

The State cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to ensuring speedy trial. The State may have its financial constraints and its priorities in expenditure, but, 'the law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty', or administrative inability. (SCC p. 107, para 10)."

IN THE SUPREME COURT OF INDIA

K. Anbazhagan v. Superintendent of Police

(2004) 3 SCC 767

S.N. Variava & H.K. Sema, JJ.

During the trial of a former Chief Minister for corruption, many witnesses were recalled on flimsy grounds. The public prosecutor neither objected to this nor took any steps to get them declared hostile. The Court considered whether the case was fit to be transferred to another State to ensure a fair trial.

H.K. Sema, J.: "2. Brief facts leading to the filing of the present petition may be noticed. From 1991-96, the second respondent herein was the Chief Minister of Tamil Nadu. AIADMK Party headed by the second respondent was defeated in the general election held in 1996 and DMK Party was voted to power. Special Courts were constituted for the trial of cases filed against the second respondent and others, the constitution of which came to be upheld by this Court. Thereafter, in 1997, CC No. 7 was filed for the trial of Respondents 2, 3, 4 and 5, who have been charge-sheeted for offences under Section 120-B IPC, Section 13(2) read with Section 13(1)(*e*) of the Prevention of Corruption Act, 1988 (hereinafter referred to as the Act) for alleged accumulation of wealth of Rs 66.65 crores, disproportionate to their known sources of income. In 2001, CC No. 2 of 2001 was filed on the file of the Principal Special Judge, Chennai. Respondent 2 and Mr T.T.V. Dinakaran (Respondent 3 in TP No. 78 of 2003) have been charge-sheeted for offences under Section 120-B IPC, Section 13(2) read with Section 13(1)(*e*) of the Prevention of Corruption Act, 1988 for acquisition and possession of pecuniary resources and property outside India, which are disproportionate to their known sources of income, by resorting to clandestine transfer of funds belonging to Respondent 2 with the help of Mr T.T.V. Dinakaran from India to outside country by violating the provisions of the Foreign Exchange Regulation Act and from other countries into the United Kingdom. Trial of CC No. 7 of 1997 progressed and by August 2000, 250 prosecution witnesses had been examined. We are told that only 10 more witnesses remained to be examined in this case. In the general election held in May 2001 AIADMK

Party headed by the second respondent secured an absolute majority in the Legislative Assembly. The second respondent was unanimously chosen to be the leader of the House by the AIADMK Party. The said appointment was challenged and this Court nullified the appointment. Consequently, on 21-9-2001, the second respondent ceased to hold the office of Chief Minister. It is claimed that a nominee of the second respondent was sworn in as the Chief Minister of Tamil Nadu. The Election Commission of India announced the bye-election to Andipatti Constituency. In the bye-election held on 21-2-2002, the second respondent was declared elected and she was again sworn in as the Chief Minister on 2-3-2002. With the change in Government, three Public Prosecutors resigned. Senior Counsel S. Natarajan, who was appearing for the State, also resigned. It appears that IO Mailama Naidu, who had earlier been given an extension, also resigned. It must be mentioned, even though we are sure that it has nothing to do with the change in government, that due to retirements and routine transfers there were changes in the Special Judge also. On 7.11.2002, the trial in CC No. 7 of 1997 resumed. It is alleged that since 7-11-2002 when the trial resumed as many as 76 PWs have been recalled for cross-examination on the ground that counsel appearing for the respondents or some of them had earlier been busy in some other case filed against them. It is claimed that the Public Prosecutor did not object and/or give consent to the witnesses being recalled. Out of total 76 PWs, 64 PWs resiled from their previous statement-in-chief. It is alleged that the Public Prosecutor has not made any attempt to declare them hostile and/or to cross-examine them by resorting to Section 154 of the Indian Evidence Act. No attempt has been made to see that court takes action against them for perjury. It has also been alleged that the presence of the second respondent has been dispensed with during her examination under Section 313 CrPC and instead a questionnaire was sent to the second respondent and her reply to the questionnaire was sent to the court in absentia. It is alleged that the procedure so adopted is unknown to law and the Public Prosecutor has not objected to the application of Respondent 2 for dispensing with her presence at the time of examination under Section 313 CrPC. These are the main facts, which have been pointed out by the counsel for the petitioner.

…

14. In the present case, in our view, the petitioner has raised many justifiable and reasonable apprehensions of miscarriage of justice and likelihood of bias, which would require our interference in exercise of our power under Section 406 CrPC.

15. At this stage, we may notice a few decisions of this Court with regard to the scope of Section 406 CrPC. In *Gurcharan Dass Chadha* v. *State of Rajasthan* [AIR 1966 SC 1418 : (1966) 2 SCR 678 : 1966 Cri LJ 1071] , at SCR p. 686 this Court observed as under: (AIR p. 1423, para 13)

> "A case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The court has further to see whether the apprehension is reasonable or not. To judge the reasonableness of the apprehension the state of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained, but must appear to the court to be a reasonable apprehension."

16. In *Maneka Sanjay Gandhi* v. *Rani Jethmalani* [(1979) 4 SCC 167 : 1979 SCC (Cri) 934] this is what this Court has said in para 2: (SCC p. 169)

> "2. Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant

> environment, is necessitous if the court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances."

17. In *Abdul Nazar Madani* v. *State of T.N.* [(2000) 6 SCC 204 : 2000 SCC (Cri) 1048] this Court pointed out in para 7 at SCC pp. 210-11 as under:

> "7. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 CrPC. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any court or even at any place, the appropriate court may transfer the case to another court where it feels that holding of fair and proper trial is conducive. No universal or hard-and-fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean

> the convenience of the petitioners alone who approached the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society."

…

20. It is undisputed that 76 witnesses have been recalled. Many of them had earlier been cross-examined. On a question from court we were informed that the witnesses were recalled as Senior Counsel for the second respondent had been busy attending to some other case filed against her when they were first examined. This could hardly have been a ground for recall of witnesses. The fact that the Public Prosecutor now appointed did not object to such an application itself suggests that free and fair trial is not going on. It appears that process of justice is being subverted. This gets reinforced by the fact that even when witness after witness have resiled from what they had stated in the evidence-in-chief, yet no steps have been taken by the Public Prosecutor to resort to Section 154 of the Indian Evidence Act… For brevity, we refer to a few instances…

…

28. We have cited only a few instances to show how the prosecution appears to have acted hand in glove with the accused.

29. On examining the facts of this case, as adumbrated above, on the touchstone of the decisions of this Court, as referred to above, the petitioner has made out a case that the public confidence in the fairness of trial is being seriously undermined. As revealed from the aforesaid recited facts, great prejudice appears to have been caused to the prosecution which could culminate in grave miscarriage of justice. The witnesses who had been examined and cross-examined earlier should on such a flimsy ground never have been recalled for cross-examination. The fact that it is done after the second respondent assumed power as the Chief Minister of the State and the Public Prosecutor appointed by her Government did not oppose and/or give consent to the application for recall of witnesses is indicative of how judicial process is being subverted. The Public Prosecutor neither resorting to Section 154 of the Indian Evidence Act nor making any application to take action in perjury taken against the witnesses also indicates that trial is not proceeding fairly. It was the duty of the Public

Prosecutor to have first strenuously opposed any application for recall and in any event to have confronted the witnesses with their statements recorded under Section 161 CrPC and their examination-in-chief. No attempt has been made to elicit or find out whether witnesses were resiling because they are now under pressure to do so. It does appear that the new Public Prosecutor is hand in glove with the accused thereby creating a reasonable apprehension of likelihood of failure of justice in the minds of the public at large. There is strong indication that the process of justice is being subverted.

30. Free and fair trial is sine qua non of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the mind of the petitioner. In the present case, the circumstances as recited above are such as to create reasonable apprehension in the minds of the public at large in general and the petitioner in particular that there is every likelihood of failure of justice.

…

34. In the result, we deem it expedient for the ends of justice to allow these petitions. The only point that remains to be considered now is to which State the cases should be transferred. We are of the view that for the convenience of the parties the State of Karnataka would be most convenient due to its nearness to Tamil Nadu. Accordingly, the petitions are allowed. …"

IN THE SUPREME COURT OF INDIA

Zahira Habibulla H. Sheikh v. State of Gujarat

(2004) 4 SCC 158

Doraiswamy Raju & Arijit Pasayat, JJ.

In the trial pertaining to the 2002 communal riots in Gujarat, witnesses were forced to depose falsely and turn hostile on account of threats and coercion, and the role of the prosecuting agency was perfunctory and not impartial. The Court described the meaning and scope of fair trial and considered whether a retrial was warranted.

Arijit Pasayat, J.: "2**.** The present appeals have several unusual features and some of them pose very serious questions of far-reaching consequences. The case is commonly to be known as "Best Bakery Case". One of the appeals is by Zahira who claims to be an eyewitness to macabre killings allegedly as a result of communal frenzy. She made statements and filed affidavits after completion of trial and judgment by the trial court, alleging that during trial she was forced to depose falsely and turn hostile on account of threats and coercion. That raises an important issue regarding witness protection besides the quality and credibility of the evidence before court. The other rather unusual question interestingly raised by the State of Gujarat itself relates to improper conduct of trial by the Public Prosecutor. Last, but not the least, that the role of the investigating agency itself was perfunctory and not impartial. Though its role is perceived differently by the parties, there is unanimity in their stand that it was tainted, biased and not fair. While the accused persons accuse it for alleged false implication, the victims' relatives like Zahira allege its efforts to be merely to protect the accused.

3. The appeals are against judgment of the Gujarat High Court in Criminal Appeal No. 956 of 2003 upholding acquittal of the respondents-accused by the trial court. Along with the said appeal, two other petitions, namely, Criminal Miscellaneous Application No. 10315 of 2003 and Criminal Revision No. 583 of 2003 were disposed of. The prayers made by the State for adducing additional evidence under Section 391 of the Code of Criminal Procedure, 1973 (in short "the Code"), and/or for directing retrial

were rejected. Consequentially, prayer for examination of witnesses under Section 311 of the Code was also rejected.

…

18. According to the appellant Zahira there was no fair trial and the entire effort during trial and at all relevant times before also was to see that the accused persons got acquitted. When the investigating agency helps the accused, the witnesses are threatened to depose falsely and the prosecutor acts in a manner as if he was defending the accused, and the court was acting merely as an onlooker and when there is no fair trial at all, justice becomes the victim.

…

30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of courts of justice. The operating principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

…

33. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation – peculiar at times and related to the nature of crime, persons involved – directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system.

…

35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community

that acts through the State and prosecuting agencies. Interests of society are not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice – often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as the Court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

36**.** The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all-comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

…

38. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.

39. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage-managed, tailored and partisan trial.

40. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

41. Witnesses, as Bentham said, are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clout and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the

interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert the trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose the truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short "the TADA Act") have taken note of the reluctance shown by witnesses to depose against dangerous criminals/terrorists. In a milder form also the reluctance and the hesitation of witnesses to depose against people with muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before courts mere mock trials as are usually seen in movies.

42. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the society. On the contrary, the efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance, if not more, as the interests of the individual accused. In this courts have a vital role to play.

43. The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all

necessary materials by playing an active role in the evidence-collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

44. The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e.: (*i*) giving a discretion to the court to examine the witness at any stage, and (*ii*) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In *Mohanlal* v. *Union of India* [1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595] this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, “any court”, “at any stage”, or “any enquiry or trial or other proceedings”, “any person” and “any such person” clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, “essential” to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

45. It is not that in every case where the witness who had given evidence before court wants to change his mind and is prepared to speak differently, that the court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case, accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in.

46. Ultimately, as noted above, ad nauseam the duty of the court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer on any party any right to examine, cross-examine and re-examine any witness. This is a power given to the court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.

…

52. Whether a retrial under Section 386 or taking up of additional evidence under Section 391 is the proper procedure will depend on the facts and circumstances of each case for which no straitjacket formula of universal and invariable application can be formulated.

53. In the ultimate analysis whether it is a case covered by Section 386 or Section 391 of the Code, the underlying object which the court must keep in view is the very reason for which the courts exist i.e. to find out the truth and dispense justice impartially and ensure also that the very process of courts are not employed or utilized in a manner which give room to

unfairness or lend themselves to be used as instruments of oppression and injustice.

54. Though justice is depicted to be blindfolded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administer justice and not to ignore or turn the mind/attention of the court away from the truth of the cause or lis before it, in disregard of its duty to prevent miscarriage of justice. When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of courts and erode in stages the faith inbuilt in the judicial system ultimately destroying the very justice-delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings.

55. The courts, at the expense of repetition we may state, exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth. It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice, in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock fight and making a mockery of the criminal justice administration itself.

…

68. If one even cursorily glances through the records of the case, one gets a feeling that the justice-delivery system was being taken for a ride and literally allowed to be abused, misused and mutilated by subterfuge. The investigation appears to be perfunctory and anything but impartial without any definite object of finding out the truth and bringing to book those who were responsible for the crime. The Public Prosecutor appears to have acted more as a defence counsel than one whose duty was to present the truth before the Court. The Court in turn appeared to be a silent spectator, mute to the manipulations and preferred to be indifferent to sacrilege being committed to justice. The role of the State Government also leaves much to be desired. One gets a feeling that there was really no

seriousness in the State's approach in assailing the trial court's judgment. This is clearly indicated by the fact that the first memorandum of appeal filed was an apology for the grounds. A second amendment was done, that too after this Court expressed its unhappiness over the perfunctory manner in which the appeal was presented and the challenge made. That also was not the end of the matter. There was a subsequent petition for amendment. All this sadly reflects on the quality of determination exhibited by the State and the nature of seriousness shown to pursue the appeal. Criminal trials should not be reduced to be mock trials or shadow-boxing or fixed trials. Judicial criminal administration system must be kept clean and beyond the reach of whimsical political wills or agendas and properly insulated from discriminatory standards or yardsticks of the type prohibited by the mandate of the Constitution.

69. Those who are responsible for protecting life and properties and ensuring that investigation is fair and proper seem to have shown no real anxiety. Large number of people had lost their lives. Whether the accused persons were really assailants or not could have been established by a fair and impartial investigation. The modern-day "Neros" were looking elsewhere when Best Bakery and innocent children and helpless women were burning, and were probably deliberating how the perpetrators of the crime can be saved or protected. Law and justice become flies in the hands of these "wanton boys". When fences start to swallow the crops, no scope will be left for survival of law and order or truth and justice. Public order as well as public interest become martyrs and monuments.

…

74. Prayer was made by learned counsel for the appellant that the trial should be conducted outside the State so that the unhealthy atmosphere which led to failure or miscarriage of justice is not repeated. This prayer has to be considered in the background and keeping in view the spirit of Section 406 of the Code. It is one of the salutary principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case or that general allegations of a surcharged atmosphere against a particular community alone does not suffice. The court has to see whether the apprehension is reasonable or not. The state of mind of the person who entertains apprehension, no doubt is a relevant factor but not the only determinative or concluding factor. But the court must be fully satisfied about the existence of such

conditions which would render inevitably impossible the holding of a fair and impartial trial, uninfluenced by extraneous considerations that may ultimately undermine the confidence of reasonable and right-thinking citizen, in the justice delivery system. The apprehension must appear to the court to be a reasonable one. This position has been highlighted in *Gurcharan Dass Chadha* v. *State of Rajasthan* [AIR 1966 SC 1418 : (1966) 2 SCR 678 : 1966 Cri LJ 1071] and *K. Anbazhagan* v. *Supdt. of Police* [(2004) 3 SCC 767 : JT (2003) 9 SC 31] .

75. Keeping in view the peculiar circumstances of the case, and the ample evidence on record, glaringly demonstrating subversion of justice delivery system with no congenial and conducive atmosphere still prevailing, we direct that the retrial shall be done by the Court under the jurisdiction of the Bombay High Court. The Chief Justice of the said High Court is requested to fix up the Court of competent jurisdiction."

IN THE SUPREME COURT OF INDIA

Kalyani Bhaskar v. M.S. Sampoornam

(2007) 2 SCC 258

G.P. Mathur & Lokeshwar Singh Panta, JJ.

In this case, the Apex Court discussed the powers of the Magistrate under Section 243 of the CrPC. This was a case concerning the Negotiable Instruments Act and the Court held that disallowing the cheque presented by the complainant to be verified by a handwriting expert or an opportunity to the accused to present her evidence, would lead to an unfair trial. In this context the concept of "fair trial" was discussed.

Lokeshwar Singh Panta, J.: "12. Section 243(2) is clear that the Magistrate holding an inquiry under CrPC in respect of an offence triable by him does not exceed his powers under Section 243(2) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a handwriting expert because even in adopting this course, the purpose is to enable the Magistrate to compare the disputed signature or writing with the admitted writing or signature of the accused and to reach his own conclusion with the assistance of the expert. The appellant is entitled to rebut the case of the respondent and if the document viz. the cheque on which the respondent has relied upon for initiating criminal proceedings against the appellant would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion of the handwriting expert has deprived the appellant of an opportunity of rebutting it. The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. "Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and the courts should be jealous in seeing that there is no breach of them. We have not been able to appreciate

the view of the learned Judge of the High Court that the petitioner has filed application under Section 243 CrPC without naming any person as witness or anything to be summoned, which are to be sent for handwriting expert for examination. As noticed above, Section 243(2) CrPC refers to a stage when the prosecution closes its evidence after examining the witnesses and the accused has entered upon his defence. The appellant in this case requests for sending the cheque in question, for the opinion of the handwriting expert after the respondent has closed her evidence, the Magistrate should have granted such a request unless he thinks that the object of the appellant is vexation or delaying the criminal proceedings. In the circumstances, the order of the High Court impugned in this appeal upholding the order of the Magistrate is erroneous and not sustainable."

IN THE SUPREME COURT OF INDIA

Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)

(2010) 6 SCC 1

P. Sathasivam & Swatanter Kumar, JJ.

Since copy of one of the ballistic reports was not supplied to the accused, the Court examined the extent of the right of an accused to ask for certain documents during the course of enquiry / trial, in light of principles of fair trial.

P. Sathasivam, J.: "…

Role of Public Prosecutor and his duty of disclosure

183. It was argued by Mr Ram Jethmalani, the learned Senior Counsel for the appellant Manu Sharma that the Prosecutor had suppressed vital evidence relating to the laboratory reports which were useful for the defence in order to establish the innocence of the accused. The learned Senior Counsel further argued that the Prosecutor had not complied with his duty thus violating fair trial and vitiating the trial itself.

184. It is thus important for us to address the role of a Prosecutor, disclosure requirements if placed by the Prosecutor and the role of a Judge in a criminal trial.

…

188. It is also important to note the active role which is to be played by the Court in a criminal trial. The court must ensure that the Prosecutor is doing his duties to the utmost level of efficiency and fair play. This Court, in *Zahira Habibulla H. Sheikh* v. *State of Gujarat* [(2004) 4 SCC 158 : 2004 SCC (Cri) 999] , has noted the daunting task of the Court in a criminal trial while noting the most pertinent provisions of the law…(SCC pp. 188-91, paras 43-49).

189. The appellants have placed heavy reliance on the position in England to argue that there is a wide duty of disclosure on the Public Prosecutor. It

was argued that any non-disclosure of evidence, whether or not it is relied upon by the prosecution, must be made available to the defence. In the absence of this, it was argued, there would be a violation of the right to fair trial.

190. In the light of this argument, let us examine the exact nature of the duty of disclosure on the Public Prosecutor in ordinary cases of criminal trial. CrPC imposes a statutory obligation on the Public Prosecutor to disclose certain evidence to the defence. This is brought out by Sections 207 and 208 as follows:

> "207. Supply to the accused of copy of police report and other documents.—In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:—
>
> (i) the police report;
>
> (ii) the first information report recorded under Section 154;
>
> (iii) the statements recorded under sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of Section 173;
>
> (iv) the confessions and statements, if any, recorded under Section 164;
>
> (v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173:
>
> Provided that the Magistrate may, after perusing any such part of a statement as is referred to in

clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in court.

208. Supply of copies of statements and documents to accused in other cases triable by Court of Session.—Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process under Section 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:—

(i) the statements recorded under Section 200 or Section 202, or all persons examined by the Magistrate;

(ii) the statements and confessions, if any, recorded under Section 161 or Section 164;

(iii) any documents produced before the Magistrate on which the prosecution proposes to rely:

Provided that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in court."

192. [I]t is clear that the Code and the Bar Council of India Rules provide a wide duty of disclosure. But this duty is limited to evidence on which the Prosecutor proposes to place reliance during the trial. Mr Ram Jethmalani argued that this duty extends beyond these provisions, and includes even that evidence which may not have been used by the Prosecutor during the trial. As we have already mentioned, for this purpose, he relied upon the position in England.

193. Currently, the position in England is governed by the Criminal Procedures and Investigations Act, 1996. Prior to this enactment, the position was squarely covered by common law. This position comes out primarily in two cases.

194. In *R.* v. *Ward (Judith)* [(1993) 1 WLR 619 : (1993) 2 All ER 577 (CA)] the Court of Appeal held that it was the duty of the prosecution to ensure fair trial for both the prosecution and the accused. The duty of disclosure would usually be performed by supplying the copies of the witness statements to the defence and all relevant experiments and tests must also be disclosed. It was held that the common law duty to disclose would cover anything which might assist the defence. Non-compliance with this duty would amount to "irregularity in the course of the trial" under Section 2(1)(*a*) of the Criminal Appeal Act, 1988.

195. In *R.* v. *Preston* [(1994) 2 AC 130 : (1993) 3 WLR 891 : (1993) 4 All ER 638 (HL)], on which the appellants specifically relied upon, dealt with the non-disclosure of a telephonic conversation in a matter dealing with the Interception of Communications Act, 1985. The relevant material had been destroyed in pursuance of Section 6 of the same Act. In appeal, the defendants essentially argued that the non-disclosure of the contents of the call to the defence amounted to a material irregularity. The Court held that it is true that the mere fact that the material was not to be used as evidence did not mean that the material was worthless, especially, when it might have been of assistance to the defendant. But at the same time, it was also held that: (*Preston case* [(1994) 2 AC 130 : (1993) 3 WLR 891 : (1993) 4 All ER 638 (HL)], AC p. 131)

> "[since the purpose of a warrant issued under Section 2(2)(b) of the 1985 Act] did not extend to the amassing of evidence with a view to the prosecution of offenders; and since the investigating authority was under a duty under

> Section 6 of the Act to destroy all material obtained by means of an interception as soon as its retention was no longer necessary for the prevention or detection of serious crime … the destruction of the documents obtained from the interception and their consequent unavailability for disclosure could not be relied upon by the defendants as a material irregularity in the course of their trial;"

196. Thus the position under common law is clear i.e. subject to exceptions like sensitive information and public interest immunity, the prosecution should disclose any material which might be exculpatory to the defence.

197. In the Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.

198. A person is entitled to be tried according to the law in force at the time of commission of offence. A person could not be punished for the same offence twice and most significantly cannot be compelled to be a witness against himself and he cannot be deprived of his personal liberty except according to the procedure established by law. The law in relation to investigation of offences and rights of an accused, in our country, has developed with the passage of time. On the one hand, power is vested in the investigating officer to conduct the investigation freely and transparently. Even the courts do not normally have the right to interfere with the investigation. It exclusively falls in the domain of the investigating agency. In exceptional cases the High Courts have monitored the investigation but again within a very limited scope. There, on the other a duty is cast upon the Prosecutor to ensure that rights of an accused are not infringed and he gets a fair chance to put forward his defence so

as to ensure that a guilty does not go scot-free while an innocent is not punished. Even in the might of the State the rights of an accused cannot be undermined, he must be tried in consonance with the provisions of the constitutional mandate. The cumulative effect of this constitutional philosophy is that both the courts and the investigating agency should operate in their own independent fields while ensuring adherence to basic rule of law.

199. It is not only the responsibility of the investigating agency but as well as that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of the criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law dehors his position and influence in the society.

200. In *Kashmeri Devi* v. *Delhi Admn.* [1988 Supp SCC 482 : 1988 SCC (Cri) 864 : JT (1988) 2 SC 293] it has been held that the record of investigation should not show that efforts are being made to protect and shield the guilty even where they are police officers and are alleged to have committed a barbaric offence/crime. The courts have even declined to accept the report submitted by the investigating officer where it is glaringly unfair and offends basic canons of the criminal investigation and jurisprudence. *Contra veritatemlexnunquamaliquidpermittit*: implies a duty on the court to accept and accord its approval only to a report which is the result of faithful and fruitful investigation. The Court is not to accept the report which is *contra legem*but (*sic*) to conduct judicious and fair investigation and submit a report in accordance with Section 173 of the Code which places a burden and obligation on the State Administration. The aim of criminal justice is two-fold. Severely punishing and really or sufficiently preventing the crime. Both these objects can be achieved only by fair investigation into the commission of crime, sincerely proving the case of the prosecution before the court and the guilty is punished in accordance with law.

201. Historically but consistently the view of this Court has been that an investigation must be fair and effective, must proceed in proper direction in consonance with the ingredients of the offence and not in haphazard manner. In some cases besides investigation being effective the

accused may have to prove miscarriage of justice but once it is shown the accused would be entitled to definite benefit in accordance with law. The investigation should be conducted in a manner so as to draw a just balance between citizen's right under Articles 19 and 21 and expansive power of the police to make investigation. These well-established principles have been stated by this Court in *Sasi Thomas* v. *State* [(2006) 12 SCC 421 : (2007) 2 SCC (Cri) 72] , *State (Inspector of Police)* v. *Surya Sankaram Karri* [(2006) 7 SCC 172 : (2006) 3 SCC (Cri) 225] and *T.T. Antony* v. *State of Kerala* [(2001) 6 SCC 181 : 2001 SCC (Cri) 1048].

202. In *Nirmal Singh Kahlon* v. *State of Punjab* [(2009) 1 SCC 441 : (2009) 1 SCC (Cri) 523] this Court specifically stated that a concept of fair investigation and fair trial are concomitant to preservation of the fundamental right of the accused under Article 21 of the Constitution of India. We have referred to this concept of judicious and fair investigation as the right of the accused to fair defence emerges from this concept itself. The accused is not subjected to harassment, his right to defence is not unduly hampered and what he is entitled to receive in accordance with law is not denied to him contrary to law.

203. It is pertinent to note here that one of the established canons of just, fair and transparent investigation is the right of defence of an accused. An accused may be entitled to ask for certain documents during the course of enquiry/trial by the court…

…

218. The liberty of an accused cannot be interfered with except under due process of law. The expression "due process of law" shall deem to include fairness in trial. The court (sic Code) gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution (prosecution and the Prosecutor) to make fair disclosure. The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in court or not. That document should essentially be furnished to the accused and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused.

219. The role and obligation of the Prosecutor particularly in relation to disclosure cannot be equated under our law to that prevalent under the English system as aforereferred to. But at the same time, the demand for a fair trial cannot be ignored. It may be of different consequences where a document which has been obtained suspiciously, fraudulently or by causing undue advantage to the accused during investigation such document could be denied in the discretion of the Prosecutor to the accused whether the prosecution relies or not upon such documents, however in other cases the obligation to disclose would be more certain. As already noticed the provisions of Section 207 have a material bearing on this subject and make an interesting reading. This provision not only require or mandate that the court without delay and free of cost should furnish to the accused copies of the police report, first information report, statements, confessional statements of the persons recorded under Section 161 whom the prosecution wishes to examine as witnesses, of course, excluding any part of a statement or document as contemplated under Section 173(6) of the Code, any other document or relevant extract thereof which has been submitted to the Magistrate by the police under sub-section (5) of Section 173. In contradistinction to the provisions of Section 173, where the legislature has used the expression “documents on which the prosecution relies” are not used under Section 207 of the Code. Therefore, the provisions of Section 207 of the Code will have to be given liberal and relevant meaning so as to achieve its object. Not only this, the documents submitted to the Magistrate along with the report under Section 173(5) would deem to include the documents which have to be sent to the Magistrate during the course of investigation as per the requirement of Section 170(2) of the Code.

220. The right of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report under Section 173(2) as per orders of the court. But certain rights of the accused flow both from the codified law as well as from equitable concepts of the constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the court under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the accused to claim copies of the statement and documents

which the prosecution has collected during investigation and upon which they rely.

221. It will be difficult for the Court to say that the accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. A document which has been obtained bona fide and has bearing on the case of the prosecution and in the opinion of the Public Prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused. Then that document should be disclosed to the accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would affect administration of criminal justice and the defence of the accused prejudicially.

222. The concept of disclosure and duties of the Prosecutor under the English system cannot, in our opinion, be made applicable to the Indian criminal jurisprudence strictosensu at this stage. However, we are of the considered view that the doctrine of disclosure would have to be given somewhat expanded application. As far as the present case is concerned, we have already noticed that no prejudice had been caused to the right of the accused to fair trial and non-furnishing of the copy of one of the ballistic reports had not hampered the ends of justice. Some shadow of doubt upon veracity of the document had also been created by the prosecution and the prosecution opted not to rely upon this document. In these circumstances, the right of the accused to disclosure has not received any setback in the facts and circumstances of the case. The accused even did not raise this issue seriously before the trial court."

IN THE SUPREME COURT OF INDIA

Selvi v. State of Karnataka

(2010) 7 SCC 263

K.G. Balakrishnan, R.V. Raveendran & J.M. Panchal, JJ.

In this case, the Supreme Court ruled on the validity of the polygraph test, narcoanalysis test and the BEAP Test and held that allowing the performance of the test would violate Articles 20(3) and 21 of the Constitution of India. Further, the Court held that performance of the test would make the right to fair trial redundant as the person is not conscious, while making the statement.

K.G. Balakrishnan, C.J.: "87. The interrelationship between the "right against self-incrimination" and the "right to fair trial" has been recognised in most jurisdictions as well as international human rights instruments. For example, the US Constitution incorporates the "privilege against self-incrimination" in the text of its Fifth Amendment. The meaning and scope of this privilege has been judicially moulded by recognising its interrelationship with other constitutional rights such as the protection against "unreasonable search and seizure" (Fourth Amendment) and the guarantee of "due process of law" (Fourteenth Amendment). In the International Covenant on Civil and Political Rights, 1966, Article 14(3)(*g*) enumerates the minimum guarantees that are to be accorded during a trial and states that everyone has a right not to be compelled to testify against himself or to confess guilt. In the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Article 6(1) states that every person charged with an offence has a right to a fair trial and Article 6(2) provides that "everybody charged with a criminal offence shall be presumed innocent until proved guilty according to law". The guarantee of "presumption of innocence" bears a direct link to the "right against self-incrimination" since compelling the accused person to testify would place the burden of proving innocence on the accused instead of requiring the prosecution to prove guilt.

88. In the Indian context, Article 20(3) should be construed with due regard for the interrelationship between rights, since this approach was recognised

in *Maneka Gandhi case* [*Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597] . Hence, we must examine the "right against self-incrimination" in respect of its relationship with the multiple dimensions of "personal liberty" under Article 21, which include guarantees such as the "right to fair trial" and "substantive due process".

...

100. Criminal defendants have been given protections such as the presumption of innocence, right to counsel, the right to be informed of charges, the right of compulsory process and the standard of proving guilt beyond reasonable doubt among others. It can hence be stated that it was only with the subsequent emergence of the "right to counsel" that the accused's "right to silence" became meaningful. With the consolidation of the role of the defence lawyers in criminal trials, a clear segregation emerged between the testimonial function performed by the accused and the defensive function performed by the lawyer. This segregation between the testimonial and defensive functions is now accepted as an essential feature of a fair trial so as to ensure a level playing field between the prosecution and the defence. In addition to a defendant's "right to silence" during the trial stage, the protections were extended to the stage of pre-trial inquiry as well. With the enactment of the Sir John Jervis Act of 1848, provisions were made to advise the accused that he might decline to answer questions put to him in the pre-trial inquiry and to caution him that his answers to pre-trial interrogation might be used as evidence against him during the trial stage.

101. The judgment in *Nandini Satpathy* v. *P.L. Dani* [(1978) 2 SCC 424: 1978 SCC (Cri) 236] , referred to the following extract from a decision of the US Supreme Court in *Brown* v. *Walker* [40 L Ed 819 : 161 US 591 (1895)] , which had later been approvingly cited by Warren, C.J. in *Miranda* v. *Arizona* [16 L Ed 2d 694 : 384 US 436 (1965)] : (*Nandini Satpathy case* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] , SCC pp. 438-39, para 31)

> "31. ...'The maxim nemo teneturseipsumaccusare had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which have long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people

> against the exercise of arbitrary power, were not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier State trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan Minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.' [Ed.: As observed in Brown v. Walker, 40 L Ed 819 at p. 821 : 161 US 591 (1895)]

…

Incompatibility with the "right to fair trial"

246. The respondents' position is that the compulsory administration of the impugned techniques should be permitted at least for investigative purposes, and if the test results lead to the discovery of fresh evidence, then these fruits should be admissible. We have already explained in light of the conjunctive reading of Article 20(3) of the Constitution and Section 27 of the Evidence Act, that if the fact of compulsion is proved, the test results

will not be admissible as evidence. However, for the sake of argument, if we were to agree with the respondents and allow investigators to compel individuals to undergo these tests, it would also affect some of the key components of the "right to fair trial".

247. The decision of this Court in *D.K. Basu* v. *State of W.B.* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92 : AIR 1997 SC 610], had stressed upon the entitlement of a person in custody to consult a lawyer. Access to legal advice is an essential safeguard so that an individual can be adequately apprised of his constitutional and statutory rights. This is also a measure which checks custodial abuses. However, the involuntary administration of any of the impugned tests can lead to a situation where such legal advice becomes ineffective. For instance even if a person receives the best of legal advice before undergoing any of these tests, it cannot prevent the extraction of information which may prove to be inculpatory by itself or lead to the subsequent discovery of incriminating materials. Since the subject has no conscious control over the drug-induced revelations or substantive inferences, the objective of providing access to legal advice are frustrated.

248. Since the subject is not immediately aware of the contents of the drug-induced revelations or substantive inferences, it is also conceivable that the investigators may chose not to communicate them to the subject even after completing the tests. In fact statements may be recorded or charges framed without the knowledge of the test subject. At the stage of trial, the prosecution is obliged to supply copies of all incriminating materials to the defendant but reliance on the impugned tests could curtail the opportunity of presenting a meaningful and wholesome defence. If the contents of the revelations or inferences are communicated much later to the defendant, there may not be sufficient time to prepare an adequate defence.

249. Earlier in this judgment, we had surveyed some foreign judicial precedents dealing with each of the tests in question. A common concern expressed with regard to each of these techniques was the questionable reliability of the results generated by them. In respect of the narcoanalysis technique, it was observed that there is no guarantee that the drug-induced revelations will be truthful. Furthermore, empirical studies have shown that during the hypnotic stage, individuals are prone to suggestibility and there is a good chance that false results could lead to a finding of guilt or innocence. As far as polygraph examination is concerned, though there are some studies showing improvements in the accuracy of results with

advancement in technology, there is always scope for error on account of several factors. Objections can be raised about the qualifications of the examiner, the physical conditions under which the test was conducted, the manner in which questions were framed and the possible use of "countermeasures" by the test subject. A significant criticism of polygraphy is that sometimes the physiological responses triggered by feelings such as anxiety and fear could be misread as those triggered by deception. Similarly, with the P300 waves test there are inherent limitations such as the subject having had "prior exposure" to the "probes" which are used as stimuli. Furthermore, this technique has not been the focus of rigorous independent studies. The questionable scientific reliability of these techniques comes into conflict with the standard of proof "beyond reasonable doubt" which is an essential feature of criminal trials.

250. Another factor that merits attention is the role of the experts who administer these tests. While the consideration of expert opinion testimony has become a mainstay in our criminal justice system with the advancement of fields such as forensic toxicology, questions have been raised about the credibility of experts who are involved in administering the impugned techniques. It is a widely accepted principle for evaluating the validity of any scientific technique that it should have been subjected to rigorous independent studies and peer review. This is so because the persons who are involved in the invention and development of certain techniques are perceived to have an interest in their promotion. Hence, it is quite likely that such persons may give unduly favourable responses about the reliability of the techniques in question.

251. Even though India does not have a jury system, the use of the impugned techniques could impede the fact-finding role of a trial Judge. This is a special concern in our legal system, since the same Judge presides over the evidentiary phase of the trial as well as the guilt phase. The consideration of the test results or their fruits for the purpose of deciding on their admissibility could have a prejudicial effect on the Judge's mind even if the same are not eventually admitted as evidence.

252. Furthermore, we echo the concerns expressed by the Supreme Court of Canada in *R.* v. *Beland* [(1987) 36 CCC 3d 481 : (1987) 2 SCR 398 (Can SC)], where it was observed that reliance on scientific techniques could cloud human judgment on account of an "aura of infallibility". While Judges are expected to be impartial and objective in their evaluation of evidence, one can never discount the possibility of undue public pressure in some

cases, especially when the test results appear to be inculpatory. We have already expressed concerns with situations where media organisations have either circulated the video recordings of narcoanalysis interviews or broadcasted dramatised reconstructions, especially in sensational criminal cases.

253. Another important consideration is that of ensuring parity between the procedural safeguards that are available to the prosecution and the defence. If we were to permit the compulsory administration of any of the impugned techniques at the behest of investigators, there would be no principled basis to deny the same opportunity to the defendants as well as witnesses. If the investigators could justify reliance on these techniques, there would be an equally compelling reason to allow the indiscrete administration of these tests at the request of convicts who want reopening of their cases or even for the purpose of attacking and rehabilitating the credibility of the witnesses during a trial. The decision in *United States* v. *Scheffer* [140 L Ed 2d 413 : 523 US 303 (1998)], has highlighted the concerns with encouraging litigation, that is, collateral to the main facts in issue. We are of the view that an untrammelled right of resorting to the techniques in question will lead to an unnecessary rise in the volume of frivolous litigation before our courts.

254. Lastly, we must consider the possibility that the victims of offences could be forcibly subjected to any of these techniques during the course of investigation. We have already highlighted a provision in the *Laboratory Procedure Manual* for polygraph tests which contemplates the same for ascertaining the testimony of victims of sexual offences. In light of the preceding discussion, it is our view that irrespective of the need to expedite investigations in such cases, no person who is a victim of an offence can be compelled to undergo any of the tests in question. Such a forcible administration would be an unjustified intrusion into mental privacy and could lead to further stigma for the victim.

…

263. We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of "substantive due process" which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot

be read into the statutory provisions which enable medical examination during investigation in criminal cases i.e. the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not feasible in light of the rule of "ejusdem generis" and the considerations which govern the interpretation of statutes in relation to scientific advancements. We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to "cruel, inhuman or degrading treatment" with regard to the language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the "right to fair trial". Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the "right against self-incrimination"."

IN THE SUPREME COURT OF INDIA

Jahid Shaikh v. State of Gujarat

(2011) 7 SCC 762

Altamas Kabir & Cyriac Joseph, JJ.

A transfer petition was filed on the ground that the local police authorities, jail authorities as well as the public prosecutor in Gujarat had conducted themselves in a manner that reflected complete bias and prejudice on their part against the accused persons who were allegedly involved in a blast case.

Altamas Kabir, J.: "4. Appearing in support of the transfer petition, learned Advocate Mr Prashant Bhushan, submitted that the transfer petition seeking transfer of the trial of the accused in the Ahmedabad bomb blast cases, as well as in the cases relating to planting of bombs in Surat, out of the State of Gujarat, was necessitated on account of the attitude and conduct of the local authorities. Mr Bhushan submitted that the local police authorities, jail authorities and the Public Prosecutor had conducted themselves in a manner which reflects total bias and prejudice against the accused and the same has created more than a reasonable apprehension in their mind that they would not get a fair and free trial in the State of Gujarat.

5. Among the more glaring examples of bias and prejudice pointed out by Mr Prashant Bhushan was the allegation that charges were framed against the accused without supplying them with the essential documents which were required to be supplied under Section 207 of the Code of Criminal Procedure (CrPC), particularly when the majority of the accused were not being represented through the counsel. Mr Bhushan submitted that in cases instituted upon a police report, Section 207 CrPC makes it obligatory on the part of the Magistrate to provide the accused, without delay, free of cost, copies of the police report, the first information report recorded under Section 154 CrPC, the statements recorded under sub-section (3) of Section 161 CrPC of all the persons whom the prosecution proposed to examine as its witnesses, the confessions and statements recorded under Section 164 CrPC, as well as any other document or

relevant extract forwarded to the Magistrate with the police report under sub-section (5) of Section 173 CrPC.

6. Mr Bhushan urged that under Section 227 CrPC the accused have a right to oppose the framing of charges on the basis of the evidence gathered during investigation, which requires the accused to have copies of all the documents mentioned in Section 207 of the Code. Mr Bhushan submitted that the said right to have the police papers had been violated by the respondents, inasmuch as, most of the accused did not have access to all the papers at the time of framing of charges against them.

7. Mr Bhushan submitted that those who had been favoured with copies of the police papers were unable to understand the same, as they were in Gujarati which language was not known to most of the accused, as most of them were from outside the State of Gujarat. Mr Bhushan also submitted that the learned advocates of those who were provided with copies of the charge-sheets in Gujarati were barely given four days' time to consider the same to prepare their case for discharge of the accused.

8. Despite the fact that on the date of framing of charges, many of the accused had not been served with copies of the charge-sheet and connected papers, such as the statement of witnesses and confessional statements of the accused recorded under Section 164 CrPC, and other documents, and those who had been served, were served with copies of the same in Gujarati, the learned Designated Judge framed charges against the accused persons on 11-1-2010. Mr Bhushan submitted that the majority of the accused were provided with lawyers and copies of the charge-sheet and other documents *after charge had already been framed* (emphasis supplied). Mr Bhushan submitted that some of the accused, who did not receive the said documents, moved an application on 15-2-2010, but the same was rejected without such copies being supplied.

9. Mr Bhushan urged that apart from the above, one other serious grievance which the accused had, which has led to the apprehension of bias, was that the counsel for the accused were not permitted to meet their clients even for 10 minutes in their court chambers, without the police being present, despite the applications made on behalf of the accused that they would not be in a position to speak freely in the presence of the police for fear of subsequent reprisal at the hands of the police. Mr Bhushan submitted that although the Court was fully aware of the fact that the accused would not

be able to speak freely about the torture inflicted on them while in custody, it decided to look the other way to prevent the learned advocates for the accused to obtain a true picture of the allegations made by the accused of torture at the hands of police while in custody. Mr Bhushan submitted that the Court chose to disregard the reality that after their production in Court, the accused would have to go back to the custody of police and to suffer the consequences of their disclosures in Court.

…

22. Having regard to the nature of the relief sought for by the petitioners, we have considered the submissions made on behalf of respective parties and the materials on record with care and caution. It appears to us that at the initial stages of the investigation and filing of charge-sheets some amount of bias could well have been detected. However, once the matter had gone out of the hands of the Magistrate concerned, no further bias could be attributed to him. Similarly, the allegation of bias against the District and Sessions Judge was no longer available since the incumbent had been elevated to the Bench and the trial will be conducted by another learned Judge.

23. However, as pointed out by Mr Prashant Bhushan, learned counsel appearing for the petitioners, the manner in which the charges had been framed, without giving the petitioners a meaningful opportunity of meeting the allegations made against them in the charge-sheet, will ultimately have a direct bearing on the trial itself. The duty of the Sessions Court to supply copies of the charge-sheet and all the relevant documents relied upon by the prosecution under Sections 207 and 208 CrPC is not an empty formality and has to be complied with strictly so that the accused is not prejudiced in his defence even at the stage of framing of charge. The fact that many of the accused persons were not provided with copies of the charge-sheet and the other relevant documents, as indicated in Sections 207 and 208 CrPC, seriously affects the right of an accused to a free and fair trial.

24. In the instant case, in addition to the above, it has also to be kept in mind that most of the accused persons in this case are from outside the State of Gujarat and are not, therefore, in a position to understand the documents relied upon by the police authorities as they were in Gujarati which most of the accused were unable to comprehend. Their demand for translated copies of the documents met with no response, and ultimately

it was the very same documents in Gujarati, which were supplied to some of the accused in some of the cases.

25. The physical torture which was said to have been inflicted on the petitioners has come on record by way of affidavits to which there is no suitable explanation. Furthermore, the accused persons were not allowed to meet their lawyers without police presence, and as stated by them, it is only natural that an accused in custody will have second thoughts before making or reiterating allegations of torture against the very persons to whose custody they would have to return.

26. Apart from the above, we also have to consider Ms Wahi's submissions regarding the convenience of the prosecution which intends to produce a large number of witnesses, who are all said to be residents of the State of Gujarat. It has been submitted by Ms Wahi that the examination of such a large number of witnesses could be compromised and/or jeopardised in the event they are required to travel outside the State of Gujarat in connection with the trial. There will also be a language problem for the witnesses to be examined outside the State of Gujarat, since the majority of the witnesses were acquainted mostly with Gujarati and would be at a disadvantage in providing a true picture of the series of incidents relating to the bomb blasts which were triggered off in the cities of Ahmedabad and Surat on 26-7-2008.

27. However, in our criminal justice delivery system the balance tilts in favour of the accused in case of any doubt in regard to the trial. The courts have to ensure that an accused is afforded a free and fair trial where justice is not only done, but seen to be done and in the process the accused has to be given the benefit of any advantage that may enure to his/her favour during the trial. As was observed by this Court in Commr. of Police v. Delhi High Court [(1996) 6 SCC 323], Article 21 of the Constitution enshrines and guarantees the precious right to life and liberty to a person, deprivable only on following the procedure established by law in a fair trial, assured of the safety of the accused. Except in certain matters relating to economic offences or in regard to national security, the burden lies heavily on the prosecution to prove its case to the hilt and it is rarely that the accused is called upon to prove his innocence.

28. This is a case where the apprehension of the accused being denied a free and fair trial within the State of Gujarat has to be considered on the weight of the materials produced on behalf of the accused in support

of such apprehension and the prejudice that may also be caused to the prosecution in presenting its case. That the facts involved in this case are of a sensitive nature, cannot be denied, but that by itself cannot be a ground for transfer of the trial outside the State of Gujarat. A good deal of care and caution has to be exercised to see whether the petitioner-accused have been able to make out a case of bias and prejudice on part of the State or the prosecuting authorities which raises a very real and plausible ground for transferring the trial pending before the Special Judge, Ahmedabad outside the State of Gujarat.

29. Apart from the above, what has also to be taken into consideration is a conceivable surcharged communal climate which could have a direct bearing on the trial itself. The Court has to undertake a balancing act between the interest of the accused, the victims and society at large in the focus of Article 21 of the Constitution to ensure a free and fair trial to the accused.

…

36. Before we proceed to the latest views expressed by this Court in a transfer petition also praying for transfer of a trial outside the State of Gujarat on account of bias and a vitiated communal atmosphere, we may refer to a slightly different view taken by this Court by a Bench of two Judges in *Abdul Nazar Madani* v. *State of T.N.*[(2000) 6 SCC 204 : 2000 SCC (Cri) 1048].

37. While disposing of a transfer petition filed by the accused in the Coimbatore Serial Bomb Blasts case on the allegation that the atmosphere in the State of Tamil Nadu in general and 0in Coimbatore in particular, being so communally surcharged that his fair and impartial trial there would be seriously impaired, this Court in *Abdul Nazar Madani case* [(2000) 6 SCC 204 : 2000 SCC (Cri) 1048] held that the purpose of a criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. This Court observed that the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. The mere existence of a surcharged atmosphere without there being proof of inability of the court of holding a fair and impartial trial, could not be made a ground for transfer of a case. The alleged communally surcharged atmosphere has to be considered in the light of the accusations made and the nature of the crimes committed by the accused seeking transfer of the case. It was

observed that no universal and hard-and-fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case.

38. As has been stated hereinbefore, in Zahira Habibulla H. Sheikh case [(2004) 4 SCC 158], in order to ensure a free and fair trial the atmosphere in which the case is tried should be conducive to the holding of a fair trial. The absence of a congenial atmosphere for such a fair and impartial trial was held to be a good ground for transfer of the case from Gujarat to Maharashtra.

39. However, such a ground, though of great importance, cannot be the only aspect to be considered while deciding whether a criminal trial could be transferred out of the State which could seriously affect the prosecution case, considering the large number of witnesses to be examined to prove the case against the accused. The golden thread which runs through all the decisions cited on behalf of the parties, is that justice must not only be done, but must also be seen to be done. If the said principle is disturbed, fresh steps can always be taken under Section 406 CrPC and Order 36 of the Supreme Court Rules, 1966 for the same reliefs.

40. The offences with which the accused have been charged are of a very serious nature, but except for an apprehension that justice would not be properly administered, there is little else to suggest that the charged atmosphere which existed at the time when the offences were alleged to have been committed, still exist and was likely to prejudice the accused during the trial. All judicial officers cannot be tarred with the same brush and denial of a proper opportunity at the stage of framing of charge, though serious, is not insurmountable. The accused have their remedies elsewhere and the prosecution still has to prove its case.

41. As mentioned earlier, the communally surcharged atmosphere which existed at the time of the alleged incidents, has settled down considerably and is no longer as volatile as it was previously. The Presiding Officers against whom bias had been alleged, will no longer be in charge of the proceedings of the trial. The conditions in Gujarat today are not exactly the same as they were at the time of the incidents, which would justify the shifting of the trial from the State of Gujarat. On the other hand, in case the Sessions trial is transferred outside the State of Gujarat for trial, the prosecution will have to arrange for production of its witnesses, who are

large in number, to any venue that may be designated outside the State of Gujarat.

42. At the present moment, the case for transfer of the trial outside the State of Gujarat is based on certain incidents which had occurred in the past and have finally led to the filing of charges against the accused. The main ground on which the petitioners have sought transfer is an apprehension that communal feelings may, once again, raise its ugly head and permeate the proceedings of the trial if it is conducted by the Special Judge, Ahmedabad. However, such an allegation today is more speculative than real, but in order to dispel such apprehension, we also keep it open to the petitioners that in the event the apprehension of the petitioners is proved to be real during the course of the trial, they will be entitled to move afresh before this Court for the relief sought for in the present transfer petition.

IN THE SUPREME COURT OF INDIA

Mohd. Hussain @ Julfikar Ali v. State (Government of NCT of Delhi)

(2012) 9 SCC 408

R.M. Lodha, Anil R. Dave & S.J. Mukhopadhaya, JJ.

The appellant, a foreign national, had been convicted and sentenced by the trial court and the High Court for committing a terrorist act. A two-judge bench of the Supreme Court, deciding an appeal filed by the appellant, held, fifteen years after the incident, that the trial was vitiated. One of the Judges ordered a re-trial, while the other recommended that he be deported since he had already spent fifteen years in prison, out of which eight years had been on death row. The matter was referred to a three-judge bench. The bench, in this case while considering whether a de novo trial was warranted, differentiated between "speedy trial" and "fair trial".

R.M. Lodha, J.: "… 40. "Speedy trial" and "fair trial" to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of the accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution

may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.

41. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.

42. Insofar as the present case is concerned, it has been concurrently held by the two Judges [Mohd. Hussain v. State (Govt. of NCT of Delhi), (2012) 2 SCC 584 : (2012) 1 SCC (Cri) 919] who heard the criminal appeal that the appellant was denied due process of law and the trial held against him was contrary to the procedure prescribed under the provisions of the Code since he was denied right of representation by counsel in the trial. The Judges differed on the course to be followed after holding that the trial against the appellant was flawed.

43. We have to consider now, whether the matter requires to be remanded for a de novo trial in the facts and the circumstances of the present case. The incident is of 1997. It occurred in a public transport bus when that bus was carrying passengers and stopped at a bus-stand. The moment the bus stopped an explosion took place inside the bus that ultimately resulted in death of four persons and injury to twenty-four persons. The nature of the incident and the circumstances in which it occurred speak volume about the very grave nature of offence. As a matter of fact, the appellant has been charged for the offences under Sections 302/307 IPC and Section 3 and, in the alternative, Section 4(b) of the ES Act. It is true

that the appellant has been in jail since 9-3-1998 and it is more than 14 years since he was arrested and he has passed through mental agony of death sentence and the retrial at this distance of time shall prolong the culmination of the criminal case but the question is whether these factors are sufficient for the appellant's acquittal and dismissal of indictment. We think not.

44. It cannot be ignored that the offences with which the appellant has been charged are of very serious nature and if the prosecution succeeds and the appellant is convicted under Section 302 IPC on retrial, the sentence could be death or life imprisonment. Section 302 IPC authorises the court to punish the offender of murder with death or life imprisonment. Gravity of the offences and the criminality with which the appellant is charged are important factors that need to be kept in mind, though it is a fact that in the first instance the accused has been denied due process. While having due consideration to the appellant's right, the nature of the offence and its gravity, the impact of crime on the society, more particularly the crime that has shaken the public and resulted in death of four persons in a public transport bus cannot be ignored and overlooked. It is desirable that punishment should follow offence as closely as possible. In an extremely serious criminal case of the exceptional nature like the present one, it would occasion in failure of justice if the prosecution is not taken to the logical conclusion. Justice is supreme. The retrial of the appellant, in our opinion, in the facts and circumstances, is indispensable. It is imperative that justice is secured after providing the appellant with the legal practitioner if he does not engage a lawyer of his choice."

IN THE SUPREME COURT OF INDIA

V.K. Sasikala v. State

(2012) 9 SCC 771

P. Sathasivam & Ranjan Gogoi, JJ.

The appellant had demanded and was denied inspection/copies of documents that were although not relied upon by the prosecution but were part of the police report under Section 173 CrPC. The Court analyzed whether this would violate the principles of fair trial, and passed certain directions to remedy the wrong done.

Ranjan Gogoi, J: "12. The parameters governing the process of investigation of a criminal charge, the duties of the investigating agency and the role of the courts after the process of investigation is over and a report thereof is submitted to the court is exhaustively laid down in the different Chapters of the Code of Criminal Procedure, 1973 (CrPC). Though the power of the investigating agency is large and expansive and the courts have a minimum role in this regard there are inbuilt provisions in the Code to ensure that investigation of a criminal offence is conducted keeping in mind the rights of an accused to a fair process of investigation. The mandatory duty cast on the investigating agency to maintain a case diary of every investigation on a day-to-day basis and the power of the court under Section 172(2) and the plenary power conferred in the High Courts by Article 226 of the Constitution are adequate safeguards to ensure the conduct of a fair investigation.

13. Without dilating on the said aspect of the matter what has to be taken note of now are the provisions of the Code that deal with a situation/ stage after completion of the investigation of a case. In this regard the provisions of Section 173(5) may be specifically noted. The said provision makes it incumbent on the investigating agency to forward/transmit to the court concerned all documents/statements, etc. on which the prosecution proposes to rely in the course of the trial. Section 173(5), however, is subject to the provisions of Section 173(6) which confers a power on the investigating officer to request the court concerned to exclude any part of the statement or documents forwarded under Section 173(5) from the copies to be granted to the accused.

…

16. …It is not in dispute that after the appearance of the accused in the Court of the Special Judge a large number of documents forwarded to the court by the investigating officer along with his report, had been furnished to the accused. Thereafter, charges against the accused had been framed way back in the year 2007 and presently the trial has reached the stage of examination of the second accused i.e. the appellant under the provisions of Section 313 CrPC. At no earlier point of time (before the examination of the second accused under Section 313 CrPC) had the accused pointed out that there are documents in the Court which have been forwarded to it under Section 173(5) and which have not been relied upon by the prosecution. It is only at such an advanced stage of the trial that the accused, after pointing out the said facts, had claimed an entitlement to copies of the said documents or at least an inspection of the same on the ground that the said documents favour the accused.

17. Seizure of a large number of documents in the course of investigation of a criminal case is a common feature. After completion of the process of investigation and before submission of the report to the court under Section 173 CrPC, a fair amount of application of mind on the part of the investigating agency is inbuilt in the Code. Such application of mind is both with regard to the specific offence(s) that the investigating officer may consider to have been committed by the accused and also the identity and particulars of the specific documents and records, seized in the course of investigation, which supports the conclusion of the investigating officer with regard to the offence(s) allegedly committed. Though it is only such reports which support the prosecution case that are required to be forwarded to the Court under Section 173(5) in every situation where some of the seized papers and documents do not support the prosecution case and, on the contrary, supports the accused, a duty is cast on the investigating officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. However, it is not impossible to visualise a situation whether the investigating officer ignores the part of the seized documents which favour the accused and forwards to the court only those documents which support the prosecution. If such a situation is pointed by the accused and such documents have, in fact, been forwarded to the court would it not be the duty of the court to make available such documents to the accused regardless of the fact whether the same may not have been marked and exhibited by the prosecution? What would happen in a situation where such documents

are not forwarded by the investigating officer to the court is a question that does not arise in the present case. What has arisen before us is a situation where evidently the unmarked and unexhibited documents of the case that are being demanded by the accused had been forwarded to the court under Section 173(5) but are not being relied upon by the prosecution. Though the prosecution has tried to cast some cloud on the issue as to whether the unmarked and unexhibited documents are a part of the report under Section 173 CrPC, it is not denied by the prosecution that the said unmarked and unexhibited documents are presently in the custody of the court. Besides, the accused in her application before the learned trial court (IA No. 711 of 2012) had furnished specific details of the said documents and had correlated the same with reference to specific seizure lists prepared by the investigating agency. In such circumstances, it can be safely assumed that what has happened in the present case is that along with the report of investigation a large number of documents have been forwarded to the court out of which the prosecution has relied only on a part thereof leaving the remainder unmarked and unexhibited.

18. In a recent pronouncement in Manu Sharma v. State (NCT of Delhi) [(2010) 6 SCC 1] to which one of us (Sathasivam, J.) was a party, the role of a Public Prosecutor and his duties of disclosure have received a wide and in-depth consideration of this Court. This Court has held that though the primary duty of a Public Prosecutor is to ensure that an accused is punished, his duties extend to ensuring fairness in the proceedings and also to ensure that all relevant facts and circumstances are brought to the notice of the Court for a just determination of the truth so that due justice prevails. The fairness of the investigative process so as to maintain the citizens' rights under Articles 19 and 21 and also the active role of the court in a criminal trial have been exhaustively dealt with by this Court. Finally, it was held that it is the responsibility of the investigating agency as well as that of the courts to ensure that every investigation is fair and does not erode the freedom of an individual except in accordance with law. It was also held that one of the established facets of a just, fair and transparent investigation is the right of an accused to ask for all such documents that he may be entitled to under the scheme contemplated by the Code of Criminal Procedure. The said scheme was duly considered by this Court in different paragraphs of the report.

…

20. The declaration of the law in Manu Sharma [(2010) 6 SCC 1] may have touched upon the outer fringe of the issues arising in the present

case. However, the positive advancement that has been achieved cannot, in our view, be allowed to take a roundabout turn and the march has only to be carried forward. If the claim of the appellant is viewed in the context and perspective outlined above, according to us, a perception of possible prejudice, if the documents or at least an inspection thereof is denied, looms large. The absence of any claim on the part of the accused to the said documents at any earlier point of time cannot have the effect of foreclosing such a right of the accused. Absence of such a claim, till the time when raised, can be understood and explained in several reasonable and acceptable ways. Suffice it would be to say that individual notion of prejudice, difficulty or handicap in putting forward a defence would vary from person to person and there can be no uniform yardstick to measure such perceptions. If the present appellant has perceived certain difficulties in answering or explaining some part of the evidence brought by the prosecution on the basis of specific documents and seeks to ascertain if the allegedly incriminating documents can be better explained by reference to some other documents which are in the court's custody, an opportunity must be given to the accused to satisfy herself in this regard. It is not for the prosecution or for the court to comprehend the prejudice that is likely to be caused to the accused. The perception of prejudice is for the accused to develop and if the same is founded on a reasonable basis it is the duty of the court as well as the prosecution to ensure that the accused should not be made to labour under any such perception and the same must be put to rest at the earliest. Such a view, according to us, is an inalienable attribute of the process of a fair trial that Article 21 guarantees to every accused.

21. The issue that has emerged before us is, therefore, somewhat larger than what has been projected by the State and what has been dealt with by the High Court. The question arising would no longer be one of compliance or non-compliance with the provisions of Section 207 CrPC and would travel beyond the confines of the strict language of the provisions of CrPC and touch upon the larger doctrine of a free and fair trial that has been painstakingly built up by the courts on a purposive interpretation of Article 21 of the Constitution. It is not the stage of making of the request; the efflux of time that has occurred or the prior conduct of the accused that is material. What is of significance is if in a given situation the accused comes to the court contending that some papers forwarded to the court by the investigating agency have not been exhibited by the prosecution as the same favours the accused the court must concede a right to the accused to have an access to the said documents, if so claimed. This,

according to us, is the core issue in the case which must be answered affirmatively. In this regard, we would like to be specific in saying that we find it difficult to agree with the view taken by the High Court that the accused must be made to await the conclusion of the trial to test the plea of prejudice that he may have raised. Such a plea must be answered at the earliest and certainly before the conclusion of the trial, even though it may be raised by the accused belatedly. This is how the scales of justice in our criminal jurisprudence have to be balanced.

…

23.4. While the anxiety to bring the trial to its earliest conclusion has to be shared it is fundamental that in the process none of the well-entrenched principles of law that have been laboriously built by illuminating judicial precedents are sacrificed or compromised. In no circumstance, can the cause of justice be made to suffer, though, undoubtedly, it is highly desirable that the finality of any trial is achieved in the quickest possible time."

IN THE SUPREME COURT OF INDIA

Sahara India Real Estate Corporation v. SEBI

(2012) 10 SCC 603

S.H. Kapadia, C.J., D.K. Jain, S.S. Nijjar, Ranjana P. Desai & J.S. Khehar, JJ.

The Court was faced with the question as to whether passing a postponement order with respect to reporting of judicial proceedings in the interest of fair trial, was violative of free speech principles laid down in the Constitution. The Court examined the scope of postponement orders, examining whether Article 19(2) applies in this regard. Issues relating to fair trial were analyzed.

S.H. Kapadia, C.J.: "***Indian Approach to Prior Restraint:***

I. Judicial Decisions

25. At the outset, it may be stated that the Supreme Court is not only the sentinel of the fundamental rights but also a balancing wheel between the rights, subject to social control. Freedom of expression is one of the most cherished values of a free democratic society. It is indispensable to the operation of a democratic society whose basic postulate is that the Government shall be based on the consent of the governed. But, such a consent implies not only that the consent shall be free but also that it shall be grounded on adequate information, discussion and aided by the widest possible dissemination of information and opinions from diverse and antagonistic sources. Freedom of expression which includes freedom of the press has a capacious content and is not restricted to expression of thoughts and ideas which are accepted and acceptable but also to those which offend or shock any section of the population. It also includes the right to receive information and ideas of all kinds from different sources. In essence, the freedom of expression embodies the right to know. However, under our Constitution no right in Part III is absolute. Freedom of expression is not an absolute value under our Constitution. It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government. Underlying our

constitutional system are a number of important values, all of which help to guarantee our liberties, *but in ways which sometimes conflict*. Under our Constitution, probably, no values are absolute. All important values, therefore, must be qualified and balanced against other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of *freedom of expression* as it is for other values. Consequently, free speech, in appropriate cases, has got to correlate with fair trial. It also follows that in an appropriate case one right (say freedom of expression) may have to yield to the other right like right to a fair trial. Further, even Articles 14 and 21 are subject to the test of *reasonableness* after the judgment of this Court in *Maneka Gandhi* v. *Union of India* [(1978) 1 SCC 248].

…

30. The question of prior restraint arose before this Court in 1988, in *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.* [(1988) 4 SCC 592 : AIR 1989 SC 190] in the context of publication in one of the national dailies of certain articles which contained adverse comments on the proposed issue of debentures by a public limited company. The validity of the debenture was *sub judice* in this Court. Initially, the Court granted injunction against the press restraining publication of articles on the legality of the debenture issue. The test formulated was that any preventive injunction against the press must be "based on reasonable grounds for keeping the administration of justice unimpaired" and that, there must be reasonable ground to believe that the danger apprehended is real and imminent. The Court went by the doctrine propounded by Holmes, J. of "*clear and present danger*" [*Schenck* v. *United States*, 63 L Ed 470 : 249 US 47 (1919)] . This Court treated the said doctrine as the basis of balance of convenience test. Later on, the injunction was lifted after subscription to debentures had closed.

31. In *Naresh Shridhar Mirajkar* v. *State of Maharashtra* [AIR 1967 SC 1] this Court dealt with the power of the Court to conduct court proceedings *in camera* under its *inherent* powers and also to *incidentally* prohibit publication of the court proceedings or evidence of the cases outside the court by the media. It may be stated that "*Open* Justice" is the cornerstone of our judicial system. It instils faith in the judicial and legal system. However, the right to open justice is not absolute. It can be restricted by the court in its inherent jurisdiction as done in *Mirajkar case* [AIR 1967 SC 1] if the necessities of administration of justice so demand [see *Kehar Singh* v. *State (Delhi Admn.)* [(1988) 3 SCC 609:

1988 SCC (Cri) 711 : AIR 1988 SC 1883]]. Even in the US, the said principle of open justice yields to the said necessities of administration of justice (see *Globe Newspaper Co.* v. *Superior Court* [73 L Ed 2d 248: 457 US 596 (1982)]). The entire law has been reiterated once again in the judgment of this Court in *Mohd. Shahabuddin* v. *State of Bihar* [(2010) 4 SCC 653 : (2010) 2 SCC (Cri) 904], affirming the judgment of this Court in *Mirajkar case* [AIR 1967 SC 1].

32. Thus, the principle of open justice is not absolute. There can be exceptions in the interest of administration of justice. In *Mirajkar* [*Naresh Shridhar Mirajkar* v.*Justice Tarkunde*, (1965) 67 Bom LR 214] , the High Court ordered that the deposition of the defence witness should not be reported in the newspapers. This order of the High Court was challenged in this Court under Article 32. This Court held [AIR 1967 SC 1] that apart from Section 151 of the Code of Civil Procedure, the High Court had the *inherent power* to restrain the press from reporting where administration of justice so demanded. This Court held vide AIR para 30 that evidence of the witness need not receive excessive publicity as fear of such publicity may prevent the witness from speaking the truth. That, such orders prohibiting publication for a *temporary period* during the course of trial are permissible under the *inherent powers* of the court whenever the court is satisfied that interest of justice so requires. As to whether such a temporary prohibition of publication of court proceedings in the media under the inherent powers of the court can be said to offend Article 19(1)(*a*) rights (which include freedom of the press to make such publication), this Court held that an order of the Court passed to protect the interest of justice and the administration of justice *could not be treated as violative of Article 19(1)(a)* (see AIR para 12). The judgment of this Court in *Mirajkar* [AIR 1967 SC 1] was delivered by a Bench of nine Judges and is binding on this Court.

33. At this stage, it may be noted that the judgment of the Privy Council in *Independent Publishing Co. Ltd.* v. *Attorney General of Trinidad and Tobago* [(2005) 1 AC 190 : (2004) 3 WLR 611 (PC)] has been doubted by the Court of Appeal in New Zealand in *Vincent Ross Siemer* v. *Solicitor General* [2012 NZCA 188] . In any event, on the inherent powers of the courts of record we are bound by the judgment of this Court in *Mirajkar* [AIR 1967 SC 1]. Thus, courts of record under Article 129/Article 215 have inherent powers to prohibit publication of court proceedings or the evidence of the witness. The judgments in *Reliance Petrochemicals Ltd.* [*Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225] and *Mirajkar* [AIR 1967 SC 1] were delivered in civil cases. However, in *Mirajkar* [AIR 1967 SC 1],

this Court held that *all courts* which have inherent powers i.e. the Supreme Court, the High Courts and the civil courts can issue prior restraint orders or proceedings, prohibitory orders in *exceptional circumstances* temporarily prohibiting publications of court proceedings to be made in the media and that such powers do not violate Article 19(1)(*a*). Further, it is important to note, that, one of the heads on which Article 19(1)(*a*) rights can be restricted is in relation to "contempt of court" under Article 19(2). Article 19(2) preserves the common law of contempt as an "existing law". In fact, the Contempt of Courts Act, 1971 embodies the common law of contempt. At this stage, suffice it to state that the Constitution Framers were fully aware of the *institution of contempt* under the common law which they have preserved as "existing law" under Article 19(2) read with Article 129 and Article 215 of the Constitution. The reason being that contempt is an offence *sui generis*. The Constitution Framers were aware that the law of contempt is only one of the ways in which administration of justice is protected, preserved and furthered. That, it is an important adjunct to the criminal process and provides a sanction. *Other* civil courts have the power under Section 151 of the Code of Civil Procedure to pass orders prohibiting publication of court proceedings. In *Mirajkar* [AIR 1967 SC 1], this Court referred to the principles governing courts of record under Article 215 (see AIR para 60). It was held that the High Court is a superior court of record and that under Article 215 it has all the powers of such the Court *including* the power to punish contempt of itself. At this stage, the word "including" in Article 129/Article 215 is to be noted. It may be noted that each of the articles is in two parts. The first part declares that the Supreme Court or the High Court "*shall be the Court of record and shall have all the powers of such the Court*". The second part says "***includes*** *the powers to punish for contempt*". These articles save the pre-existing powers of the Courts as courts of record and that the power *includes* the power to punish for contempt (see *Delhi Judicial Service Assn.* v. *State of Gujarat* [(1991) 4 SCC 406] and *Supreme Court Bar Assn.* v. *Union of India* [(1998) 4 SCC 409]). As such a declaration has been made in the Constitution that the said powers *cannot be taken away* by any law made by Parliament *except to the limited extent* mentioned in Article 142(2) in the matter of investigation or punishment of any contempt of itself. If one reads Article 19(2) which refers to law in relation to contempt of court with the first part of Article 129 and Article 215, it becomes clear that the power is conferred on the High Court and the Supreme Court to see that "the administration of justice is not perverted, prejudiced, obstructed or interfered with". To see that the administration of justice is not prejudiced or perverted clearly includes power of the Supreme Court/High Court to prohibit temporarily, statements

being made in the media which would prejudice or obstruct or interfere with the administration of justice in a given case pending in the Supreme Court or the High Court or even in the subordinate courts. In view of the judgment of this Court in *A.K. Gopalan* v. *Noordeen* [(1969) 2 SCC 734], such statements which could be prohibited temporarily would include statements in the media which would prejudice the right to a fair trial of a suspect or accused under Article 21 from the time when the criminal proceedings in a subordinate court are imminent or where the suspect is arrested. This Court has held in *Ram Autar Shukla* v. *Arvind Shukla* [1995 Supp (2) SCC 130] that the law of contempt is a way to prevent the due process of law from getting perverted. That, the words "due course of justice" in Section 2(*c*) or Section 13 of the 1971 Act are wide enough and are not limited to a particular judicial proceedings. That, the meaning of the words "contempt of court" in Article 129 and Article 215 *is wider than* the definition of "criminal contempt" in Section 2(*c*) of the 1971 Act. Here, we would like to add a caveat. The contempt of court is a special jurisdiction to be exercised sparingly and with caution *whenever an act adversely affects the administration of justice* [see Nigel Lowe and Brenda Sufrin, *Law of Contempt* (3rd Edn., Butterworth, London 1996)]. Trial by newspaper comes in the category of acts which interferes with the course of justice or due administration of justice (see Nigel Lowe and Brenda Sufrin, *Law of Contempt*, p. 5 of 4th Edn.). According to Nigel Lowe and Brenda Sufrin (p. 275) and also in the context of second part of Article 129 and Article 215 of the Constitution the object of the contempt law is not only to punish, it *includes* the power of the courts *to prevent* such acts which interfere, impede or pervert administration of justice. Presumption of innocence is held to be a human right. (See *Ranjitsing Brahmajeetsing Sharma* v. *State of Maharashtra* [(2005) 5 SCC 294 : 2005 SCC (Cri) 1057].) If in a given case the appropriate Court finds infringement of such presumption by excessive prejudicial publicity by the newspapers (in general), then under inherent powers, the courts of record suomotu or on being approached or on report being filed before it by the subordinate court can under its inherent powers under Article 129 or Article 215 pass orders of postponement of publication for a limited period if the applicant is able to demonstrate substantial risk of prejudice to the pending trial and provided that he is able to displace the presumption of open justice and to that extent the burden will be on the applicant who seeks such postponement of offending publication.

34. The above discussion shows that in most jurisdictions there is power in the courts to postpone reporting of judicial proceedings in the interest

of administration of justice. Under Article 19(2) of the Constitution, law in relation to contempt of court, is a reasonable restriction. It also satisfies the test laid down in the judgment of this Court in *R. Rajagopal* v. *State of T.N.* [(1994) 6 SCC 632] As stated, in most common law jurisdictions, discretion is given to the courts to evolve *neutralising devices* under contempt jurisdiction such as postponement of the trial, retrials, change of venue and in appropriate cases even to grant acquittals in cases of excessive media prejudicial publicity. The very object behind empowering the courts to devise such methods is to see that the administration of justice is not perverted, prejudiced, obstructed or interfered with. At the same time, there is a presumption of open justice under the common law. Therefore, courts have evolved mechanisms such as postponement of publicity to balance presumption of innocence, which is now recognised as a human right in *Ranjitsing Brahmajeetsing Sharma* v. *State of Maharashtra* [(2005) 5 SCC 294 : 2005 SCC (Cri) 1057] vis-à-vis presumption of open justice. Such an order of postponement has to be passed only when other alternative measures such as change of venue or postponement of trial are not available. In passing such orders of postponement, the courts have to keep in mind the principle of proportionality and the test of necessity. The applicant who seeks order of postponement of publicity must displace the presumption of open justice and only in such cases the higher courts shall pass the orders of postponement under Article 129/Article 215 of the Constitution. Such orders of postponement of publicity shall be passed for a limited period and subject to the courts evaluating in each case the necessity to pass such orders not only in the context of administration of justice but also in the context of the rights of the individuals to be protected from prejudicial publicity or misinformation, in other words, where the court is satisfied that Article 21 rights of a person are offended. There is no general law for courts to postpone publicity, either prior to adjudication or during adjudication as it would depend on facts of each case. The necessity for any such order would depend on the extent of prejudice, the effect on individuals involved in the case, the overriding necessity to curb the right to report judicial proceedings conferred on the media under Article 19(1)(*a*) and the right of the media to challenge the order of postponement.

…

40. As stated, right to freedom of expression under the First Amendment in US is absolute which is not so under the Indian Constitution in view of such right getting restricted by the test of reasonableness and in view of the heads of restrictions under Article 19(2). Thus, the *clash model* is

more suitable to the American Constitution rather than Indian or Canadian jurisprudence, since the First Amendment has no equivalent of Article 19(2) or Section 1 of the Canadian Charter. This has led the American courts, in certain cases, to evolve techniques or methods to be applied in cases where on account of excessive prejudicial publicity, there is usurpation of court's functions. These are techniques such as retrials being ordered, change of venue, ordering acquittals even at the appellate stage, etc. In our view, orders of postponement of publications/publicity in appropriate cases, as indicated above, keeping in mind the timing (the stage at which it should be ordered), its duration and the right of appeal to challenge such orders is just a *neutralising device*, when no other alternative such as change of venue or postponement of trial is available, evolved by courts as a preventive measure to protect the press from getting prosecuted for contempt and also to prevent administration of justice from getting perverted or prejudiced.

IV. WIDTH OF THE POSTPONEMENT ORDERS

41. The question is whether such "postponement orders" constitute restriction under Article 19(1)(a) and whether such restriction is saved under Article 19(2)?

42. At the outset, we must understand the nature of such orders of postponement. Publicity postponement orders should be seen in the context of Article 19(1)(a) not being an absolute right. The US clash model based on collision between freedom of expression (including free press) and the right to a fair trial will not apply to the Indian Constitution. In certain cases, even the accused seeks publicity (not in the pejorative sense) as openness and transparency is the basis of a fair trial in which all the stakeholders who are a party to a litigation including the Judges are under scrutiny and at the same time people get to know what is going on inside the courtrooms. These aspects come within the scope of Article 19(1) and Article 21. When rights of equal weight clash, the Courts have to evolve balancing techniques or measures based on recalibration under which both the rights are given equal space in the constitutional scheme and this is what the "postponement order" does, subject to the parameters mentioned hereinafter. But, what happens when the courts are required to balance important public interests placed side by side. For example, in cases where presumption of open justice has to be balanced with presumption of innocence, which as stated above, is now recognised as a human right. These presumptions existed at the time

when the Constitution was framed [existing law under Article 19(2)] and they continue till date not only as part of rule of law under Article 14 but also as an Article 21 right. The constitutional protection in Article 21 which protects the rights of the person for a fair trial is, in law, a valid restriction operating on the right to free speech under Article 19(1)(a), by virtue of force of it being a constitutional provision. Given that the postponement orders curtail the freedom of expression of third parties, such orders have to be passed only in cases in which there is real and substantial risk of prejudice to fairness of the trial or to the proper administration of justice which in the words of Justice Cardozo is "the end and purpose of all laws". However, such orders of postponement should be ordered for a limited duration and without disturbing the content of the publication. They should be passed only when necessary to prevent real and substantial risk to the fairness of the trial (court proceedings), if reasonable alternative methods or measures such as change of venue or postponement of trial will not prevent the said risk and when the salutary effects of such orders outweigh the deleterious effects to the free expression of those affected by the prior restraint. The order of postponement will only be appropriate in cases where the balancing test otherwise favours non-publication for a limited period. It is not possible for this Court to enumerate categories of publications amounting to contempt. It would require the courts in each case to see the content and the context of the offending publication. There cannot be any straitjacket formula enumerating such categories. In our view, keeping the above parameters, if the High Court/Supreme Court (being courts of record) pass postponement orders under their inherent jurisdictions, such orders would fall within "reasonable restrictions" under Article 19(2) and which would be in conformity with societal interests, as held in Cricket Assn. of Bengal [(1995) 2 SCC 161] . In this connection, we must also keep in mind the language of Article 19(1) and Article 19(2). Freedom of press has been read into Article 19(1)(a). After the judgment of this Court in Maneka Gandhi [(1978) 1 SCC 248] (p. 284), it is now well settled that the test of reasonableness applies not only to Article 19(1) but also to Article 14 and Article 21. For example, right to access courts under Articles 32, 226 or 136 seeking relief against infringement of say Article 21 rights has not been specifically mentioned in Article 14. Yet, this right has been deduced from the words "equality before the law" in Article 14. Thus, the test of reasonableness which applies in Article 14 context would equally apply to Article 19(1) rights. …

…

45. The postponement order is, as stated above, a *neutralising device* evolved by the courts to balance interests of equal weightage viz. freedom of expression vis-à-vis freedom of trial, in the context of the law of contempt.

…

47. One more aspect needs to be mentioned. Excessive prejudicial publicity leading to usurpation of functions of the court not only interferes with administration of justice which is sought to be protected under Article 19(2), it also prejudices or interferes with a particular legal proceedings. In such case, courts are duty-bound under inherent jurisdiction, subject to above parameters, to protect the presumption of innocence which is now recognised by this Court as a human right under Article 21, subject to the applicant proving *displacement of such a presumption in appropriate proceedings*.

48. Lastly, postponement orders must be integrally connected to the outcome of the proceedings including guilt or innocence of the accused, which would depend on the facts of each case.

49. For the aforestated reasons, we hold that subject to the above parameters, postponement orders fall under Article 19(2) and they satisfy the test of reasonableness.

V. RIGHT TO APPROACH THE HIGH COURT/SUPREME COURT

50. In the light of the law enunciated hereinabove, anyone, be he an accused or an aggrieved person, who genuinely apprehends on the basis of the content of the publication and its effect, an infringement of his/her rights under Article 21 to a fair trial and all that it comprehends, would be entitled to approach an appropriate writ court and seek an order of postponement of the offending publication/broadcast or postponement of reporting of certain phases of the trial (including identity of the victim or the witness or the complainant), and that the court may grant such preventive relief, on a balancing of the right to a fair trial and Article 19(1)(a) rights, bearing in mind the abovementioned principles of necessity and proportionality and keeping in mind that such orders of postponement should be for short duration and should be applied only in cases of real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such neutralising device (balancing test) would not be an unreasonable restriction and on the contrary would fall within the proper constitutional framework."

IN THE SUPREME COURT OF INDIA

Chaluvegowda v. State

(2012) 13 SCC 538

H.L. Dattu & A.R. Dave, JJ.

In a case of murder, where the accused had been acquitted by the trial court, the High Court on appeal appointed an amicus curiae to represent the accused. However, the lawyer was not present in court on the date of hearing. The Court appointed another lawyer as amicus, heard her on the same day, and reserved judgment. It delivered the judgment in the case five days later, convicting the accused. In this case, the Supreme Court analyzed whether this was in violation of the principles of fair trial.

Order:- "11. In our opinion, the High Court rightly thought it fit to appoint yet another learned counsel as amicus curiae to assist the appellant-accused as Smt Pushpakantha, appointed as amicus curiae earlier had not turned up to argue the case and failed to represent the accused. However, having thus appointed another amicus curiae, it was incumbent upon the High Court to have given sufficient time and opportunity to Smt Manjula Kamadolli to go through the papers and prepare her brief, and only then make her submissions. We do not approve the method in which SmtKamadolli was made to argue the case on the very day she was asked to represent the respondent-accused. We cannot loose sight of the fact that the accused were acquitted by the learned Sessions Judge after a lengthy trial where prosecution had examined 21 witnesses and had marked numerous exhibits in aid of the prosecution case. The ground realities are that even the best of brains in criminal law jurisprudence would certainly take some time to scan through the prosecution case, lengthy cross-examination of material witnesses, nuances of the prosecution case and the possible reasons and conclusion reached by the learned Sessions Judge. This aspect appears to have been lost sight of by the learned Judges who had vast experience as learned Judges, who had conducted and decided the cases arising under the criminal law jurisprudence. Even otherwise also, a learned counsel who was sitting in the Court, for some other case, if he or she is asked to accept a brief, which has its own complexities and make the submission either for the prosecution or for the defence, the counsel may accept the brief out of sheer humility and

respect to the Court, but may not be in a position to do any justice either to himself/herself, to the brief and to the Court. Therefore, in our opinion, sufficient time and complete papers should have been made available, so that the advocate chosen may serve the cause of justice with all ability at her/his command.

…

18. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for an accused is presumed to be innocent until proved to be otherwise in a fairly conducted trial. This right would include that he be defended by a competent counsel. The provision of an amicus curiae for an accused, in case the accused is unable to engage an advocate to conduct his defence, is to ensure the goal of a fair trial which is a guarantee provided in the Constitution. We may recall the often quoted passage of Potter Stewart "Fairness is what justice really is".

19. The right to be represented by a lawyer must not be an empty formality. It must not be a sham or an eyewash. The appointment of an amicus curiae for the defence of an accused person must be in true letter and spirit, with due regard to the effective opportunity of hearing that is to be afforded to every accused person before being condemned. The due process of law incorporated in our constitutional system demands that a person not only be given an opportunity of being heard before being condemned, but also that such opportunity be fair, just and reasonable.

20. It is appropriate to recall Powell v. Alabama [77 L Ed 158: 287 US 45 (1932)], in which nine Black men were accused of raping two White women, and were charged with the same. Since the accused were from a different State, they did not have legal assistance, so the trial Judge, in a very vague manner, appointed all the members of the Alabama Bar to defend the accused. However, when the actual trial was underway, none of the lawyers defended the accused, but only offered to provide assistance to the defence lawyer. Satisfied by this, the trial Judge allowed the trial to proceed in the absence of an effective legal assistance for the accused, and the trial resulted in a conviction with the death sentence accorded on the accused. The US Supreme Court took strong exception to the procedure adopted by the trial court. The Court held: (L Ed p. 162: US p. 53)

> "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his

> own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard."

21. The Court, speaking through Sutherland, J. further held: (Powell case [77 L Ed 158: 287 US 45 (1932)], L Ed p. 165: US p. 58)

> "… The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.
>
> It is not enough to assume that counsel thus precipitated into the case thought there was no defence, and exercised their best judgment in proceeding to trial without preparation."

22. In *Gideon* v. *Wainwright* [9 L Ed 2d 799 : 372 US 335 (1963)] the US Supreme Court, approving the above observations, laid down following principles: (L Ed p. 805)

> "… In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants

> charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defences. That Government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trial in some countries, but it is in ours."

23. This Court in *Mohd. Sukur Ali* v. *State of Assam* [(2011) 4 SCC 729 : (2011) 2 SCC (Cri) 481] has held: (SCC pp. 730-32, paras 5 & 9-10)

> "5. We are of the opinion that even assuming that the counsel for the accused does not appear because of the counsel's negligence or deliberately, even then the court should not decide a criminal case against the accused in the absence of his counsel since an accused in a criminal case should not suffer for the fault of his counsel and in such a situation the court should appoint another counsel as amicus curiae to defend the accused. This is because liberty of a person is the most important feature of our Constitution. Article 21 which guarantees protection of life and personal liberty is the most important fundamental right of the fundamental rights guaranteed by the Constitution. Article 21 can be said to be the 'heart and soul' of the fundamental rights.
>
> ***
>
> 9. In Maneka Gandhi v. Union of India [(1978) 1 SCC 248], it has been held by a Constitution Bench of this Court that the procedure for depriving a person of his life or liberty should be fair, reasonable and just. We are of the opinion that it is not fair or just that a criminal case should be decided against an accused in the absence of a counsel. It is only a lawyer who is conversant with law who can properly defend an accused in a criminal case. Hence, in

> our opinion, if a criminal case (whether a trial or appeal/revision) is decided against an accused in the absence of a counsel, there will be violation of Article 21 of the Constitution.
>
> 10. The right to appear through counsel has existed in England for over three centuries. In ancient Rome there were great lawyers e.g. Cicero, Scaevola, Crassus, etc. who defended the accused. In fact the higher the human race has progressed in civilisation, the clearer and stronger has that right appeared, and the more firmly has it been held and asserted. Even in the Nuremberg trials the Nazi war criminals, responsible for killing millions of persons, were yet provided counsel. Therefore when we say that the accused should be provided counsel we are not bringing into existence a new principle but simple recognising what already existed and which civilised people have long enjoyed."

…

25. In our considered view, the appellant-accused were not given an effective opportunity to defend themselves in a case as the one involved here, carrying the possibility of a substantial prison sentence. Therefore, we say, the procedure adopted by the High Court is not only contrary to the Rules as quoted above, and also contrary to the fair trial which is the first imperative of dispensation of justice. Therefore, it is difficult for us to sustain the impugned judgment and order [State v. Chaluvegowda, Criminal Appeal No. 777 of 1996, order dated 17-10-2001 (KAR)] passed by the High Court."

IN THE SUPREME COURT OF INDIA

Natasha Singh v. CBI

(2013) 5 SCC 741

Dr. B.S. Chauhan & F.M. Ibrahim Kalifulla, JJ.

Both the trial court and the Delhi High Court dismissed the appellant's applications under Section 311 CrPC for summoning material witnesses. The Supreme Court considered whether this violated the principle of fair trial.

Dr. B.S. Chauhan, J.: "… 15. The scope and object of [Section 311] is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as "any court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardised. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. [Vide Talab Haji Hussain v. Madhukar Purshottam Mondkar [AIR 1958 SC 376], Zahira Habibulla H. Sheikh v. State of Gujarat [(2004) 4 SCC 158], Zahira Habibullah Sheikh (5) v. State of Gujarat [(2006) 3 SCC 374], Kalyani Baskar v. M.S. Sampoornam [(2007) 2 SCC 258], Vijay Kumar v. State of U.P. [(2011) 8 SCC 136] and Sudevanand v. State [(2012) 3 SCC 387].]

…

20. Undoubtedly, an application filed under Section 311 CrPC must be allowed if fresh evidence is being produced to facilitate a just decision, however, in the instant case, the learned trial court prejudged the evidence of the witness sought to be examined by the appellant, and thereby caused grave and material prejudice to the appellant as regards her defence, which tantamounts to a flagrant violation of the principles of law governing the production of such evidence in keeping with the provisions of Section 311 CrPC. By doing so, the trial court reached the conclusion that the production of such evidence by the defence was not essential to facilitate a just decision of the case. Such an assumption is wholly misconceived, and is not tenable in law as the accused has every right to adduce evidence in rebuttal of the evidence brought on record by the prosecution. The court must examine whether such additional evidence is necessary to facilitate a just and proper decision of the case."

IN THE SUPREME COURT OF INDIA

J. Jayalalithaa v. State of Karnataka

(2014) 2 SCC 401

Dr. B.S. Chauhan & S.A. Bobde, JJ.

While transferring the case of the petitioner to another state, the Supreme Court had issued a direction to the State of Karnataka to appoint a Special Public Prosecutor for the case. The appointment of the appointed SPP was later withdrawn by the State without giving reasons. The Supreme Court analyzed whether this was in violation of fair trial of the accused.

Dr. B.S. Chauhan, J.: "28. Fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society. Thus, fair trial must be accorded to every accused in the spirit of the right to life and personal liberty and the accused must get a free and fair, just and reasonable trial on the charge imputed in a criminal case. Any breach or violation of public rights and duties adversely affects the community as a whole and it becomes harmful to the society in general. In all circumstances, the courts have a duty to maintain public confidence in the administration of justice and such duty is to vindicate and uphold the "majesty of the law" and the courts cannot turn a blind eye to vexatious or oppressive conduct that occurs in relation to criminal proceedings.

29. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a trial before an impartial Judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seem to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution. Right to get a fair trial is not only a basic

fundamental right but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution. "No trial can be allowed to prolong indefinitely due to the lethargy of the prosecuting agency or the State machinery and that is the raison d'être in prescribing the time frame" for conclusion of the trial.

30. Article 12 of the Universal Declaration of Human Rights provides for the right to a fair trial what is enshrined in Article 21 of our Constitution. Therefore, fair trial is the heart of criminal jurisprudence and, in a way, an important facet of a democratic polity and is governed by the rule of law. Denial of fair trial is crucifixion of human rights. [Vide Triveniben v. State of Gujarat [(1989) 1 SCC 678], Abdul Rehman Antulay v. R.S. Nayak [(1992) 1 SCC 225], Raj Deo Sharma (2) v. State of Bihar [(1999) 7 SCC 604], Dwarka Prasad Agarwal v. B.D. Agarwal [(2003) 6 SCC 230], K. Anbazhagan v. Supt. of Police, (2004) 3 SCC 767], Zahira Habibullah Sheikh (5) v. State of Gujarat [(2006) 3 SCC 374], Noor Aga v. State of Punjab [(2008) 16 SCC 417], Amarinder Singh v. Parkash Singh Badal [(2009) 6 SCC 260], Mohd. Hussain v. State (Govt. of NCT of Delhi) [(2012) 2 SCC 584], Sudevanand v. State [(2012) 3 SCC 387], Rattiram v. State of M.P. [(2012) 4 SCC 516] and Natasha Singh v. CBI [(2013) 5 SCC 741]."

CHAPTER 3
SENTENCING

Principles of Sentencing

Sentencing is an important phase of a criminal trial. The Supreme Court has in various judgments discussed the purposes of sentencing, thus providing guidance to courts in relation to exercising their sentencing powers. In **Modi Ram & Lala v. State of Madhya Pradesh,**[1] the Court held that the sentence should neither be too severe nor too lenient. It held that the factors to be kept in mind while deciding the question of sentence are: motive and magnitude of the offence, the circumstances in which it was committed, and the age and character (including his antecedents) and station in life of the offender. In **B.G. Goswami v. Delhi Administration,**[2] the Court held that the purpose of sentencing is that the accused must realise that he/she has committed an act which is not only harmful to the society of which he/she forms an integral part but is also harmful to his/her own future. It ruled that punishment should be designed to reform the offender and reclaim him /her as a law abiding citizen for the good of the society as a whole. In **Mohammad Giasuddin v State of Andhra Pradesh,**[3] the Court, speaking through Justice Krishna Iyer, laid emphasis on the reformatory theory of punishment, and advocated various measures to reform the offender. It ruled that a humanistic approach should be taken to sentencing, and social factors should be considered by while deciding on sentence.

Section 235(2) of the CrPC provides for a pre-sentence hearing, after a person has been convicted of an offence. Analysing the scope of this section, the Supreme Court in **Santa Singh v State of Punjab,**[4] held that the purpose of Section 235(2) was not limited to merely an oral hearing and that the accused should be permitted to place before the Court, material facts that have a bearing on sentence. Additionally, the Court held that non-compliance with the section would not amount to a mere irregularity, but would result in vitiation of sentence. In **Muniappan v State of Tamil Nadu,**[5] the Court held that a formal question to the accused will not suffice, and the judge has to make a genuine effort to elicit all the information that might have a bearing on the question of sentence.

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1 (1972) 2 SCC 630
2 (1974) 3 SCC 85
3 (1977) 3 SCC 287
4 (1976) 4 SCC 190
5 (1981) 3 SCC 11

An important issue that has arisen before the Supreme Court is whether an adjournment can be sought solely to argue on the issue of sentence. An amendment made to Section 309(2), CrPC, stating that an adjournment should not be given by the Court solely for hearing the accused on sentence has been discussed, and adjudicated upon by the Supreme Court. In **Alauddin Mian v. State of Bihar,**[6] the Court discussing the mandatory nature of Section 235(2) of the Code held that it was an important tool to secure the requirements of natural justice and enable the judge to exercise his discretion in a controlled manner. To this effect, the Court ruled that the judge should adjourn the case for another date, in order to facilitate the prosecution and defence to place material relevant to sentencing before the court. In **Sevaka Perumal v State of Tamil Nadu,**[7] the Court also briefly discussed the impact of the proviso of Section 309(2), CrPC and observed that even though in light of the proviso no adjournment should be granted solely for the purpose of hearing the accused on the question of sentence, the accused should still be given a chance to present evidence and the hearing can be on the same day, if the parties are ready, or be adjourned if they are not. More recently, in **Ramdeo Chauhan v State of Assam,**[8] the Court once again tried to harmoniously interpret Section 235(2) and the third proviso to Section 309(2) of the CrPC and observed that despite the ban in the latter, the court can in appropriate cases still grant adjournment to the accused to show cause against the sentence since it is a very important right. This judgment is also noteworthy since although Justice K.T. Thomas, while dissenting on other issues before the Court in the case, concurred with the majority on the question of whether an adjournment should be granted for the purpose of hearing on sentence.

The Supreme Court has also analyzed set off under Section 428 of the CrPC. In **Bhagirath v Delhi Administration,**[9] it held that imprisonment for life can be regarded as "imprisonment for a term" under Section 428 of the CrPC and hence, the period of detention already undergone by the accused can be set off against the life sentence. In **State of Maharashtra v Najakat Alia Mubarak Ali,**[10] the issue before the court was whether a person is entitled to have his/her sentence set-off under Section 428, CrPC if he/she is in prison for a second case as well. The court held (by a majority of 2:1) that if a person is convicted for more than one offence, the sentences run concurrently and the period spent in jail will be set off against both the sentences awarded.

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6 (1989) 3 SCC 5
7 (1991) 3 SCC 471
8 (2001) 5 SCC 714
9 (1985) 2 SCC 580
10 (2001) 6 SCC 311

Death Penalty

The Supreme Court has had to regularly adjudicate on the issue of the death sentence, and to issue guidelines in this regard. In **Jagmohan Singh v. State of U.P.,**[11] in ruling on the constitutionality of the death penalty, the Court noted circumstances which play a role in determining the question of sentence, lisiting out illustrative aggravating and mitigating circumstances. Later, in **Rajendra Prasad v. State of U.P.,**[12] the Court noted the importance of reasoning as statutorily mandated by Section 354(3) of the CrPC, 1973. It rejected the retributive theory of punishment and stated that reformation is the primary goal of punishment. Further, it noted the importance of pre-sentencing hearing, as laid down by Section 235(2) of the CrPC, and the manner in which such pre-sentence hearing should be conducted. In **Bachan Singh v. State of Punjab,**[13] the constitutionality of the death penalty was challenged again, and the Supreme Court ruled it to be constitutional. The Court laid down the 'rarest of the rare' doctrine in order to identify cases where the death penalty should be imposed. It overruled **Rajendra Prasad** on two points. First, it clarified that the special reasons related both to the crime as well as the criminal. Second, it held that the restriction of imposition to death penalty to certain specific category of offences was not permissible. The Court laid down a list of aggravating and mitigating circumstances that need to consider while deciding if the alternative option of life sentence is unquestionably foreclosed. At the same time, the majority cautioned that the guidelines are not exhaustive and held that the courts should perform the sentencing function with even more scrupulous care. Justice Bhagwati recorded a famous dissent and held that the death penalty is violative of Articles 14 and 21 of the Constitution of India due to the unguided discretion afforded to the judges. **Machhi Singh v. State of Punjab,**[14] interpreted the guidelines laid down in **Bachan Singh**. The Court said that a balance sheet of aggravating and mitigating circumstances must be drawn to determine if the accused deserves the death penalty. However, the Case has been criticised for re-introducing the balancing criterion that was opposed by the bench in **Bachan Singh**, which was noted and clarified by the Court in **Sangeet v. State of Haryana.**[15] More recently, in **Shankar Kisanrao Khade v State of Maharashtra,**[16] the Court relied on **Bachan Singh** to determine

11 (1973) 1 SCC 20
12 (1979) 3 SCC 646
13 (1982) 3 SCC 24
14 (1983) 3 SCC 470
15 (2013) 2 SCC 452
16 (2013) 5 SCC 546

whether the case at hand fell within the "rarest of rare" category in light of the mitigating and aggravating circumstances. The Supreme Court also expressed its preference for the crime, criminal and rarest of rare test over the balancing test. In **Santosh Kumar Bariyar,**[17] the Supreme Court emphasized the need for "principled sentencing." It noted the arbitrariness in capital sentencing by the Supreme Court of India, and noted how such arbitrariness violated Articles 14 and 21 of the Constitution of India. The Court also provided a framework for sentencing in cases where the death penalty is a sentencing option.

In **Mithu v. State of Punjab**[18], the Apex Court decided that the mandatory death punishment imposed on a person sentenced to life imprisonment is violative of Article 21 of the Constitution for failing to take into account the facts and circumstances of each case. It held that a provision of law which deprives the court of the use of its discretion in a matter of life and death without regard to circumstances in which the offence was committed is harsh, unjust and unfair.

Plea Bargaining

In **Guerrero Lugo Elvia Grissel & Ors. v. State of Maharashtra**[19], the Bombay High Court held that the court has no discretion in terms of imposing a punishment less than the term specified in Section 265E.

Probation

In **Gulzar v State of M.P.,**[20] the Supreme Court held that the provisions of Section 360 of the CrPC would be inapplicable in situations where the POA may be invoked.

17 (2009) 6 SCC 498.
18 (1983) 2 SCC 277.
19 2012 SCC OnLineBom 6.
20 (2007) 1 SCC 619.

IN THE SUPREME COURT OF INDIA

Modi Ram & Lala v. State of Madhya Pradesh

(1972) 2 SCC 630

J.M. Shelat, I.D. Dua & H.R. Khanna, JJ.

The question before the Supreme Court on how to determine adequate sentence. The Court mentions factors that should be considered while imposing sentence.

Dua, J.:"4. The only question with which we are concerned, as observed at the very outset of the judgment, is the question of sentence…Now the question of sentence is always a difficult and complex question. The accused persons found guilty may be hardened or professional criminals having taken to the life of crime since long, or they may have taken to crime only recently or may have committed the crime under the influence of bad company or again commission of a solitary offence may be due to provocative wrongful action seriously injuring the feelings and sentiments of the accused. Human nature being what it is men are at times moved by the impulse of the moment rather than by rational, cool, calculated estimate of the future good and evil. At such moments they are ordinarily inclined to be ready to face any future evil falling short of the inevitable. Keeping in view the broad object of punishment of criminals by courts in all progressive civilised societies true dictates of justice seem to us to demand that all the attending relevant circumstances should be taken into account for determining the proper and just sentence. The sentence should bring home to the guilty party the consciousness that the offence committed by him was against his own interest as also against the interests of the society of which he happens to be a member. In considering the adequacy of the sentence which neither be too severe nor too lenient the court has, therefore, to keep in mind the motive and magnitude of the offence, the circumstances in which it was committed and the age and character (including his antecedents) and station in life of the offender."

IN THE SUPREME COURT OF INDIA

Jagmohan Singh v. State of U.P.

(1973) 1 SCC 20

S.M. Sikri, C.J., A.N. Ray, I.D. Dua, D.G. Palekar & M.H. Beg, JJ.

The question before the Constitution Bench in this case was primarily on the issue of the death penalty. The Court in discussing capital sentencing, also dealt with aggravating and mitigating factors that should be considered while sentencing in non-capital crimes.

Palekar, J.:"22…As regards the rest of the offences, even those cases where the maximum punishment is the death penalty, a wide discretion to punish is given to the Judge. The reasons are explained by Ratanlal …:

> "Circumstances which are properly and expressly recognized by the law as aggravations calling for increased severity of punishment are principally such as consist in the manner in which the offence is perpetrated; whether it be by forcible or fraudulent means, or by aid of accomplices or in the malicious motive by which the offender was actuated, or the consequences to the public or to individual sufferers, or the special necessity which exists in particular cases for counter-acting the temptation to offend, arising from the degree of expected gratification, or the facility of perpetration peculiar to the case. These considerations naturally include a number of particulars, as of time, place, persons and things, varying according to the nature of the case. Circumstances which are to be considered in alleviation of punishment are: (1) the minority of the offender; (2) the old age of the offender; the condition of the offender, e.g., wife, apprentice; (4) the order of a superior military officer; (5) provocation; (6) when

offence was committed under a combination of circumstances and influence of motives which are not likely to recur either with respect to the offender or to any other; (7) the state of health and the sex of the delinquent. [Ed. foot note.— Irresistible impulse has also been accepted. 1972 SCC (Cri) 179 (2), 182 : (1971) 3 SCC 931 (2)] Bentham mentions the following circumstances in mitigation of punishment which should be inflicted: (1) absence of bad intention; (2) provocation; (3) self-preservation; (4) preservation of some near friends; (5) transgression of the limit of self-defence; (6) submission to the menaces; (7) submission to authority; (8) drunkenness; (9) childhood."

IN THE SUPREME COURT OF INDIA

B.G. Goswami v. Delhi Administration

(1974) 3 SCC 85

K.K. Mathew, I.D. Dua, JJ.

The offence dealt with the charge of taking a bribe which was punishable under the Prevention of Corruption Act. The Supreme Court in deciding the case discusses the purposes of sentencing.

Dua, J.:"10. [T]he question of sentence is always a difficult question, requiring as it does, proper adjustment and balancing of various considerations which weigh with a judicial mind in determining its appropriate quantum in a given case. The main purpose of the sentence broadly stated is that the accused must realise that he has committed an act which is not only harmful to the society of which he forms an integral part but is also harmful to his own future, both as an individual and as a member of the society. Punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining this question. In modern civilized societies, however, reformatory aspect is being given somewhat greater importance. Too lenient as well as too harsh sentence both lose their efficaciousness. One does not deter and the other may frustrate, thereby making the offender a hardened criminal."

IN THE SUPREME COURT OF INDIA

Santa Singh v. State of Punjab

(1976) 4 SCC 190

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

The trial court in this case convicted the appellant for a capital offence and sentenced him to death on the same day on which it convicted him. He was not given an opportunity to be heard on the sentence to be imposed upon him. On appeal, the High Court confirmed the conviction and sentence was confirmed. In this Special Leave Petition, the appellant contended that failure of the court to give him an opportunity to be heard on sentence violated the mandate of Section 235(2) of the CrPC, 1973. The Court in this case discusses the scope of Section 235(2).

P.N. Bhagwati, J.: "2. …This provision is clear and explicit and does not admit of any doubt. It requires that in every trial before the Court of Session, there must first be a decision as to the guilt of the accused…[I]f 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 judgment 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.

3. 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 judgment 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 it 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 realised

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…[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 condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to a 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 are factors which have to be taken into account by the court in deciding upon the appropriate sentence, and, therefore, the legislature felt that, for this purpose, a separate stage should be provided after conviction when the court can hear the accused in regard to these factors bearing on sentence and then pass proper sentence on the accused. Hence the new provision in Section 235(2).

4. 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 submissions 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 is the hearing to be confined only to oral submissions? That depends on the interpretation to be placed on the word "hear". Now, the word "hear" has no fixed rigid connotation. It can bear either of the two rival meanings depending on the context in which it occurs. It is a well settled rule of interpretation, hallowed by time and sanctified by authority, that the meaning of an ordinary word is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which it is used and the object which is intended to be attained. 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. Modern penology, as pointed out by this Court

in Ediga Anamma v. State of Andhra Pradesh [(1974) 4 SCC 443 : 1974 SCC (Cri) 479 : (1974) 3 SCR 329] "regards crime and criminal 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 personalise 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."

We have set out a large number of factors which go into the alchemy which ultimately produces an appropriate sentence and full and adequate material relating to these factors would have to be brought before the court in order to enable the court to pass an appropriate sentence. This material may be placed before the court by means of affidavits, but if either party disputes the correctness or veracity of the material sought to be produced by the other, on opportunity would have to be given to the party concerned to lead evidence for the purpose of bringing such material on record. The hearing on the question of sentence, would be rendered devoid of all meaning and content and it would become an idle formality, if it were confined merely to hearing oral submissions without any opportunity being given to the parties and particularly to the accused, to produce material in regard to various factors bearing on the question of sentence, and if necessary, to lead evidence for the purpose of placing such material before the court. This was also the opinion expressed by the Law Commission in its Forty-eighth Report where it was stated that: "the taking of evidence as to the circumstances relevant to sentencing should be encouraged and both the prosecution and the accused should be allowed to cooperate in the process".

The Law Commission strongly recommended that "if a request is made in that behalf by either the prosecution or 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 hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the accused to place before the court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same. Of course, care would have to be taken by the court to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting

the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings.

5. 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, to produce material and make submissions in regard to the sentence to be imposed on him. Since the appellant was convicted under Section 302 of the Indian Penal Code, only two options were available to the Sessions Court in the matter of sentencing the appellant either to sentence him to death or to impose on him sentence of imprisonment for life…[T]he Sessions Court chose to inflict death sentence on the appellant and the possibility cannot be ruled out that if the accused had been given opportunity to produce material and make submissions on the question of sentence, as contemplated by Section 235(2), he might have been able to persuade the Sessions Court to impose the lesser penalty of life imprisonment. 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.

6.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 that 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…No inference can…be drawn from the omission 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.

7. So far as Section 465 of the Code of Criminal Procedure, 1973 is concerned, I do not think it can avail the State in the present case. In the first place, non-compliance with the requirement of Section 235(2) cannot be described as mere irregularity in the course of the trial curable under

Section 465. It is much more serious. It amounts to bypassing an important stage of the trial and omitting it altogether, so that the trial cannot be said to be that contemplated in the Code. It is a different kind of trial conducted in a manner different from that prescribed by the Code. This deviation constitutes disobedience to an express provision of the Code as to the mode of trial, and as pointed out by the Judicial Committee of the Privy Council in Subramania Iyer v. King Emperor [(1901) 28 IA 257 : ILR 25 Mad 61] such a deviation cannot be regarded as a mere irregularity. It goes to the root of the matter and the resulting illegality is of such a character that it vitiates the sentence. Vide Pulukuri Kotayya v. King Emperor [AIR 1947 PC 67 : (1947) 74 IA 65] and Magga v. State of Rajasthan [AIR 1953 SC 174 :1953 SCR 973, 983-984 : 1953 Cri LJ 892] . Secondly, when no opportunity has been given to the appellant to produce material and make submissions in regard to the sentence to be imposed on him, failure of justice must be regarded as implicit. Section 465 cannot, in the circumstances, have any application in a case like the present.

8. I accordingly allow the appeal and whilst not interfering with the conviction of the appellant under Section 302 of the Indian Penal Code, set aside the sentence of death and remand the case to the Sessions Court with a direction to pass appropriate sentence after giving an opportunity to the appellant to be heard in regard to the question of sentence in accordance with the provision of Section 235(2) as interpreted by me.

S. Murtaza Fazal Ali, J. (concurring): I entirely agree with the judgment proposed by my learned Brother Bhagwati, J. and I am at one with the views expressed by him in his judgment, but I would like to add a few lines of my own to highlight some important aspects of the question involved in this appeal…

11. A perusal of this section clearly reveals that the object of the 1973 Code was to split up the sessions trial or the warrant trial, where also a similar provision exists, into two integral parts — (i) the stage which culminates in the passing of the judgment of conviction or acquittal; and (ii) the stage which on conviction results in imposition of sentence on the accused. Both these parts are absolutely fundamental and non-compliance with any of the provisions would undoubtedly vitiate the final order passed by the court. The two provisions do not amount merely to a ritual formula or an exercise in futility but have a very sound and definite purpose to achieve. Section 235(2) of the 1973 Code enjoins on the court that after passing a judgment of conviction the court should stay its hands and hear

the accused on the question of sentence before passing the sentence in accordance with the law. This obviously postulates that the accused must be given an opportunity of making his representation only regarding the question of sentence and for this purpose he may be allowed to place such materials as he may think fit but which may have bearing only on the question of sentence. The statute, in my view, seeks to achieve a socio economic purpose and is aimed at attaining the ideal principle of proper sentencing in a rational and progressive society. The modern concept of punishment and penology has undergone a vital transformation and the criminal is now not looked upon as a grave menace to the society which should be got rid of but as a diseased person suffering from mental malady or psychological frustration due to subconscious reactions and is, therefore, to be cured and corrected rather than to be killed or destroyed. There may be a number of circumstances of which the court may not be aware and which may be taken into consideration by the court while awarding the sentence, particularly a sentence of death, as in the instant case. It will be difficult to lay down any hard and fast rule, but the statement of objects and reasons of the 1973 Code itself gives a clear illustration. It refers to an instance where the accused is the sole bread-earner of the family. In such a case if the sentence of death is passed and executed it amounts not only to a physical effacement of the criminal but also a complete socio-economic destruction of the family which he leaves behind. Similarly there may be cases, where, after the offence and during the trial, the accused may have developed some virulent disease or some mental infirmity, which may be an important factor to be taken into consideration while passing the sentence of death. It was for these reasons that Section 235(2) of the 1973 Code was enshrined in the Code for the purpose of making the court aware of these circumstances so that even if the highest penalty of death is passed on the accused he does not have a grievance that he was not heard on his personal, social and domestic circumstances before the sentence was given.

…

13. The next question that arises for consideration is whether non-compliance with Section 235(2) is merely an irregularity which can be cured by Section 465 or it is an illegality which vitiates the sentence. Having regard to the object and the setting in which the new provision of Section 235(2) was inserted in the 1973 Code there can be no doubt that it is one of the most fundamental parts of the criminal procedure and non-compliance thereof will ex facie vitiate the order. Even if it be regarded as an irregularity the prejudice caused to the accused would be inherent

and implicit because of the infraction of the rules of natural justice which have been incorporated in this statutory provision, because the accused has been completely deprived of an opportunity to represent to the court regarding the proposed sentence and which manifestly results in a serious failure of justice. There is abundant authority for this proposition to which reference has been made by my learned Brother.

14. The last point to be considered is the extent and import of the word "hear" used in Section 235(2) of the 1973 Code. Does it indicate that the accused should enter into a fresh trial by producing oral and documentary evidence on the question of the sentence which naturally will result in further delay of the trial? Parliament does not appear to have intended that the accused should adopt dilatory tactics under the cover of this new provision but contemplated that a short and simple opportunity has to be given to the accused to place materials if necessary by leading evidence before the court bearing on the question of sentence and a consequent opportunity to the prosecution to rebut those materials. The Law Commission was fully aware of this anomaly and it accordingly suggested thus:

> "We are aware that a provision for an opportunity to give evidence in this respect may necessitate an adjournment; and to avoid delay adjournment, for the purpose should, ordinarily be for not more than 14 days. It may be so provided in the relevant clause."

It may not be practicable to keep up to the time-limit suggested by the Law Commission with mathematical accuracy but the courts must be vigilant to exercise proper control over the proceedings so that the trial is not unavoidably or unnecessarily delayed."

SUPREME COURT OF INDIA

Mohammad Giasuddin v. State of Andhra Pradesh

(1977) 3 SCC 287

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

The appellant was convicted of cheating under Section 420 of the IPC. The trial court provided a perfunctory pre-sentence hearing under Section 248(2), CrPC. The judges only looked at the serious nature of the crime and failed to take the other relevant social facts into consideration, and so this appeal raised questions regarding the sentence passed.

V.R. Krishna Iyer, J.: "4. Progressive criminologists across the world will agree that the Gandhian diagnosis of offenders as patients and his conception of prisons as hospitals — mental and moral — is the key to the pathology of delinquency and the therapeutic role of "punishment". The whole man is a healthy man and every man is born good. Criminality is a curable deviance. The morality of the law may vary, but is real. The basic goodness of all human beings is a spiritual axiom, a fall-out of the advaita of cosmic creation and the spring of correctional thought in criminology.

5. If every saint has a past, every sinner has a future, and it is the role of law to remind both of this. The Indian legal genius of old has made a healthy contribution to the word treasury of criminology. The drawback of our criminal process is that often they are built on the bricks of impressionist opinions and dated values, ignoring empirical studies and deeper researches.

…

16. 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 reformative angle. This Court, in Santa Singh [Santa Singh v. State of Punjab, (1976) 4 SCC 190 : 1976 SCC (Cri) 546] , has emphasized how fundamental it is to put such provision to dynamic judicial use, while dealing with the analogous provisions in Section 235(2)…

17. …[T]here is a great discretion vested in the Judge, especially when pluralistic factors enter 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.

18. 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 or other are too insensitisve to the highly delicate and subtle operation expected of a sentencing Judge. Release on probation, conditional sentences, visits to healing centres, are all on the cards. We do not wish to be exhaustive. Indeed, we cannot be.

19. 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 recognised 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 an obsolescent backseat to the sophisticated judgment on sentencing. Now this judicial skill has to come of age.

…

33. We allow the appeal in humanist part, as outlined above, while affirming the conviction. More concretely, we direct that (a) the sentence shall be reduced to 18 (eighteen) months, less the period already undergone; (b) our directions, abovementioned, regarding parole and assignment of suitable work and payment of wages in jail shall be complied with; and (c) the appellant shall pay a fine of Rs 1200…"

IN THE SUPREME COURT OF INDIA

Rajendra Prasad v. State of Uttar Pradesh

(1979) 3 SCC 646

V.R. Krishna Iyer, D.A. Desai & A.P. Sen, JJ.

The appellant had questioned the constitutionality of the discretionary power in courts to award the death sentence or life imprisonment.

Krishna Iyer, J.:"8. We banish possible confusion about the precise issue before us — it is not the constitutionality of the provision for death penalty, but only the canalisation of the sentencing discretion in a competing situation. The former problem is now beyond forensic doubt after Jagmohan Singh [Jagmohan Singh v. State of U.P., (1973) 1 SCC 20 : 1973 SCC (Cri) 169: AIR 1973 SC 947 (Ed. : Coram : Sikri, C. J. and Ray, Dua, Palekar and Beg, JJ. Judgment by Palekar, J)] and the latter is in critical need of tangible guidelines, at once constitutional and functional. The law reports reveal the impressionistic and unpredictable notes struck by some decisions and the occasional vocabulary of horror and terror, of extenuation and misericordia, used in the sentencing tailpiece of judgments. Therefore, this jurisprudential exploration, within the framework of Section 302 IPC, has become necessitous, both because the awesome 'either/or' of the section spells out no specific indicators and law in this fatal area cannot afford to be conjectural. Guided missiles, with lethal potential, in unguided hands, even judicial, is a grave risk where the peril is mortal though tempered by the appellate process. The core question — the only question — that occupies our attention, within the confines of the Code, is as to when and why shall capital sentence be pronounced on a murderer and why not in other cases.

9. The penological poignancy and urgency of the solution is obvious since the human stakes are high, and error, even judicial error, silences for ever a living being and despatches him to that 'undiscovered country from whose bourn no traveller returns': nor, once executed, can 'storied urn or

animated bust back to its mansion call the fleeting breath'. The macabre irrevocability of the extreme penalty makes the sombre issue before us too important to be relegated, as often happens, to a farewell paragraph with focus on frightful features of the crime and less stress on the crime-doer and related factors. When human rights jurisprudence and constitutional protections have escalated to sublime levels in our country and heightened awareness of the gravity of death penalty is growing all over the civilised globe in our half-century, is it right to leave Section 302 IPC, in vague duality and value-free neutrality? Any academic who has monitored Indian sentencing precedents on murder may awaken to 'the overt ambivalence and covert conflict' among Judges 'concerning continued resort to the death sentence' which, according to Prof. Blackshield, [Prof. A.R. Blackshield (Associate Professor of Law, University of New South Wales): Capital Punishment in India — The impact of the Ediga Anamma case — July 1977] 'seems to mirror the uncertainties and conflicts of values in the community itself'. This tangled web of case-law has been woven around the terse terms of Section 302 IPC during the last hundred years.

The Old Text And The New Light

> Section 302. Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

Such stark brevity leaves a deadly discretion but beams little legislative light on when the Court shall hang the sentence or why the lesser penalty shall be preferred. This facultative fluidity of the provision reposes a trust in the court to select. And 'discretionary' navigation in an unchartered sea is a hazardous undertaking unless recognised and recognizable principles, rational and constitutional, are crystallised as 'interstitial legislation' by the highest court. The flame of life cannot flicker uncertain; and so Section 302 IPC, must be invested with pragmatic concreteness that inhibits ad hominem responses of individual Judges and is in penal conformance with constitutional norms and world conscience. Within the dichotomous framework of Section 302 IPC, upheld in Jagmohan Singh(supra), we have to evolve working rules of punishment bearing the markings of enlightened flexibility and societal sensibility. Hazy law, where human life hangs in the balance, injects an agonising consciousness that judicial error may prove to be 'crime' beyond 'punishment.'

…

15. We are cognizant of the fact that no inflexible formula is feasible which will provide a complete set of criteria for the infinite variety of circumstances that may affect the gravity of the crime of murder, as pointed out by Palekar. J., in Jagmohan Singh. The learned Judge further observed: (SCC p. 35, para 26)

> "The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment. The discretion in the matter of sentence is, as already pointed out, liable to be corrected by superior courts."

16. What is important to remember is that while rigid prescriptions and random proscriptions which imprison judicial discretion may play tricks with justice, the absence, altogether, of any defined principles except a variorum of rulings may stultify sentencing law and denude it of decisional precision. 'Well-recognised principles' is an elegant phrase. But what are they, when minds differ even on the basics?

17. Fluctuating facts and kaleidoscopic circumstances, bewildering novelties and unexpected factors, personal vicissitudes and societal variables may defy standard-setting for all situations; but that does not mean that humane principles should be abandoned and blanket discretion endowed, making life and liberty the plaything of the mentality of human judges. Benjamin Cardozo has pricked the bubble of illusion about the utter objectivity of the judicial process: [Op. Cit., supra note 9, p. 167]

> "I have spoken of the forces of which Judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed . . . Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."

Section 302 is silent; so the Judges have to speak, because the courts must daily sentence. Merely to say that discretion is guided by well-recognised principles shifts the issue to what those recognised rules are. Are they the same as were exercised judicially when Bhagat Singh was swung into physical oblivion? No. The task is to translate in new terms the currently consecrated principles, informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in social life'. The error of parallax which dated thought processes, through dusty precedents, may project needs to be corrected. That is the essay we undertake here.

18. Moreover, the need for well-recognised principles to govern the 'deadly' discretion is so interlaced with fair procedure that unregulated power may even militate against Article 21 as expounded in Maneka Gandhi case [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] , an aspect into which we do not enter here. Judicial absolutism or ad hocism is anathema in our constitutional scheme. It has been said that 'a judge untethered by a text is a dangerous instrument'; and we may well add, judge-power, uncanalised by clear principles may be equally dangerous when the consequence of his marginal indiscretion may be horrific hanging of a human being until he be dead. Palekar, J., himself accepted that "well-recognised principles" must govern sentencing discretion.

…

24. Prof. Blackshield, on an analytical study of Indian death sentence decisions, has remarked with unconventional candour: [Supra note 2]

> "But where life and death are at stake, inconsistencies which are understandable may not be acceptable."

His further comments are noteworthy:

> "The fact is that in most cases where the sentence of death under Section 302 is confirmed by the Supreme Court, there is little or no discussion of the reasons for confirmation. Sometimes there is a brief assertion of "no extenuating circumstances" (which means to imply that the Court is making its own discretionary judgment); at other times there is a brief assertion of "no ground to interfere" (which seems to imply that the Court is merely reviewing the legitimacy of the High Court's choice

> of sentence). The result is to obfuscate, probably beyond any hope of rationalisation, the analytical issues involved."

The twists and turns in sentencing pattern and the under-emphasis on the sentencee's circumstances in decided cases make an in-depth investigation of the 'principles' justifying the award of death sentence a constitutional duty of conscience. This Court must extricate, until Parliament legislates, the death sentence sector from judicial subjectivism and consequent uncertainty. As Justice Cardozo, bluntly states: [Op. cit. : supra note 9, pp. 167-168]

> "There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if Judges must lose respect and confidence by the reminder that they are subject to human limitations ... if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men do not turn aside in their course and pass the Judges by."

25. It is fair to mention that the humanistic imperatives of the Indian Constitution, as paramount to the punitive strategy of the Penal Code, have hardly been explored by courts in this field of 'life or death' at the hands of the law. The main focus of our judgment is on this poignant gap in 'human rights jurisprudence' within the limits of the Penal Code, impregnated by the Constitution. To put it pithily, a world order voicing the worth of the human person, a cultural legacy charged with compassion, an interpretative liberation from colonial callousness to life and liberty, a concern for social justice as setting the sights of individual justice, interact with the inherited text of the Penal Code to yield the goals desiderated by the Preamble and Articles 14, 19 and 21.

…

52. Punishment by deprivation of life or liberty must be validated by Articles 21, 19 and 14 — the first guarantees fair procedure, the second is based on reasonableness of the deprivation of freedom to live and exercise the seven liberties and the last is an assurance of non-arbitrary and civilized

punitive treatment. But in the connotation of these and other Articles of Part III, the social justice promise of Part IV and the primordial proposition of human dignity set high in the Preamble must play upon the meaning.

…

88. We may summarise our conclusions to facilitate easier application and to inject scientific formulation.

(1) The criminal law of the Raj vintage has lost some of its vitality, notwithstanding its formal persistence in print in the Penal Code so far as Section 302 IPC, is concerned. In the post-Constitution period Section 302 IPC, and Section 354(3) of the Code of Criminal Procedure have to be read in the humane light of Parts III and IV, further illumined by the Preamble to the Constitution. In Sunil Batra [Sunil Batra v. Delhi Administration, (1978) 4 SCC 494, 569, 572] a Constitution Bench of this Court has observed: (SCC pp. 569 and 572, paras 213-A and 222)

"Consciously and deliberately we must focus our attention, while examining the challenge, to one fundamental fact that we are required to examine the validity of a pre-constitution statute in the context of the modern reformist theory of punishment, jail being treated as a correctional institution .... Cases are not unknown where merely on account of a long lapse of time, the Courts have commuted the sentence of death to one of life imprisonment on the sole ground that the prisoner was for a long time hovering under the tormenting effect of the shadow of death." (emphasis added).

(2) The scheme of the Code, read in the light of the Constitution, leaves no room for doubt that reformation, not retribution, is the sentencing lodestar.

The retributive theory has had its day and is no longer valid. Deterrence and reformation are the primary social goals which make deprivation of life and liberty reasonable as penal panacea.

(3) 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.

(4) 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 new Code of 1973. So also the intense suffering already endured by prison torture or agonising death penalty hanging overhead consequent on the legal process.

…

(9) 'Special reasons' necessary for imposing death penalty must relate, not to the crime as such but to the criminal. The crime may be shocking and yet the criminal may not deserve death penalty. The crime may be less shocking than other murders and yet the callous criminal, e.g. a lethal economic offender, may be jeopardizing societal existence by his act of murder. Likewise, a hardened murderer or dacoit or armed robber who kills and relishes killing and raping and murdering to such an extent that he is beyond rehabilitation within a reasonable period according to current psychotherapy or curative techniques may deserve the terminal sentence. Society survives by security for ordinary life. If officers enjoined to defend the peace are treacherously killed to facilitate perpetuation of murderous and often plunderous crimes social justice steps in to demand death penalty dependent on the totality of circumstances.

(10) We must always have the brooding thought that there is a divinity in every man and that none is beyond redemption. But death penalty, still on our Code, is the last step in a narrow category where, within a reasonable spell, the murderer is not likely to be cured and tends to murder others, even within the prison or immediately on release, if left alive — a king cobra which, by chronic habit, knows only to sting to death unless defanged if possible. The patience of society must be tempered by the prudence of social security and that is the limited justification for deprivation of fundamental rights by extinguishment of the whole human being. The extreme penalty can be invoked only in extreme situations.

The criminology of higher consciousness claims that by expanding inner awareness through meditational and yogic techniques the worst offender can be reformed, if prisons can function more fulfillingly and less fatuously — a consummation devoutly to be wished. Murderers are not born but made and often can be unmade.

> This claim, if experimented with and found credible, goes a long way to remove from the scales of justice stains of human blood. When this healing hope is developed adequately, maybe the penal pharmacopoea may remove death sentence from the system. The journey is long and we are far from home. Currently, our prisons often practise zoological, not humanising strategies, as some competent reports and writings trend to prove."

…

94. A specific stage is prescribed in the trial of cases tried by the Sessions Court in accordance with the procedure prescribed in Chapter XVIII. After the prosecution evidence is complete and the accused is called upon to enter the defence and if evidence is led on behalf of defence, after the defence evidence is complete, the Court should hear arguments of the prosecutor and the advocate on behalf of the accused (see Section 234). Thereafter comes Section 235 which obligates the Court to give a judgment. The question of sentence does not enter the verdict or consideration at this stage. If the accused is to be acquitted, the matter ends there. If the Court, upon consideration of the evidence led before it, holds the accused guilty of any offence it must pronounce judgment to the extent that it holds accused guilty of a certain offence.

95. Thereafter a statutory duty is cast upon the Court to hear the accused on the question of sentence. Sub-section (2) obligates the Court to hear the accused on the question of sentence. In fact, this provision should be construed to mean that where the Court has to choose one or the other sentence and if with a view to inflicting a certain sentence, special reasons are required to be recorded, obviously the State which is the prosecutor, must be called upon to state to the Court which sentence as prosecutor it would consider appropriate in the facts and circumstances of the case.

96. Where the accused is convicted for an offence under Section 302 IPC, the Court should call upon the Public Prosecutor at the stage of Section 235(2) to state to the Court whether the case is one where the accused as a matter of justice should be awarded the extreme penalty of law or the lesser sentence of imprisonment for life. If the Public Prosecutor informs the Court that the State as prosecutor is of the opinion that the case is not one where extreme penalty is called for and if the Sessions Judge agrees with the submission, the matter should end there.

97. If, on the other hand, the Public Prosecutor states that the case calls for extreme penalty prescribed by law, the Court would be well advised

to call upon the Public Prosecutor to state and establish, if necessary, by leading evidence, facts for seeking extreme penalty prescribed by law. Those reasons and the evidence in support of them would provide the special reasons according to the State which impel capital punishment. It would be open to the accused to rebut this evidence either by submissions or if need be, by leading evidence. At that stage the only consideration relevant for the purpose of determining the quantum of punishment would be the consideration bearing on the question of sentence alone and not on the validity of the verdict of guilty. After considering the submissions and evidence it would be for the Court with its extreme judicious approach and bearing in mind the question that the extreme penalty is more an exception, to determine what would be the appropriate sentence. This would ensure a proper appreciation of vital considerations entering judicial verdict for determining the quantum of sentence.

98. We hope the Bar will assist the Bench in fully using the resources of the new provision to ensure socio-personal justice, instead of ritualising the submissions on sentencing by reference only to materials brought on record for proof or disproof of guilt."

IN THE SUPREME COURT OF INDIA

Bachan Singh v. State of Punjab

(1980) 2 SCC 684

Y.V. Chandrachud, C.J., P.N. Bhagwati, R.S. Sarkaria, A.C. Gupta & N.L. Untwalia, JJ.

The appellant challenged the constitutionality of the death penalty. The Court laid down judicial guidelines for imposing the death penalty.

Sarkaria, J.:"151. Section 354(3) of the Code of Criminal Procedure, 1973, marks a significant shift in the legislative policy underlying the Code of 1898, as in force immediately before April 1, 1974, according to which both the alternative sentences of death or imprisonment for life provided for murder and for certain other capital offences under the Penal Code, were normal sentences. Now, according to this changed legislative policy which is patent on the face of Section 354(3), the normal punishment for murder and six other capital offences under the Penal Code, is imprisonment for life (or imprisonment for a term of years) and death penalty is an exception. The Joint Committee of Parliament in its Report, stated the object and reason of making this change, as follows:

> "A sentence of death is the extreme penalty of law and it is but fair that when the Court awards that sentence in a case where the alternative sentence of imprisonment for life is also available, it should give special reasons in support of the sentence."

Accordingly, sub-section (3) of Section 354 of the current Code provides:

> "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 judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."

152. In the context, we may also notice Section 235(2) of the Code of 1973, because it makes not only explicit, what according to the decision inJagmohan case [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : (1973) 2 SCR

541] was implicit in the scheme of the code, but also bifurcates the trial by providing for two hearings, one at the pre-conviction stage and another at the pre-sentence stage. It requires that:

> "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."

The Law Commission in its 48th Report had pointed out this deficiency in the sentencing procedure:

> "45. It is now being increasingly recognised that a rational and consistent sentencing policy requires the removal of several deficiencies in the present system. One such deficiency is the lack of comprehensive information as to characteristics and background of the offender.
>
> The aims of sentencing: Themselves obscure — become all the more in the absence of information on which the correctional process is to operate. The public as well as the courts themselves are in the dark about judicial approach in this regard. We are of the view that the taking of evidence as to the circumstances relevant to sentencing should be encouraged and both the prosecution and the accused should be allowed to cooperate in the process."

By enacting Section 235(2) of the new Code, Parliament has accepted that recommendation of the Law Commission. Although sub-section (2) of Section 235 does not contain a specific provision as to evidence and provides only for hearing of the accused as to sentence, yet it is implicit in this provision that if a request is made in that behalf by either the prosecution or the accused, or by both, the Judge should give the party or parties concerned an opportunity of producing evidence or material relating to the various factors bearing on the question of sentence. "Of course", as was pointed out by this Court in Santa Singh v. State of Punjab [(1976) 4 SCC 190 : 1976 SCC (Cri) 545 : AIR 1976 SC 2386],

> "care would have to be taken by the court to see that this hearing on the question of sentence is not turned into an instrument for unduly protracting the

proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings."

…

160. In the light of the above conspectus, we will now consider the effect of the aforesaid legislative changes on the authority and efficacy of the propositions laid down by this Court in Jagmohan case [(1978) 1 SCC 248 : (1978) 2 SCR 621] . These propositions may be summed up as under:

"(i) The general legislative policy that underlines the structure of our criminal law, principally contained in the Indian Penal Code and the Criminal Procedure Code, is to define an offence with sufficient clarity and to prescribe only the maximum punishment therefore, and to allow a very wide discretion to the Judge in the matter of fixing the degree of punishment.

With the solitary exception of Section 303, the same policy permeates Section 302 and some other sections of the Penal Code, where the maximum punishment is the death penalty.

(ii) (a) No exhaustive enumeration of aggravating or mitigating circumstances which should be considered when sentencing an offender, is possible. "The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no Jury (Judge) would need." (referred to McGoutha v. California [(1971) 402 US 183])

(b) The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment.

(iii) The view taken by the plurality in Furman v. Georgia [33 L Ed 2d 346 : 408 US 238 (1972)] decided by the Supreme Court of the United States, to the

effect, that a law which gives uncontrolled and unguided discretion to the Jury (or the Judge) to choose arbitrarily between a sentence of death and imprisonment for a capital offence, violates the Eighth Amendment, is not applicable in India. We do not have in our Constitution any provision like the Eighth Amendment, nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply "the due process" clause. There are grave doubts about the expediency of transplanting western experience in our country. Social conditions are different and so also the general intellectual level. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area.

(iv) (a) This discretion in the matter of sentence is to be exercised by the Judge judicially, after balancing all the aggravating and mitigating circumstances of the crime.

(b) The discretion is liable to be corrected by superior courts. The exercise of judicial discretion on well recognised principles is, in the final analysis, the safest possible safeguard for the accused.

In view of the above, it will be impossible to say that there would be at all any discrimination, since crime as crime may appear to be superficially the same but the facts and circumstances of a crime are widely different. Thus considered, the provision in Section 302, Penal Code is not violative of Article 14 of the Constitution on the ground that it confers on the Judges an unguided and uncontrolled discretion in the matter of awarding capital punishment or imprisonment for life.

(v) (a) Relevant facts and circumstances impinging on the nature and circumstances of the crime can be brought before the court at the preconviction stage, notwithstanding

the fact that no formal procedure for producing evidence regarding such facts and circumstances had been specifically provided. 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 challenges the facts.

(b) It is to be emphasised that in exercising its discretion to choose either of the two alternative sentences provided in Section 302 Penal Code, "the court is principally concerned with the facts and circumstances whether aggravating or mitigating, which are connected with the particular crime under inquiry. 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 CrPC. The trial 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. The only thing that remains is for the Judge to decide on the guilt and punishment and that is what Sections 306(2) and 309(2), CrPC purport to provide for. These provisions are part of the procedure established by law and unless it is shown that they are invalid for any other reasons they must be regarded as valid. No reasons are offered to show that they are constitutionally invalid and hence the death sentence imposed after trial in accordance with the procedure established by law is not unconstitutional under Article 21". (SCC p. 36),

(emphasis added)"

161. A study of the propositions set out above, will show that, in substance, the authority of none of them has been affected by the legislative changes since the decision in Jagmohan case [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : (1973) 2 SCR 541] . Of course, two of them require to be adjusted and

attuned to the shift in the legislative policy. The first of those propositions is No. (iv)(a) which postulates, that according to the then extant Code of Criminal Procedure both the alternative sentences provided in Section 302 of the Penal Code are normal sentences and the court can, therefore, after weighing the aggravating and mitigating circumstances of the particular case, in its discretion, impose either of those sentences. This postulate has now been modified by Section 354(3) which mandates the court convicting a person for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, not to impose the sentence of death on that person unless there are "special reasons" — to be recorded — for such sentence. The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. Thus, the legislative policy now writ large and clear on the face of Section 354(3) is that on conviction for murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only in extreme cases.

…

163. Another proposition, the application of which, to an extent, is affected by the legislative changes, is No. (v). In portion (a) of that proposition, it is said that circumstances impinging on the nature and circumstances of the crime can be brought on record before the pre-conviction stage. In portion (b), it is emphasised that while making choice of the sentence under Section 302 of the Penal Code, the court is principally concerned with the circumstances connected with the particular crime under inquiry. Now, Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3), a bearing on the choice of sentence. The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302 of the Penal Code, the court should not confine its consideration "principally" or merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal.

165. …Now, Parliament has in Section 354 (3) given a broad and clear guide-line which is to serve the purpose of lodestar to the court in the

exercise of its sentencing discretion. Parliament has advisedly not restricted this sentencing discretion further, as, in its legislative judgment, it is neither possible nor desirable to do so. Parliament could not but be aware that since the Amending Act 26 of 1955, death penalty has been imposed by courts on an extremely small percentage of persons convicted of murder — a fact which demonstrates that courts have generally exercised their discretion in inflicting this extreme penalty with great circumspection, caution and restraint. Cognizant of the past experience of the administration of death penalty in India, Parliament, in its wisdom, thought it best and safe to leave the imposition of this gravest punishment in gravest cases of murder, to the judicial discretion of the courts which are manned by persons of reason, experience and standing in the profession. The exercise of this sentencing discretion cannot be said to be untrammelled and unguided. It is exercised judicially in accordance with well recognised principles crystallised by judicial decisions, directed along the broad contours of legislative policy towards the signposts enacted in Section 354(3).

166. The new Section 235(2) adds to the number of several other safeguards which were embodied in the Criminal Procedure Code of 1898 and have been re-enacted in the Code of 1973. Then, the errors in the exercise of this guided judicial discretion are liable to be corrected by the superior courts. The procedure provided in Criminal Procedure Code for imposing capital punishment for murder and some other capital crimes under the Penal Code cannot, by any reckoning, be said to be unfair, unreasonable and unjust. Nor can it be said that this sentencing discretion, with which the courts are invested, amounts to delegation of its power of legislation by Parliament. The argument to that effect is entirely misconceived. We would, therefore, reaffirm the view taken by this Court in Jagmohan [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : (1973) 2 SCR 541] , and hold that the impugned provisions do not violate Articles 14, 19 and 21 of the Constitution.

…

196. This takes us to the question of indicating the broad criteria which should guide the courts in the matter of sentencing a person convicted of murder under Section 302 of the Penal Code. Before we embark on this task, it will be proper to remind ourselves, again that “while we have an obligation to ensure that the constitutional bounds are not overreached, we may not act as judges as we might as legislatures”. [428 US 153 : 49 L Ed 2d 859]

197. In Jagmohan [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : (1973) 2 SCR 541] , this Court had held that this sentencing discretion is to be exercised judicially on well recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. By "well recognised principles" the court obviously meant the principles crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases. The legislative changes since Jagmohan [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : (1973) 2 SCR 541] — as we have discussed already — do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354(3) and 235(2), namely: (1) The extreme penalty can be inflicted only in gravest cases of extreme culpability; (2) In making choice of the sentence, in addition to the circumstances, of the offence, due regard must be paid to the circumstances of the offender, also.

…

201. ... As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because "style is the man". In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

Bhagwati, J.* "13-15. It can therefore now be taken to be well-settled that if a law is arbitrary or irrational, it would fall foul of Article 14 and would be liable to be struck down as invalid. Now a law may contravene Article 14 because it enacts provisions which are arbitrary: as for example, they make discriminatory classification which is not founded on intelligible differentia having rational relation to the object sought to be achieved

by the law or they arbitrarily select persons or things for discriminatory treatment. But there is also another category of cases where without enactment of specific provisions which are arbitrary, a law may still offend Article 14 because it confers discretion on an authority to select persons or things for application of the law without laying down any policy or principle to guide the exercise of such discretion. Where such unguided and unstructured discretion is conferred on an authority, the law would be violative of Article 14 because it would enable the authority to exercise such discretion arbitrarily and thus discriminate without reason. Unfettered and unchartered discretion conferred on any authority, even if it be the judiciary, throws the door open for arbitrariness, for after all a judge does not cease to be a human being subject to human limitations when he puts on the judicial robe and the nature of the judicial process being what it is, it cannot be entirely free from judicial subjectivism…[W]here discretion is conferred on an authority by a statute, the court always strains to find in the statute the policy or principle laid down by the legislature for the purpose of guiding the exercise of such discretion and, as pointed out by Subba Rao, J., as he then was, the court sometimes even tries to discover the policy or principle in the crevices of the statute in order to save the law from the challenge of Article 14 which would inevitably result in striking down of the law if the discretion conferred were unguided and unfettered. But where after the utmost effort and intense search, no policy or principle to guide the exercise of discretion can be found, the discretion conferred by the law would be unguided and unstructured, like a tumultuous river overflowing its banks and that would render the law open to attack on ground of arbitrariness under Article 14.

69. ...I must now turn to consider the attack against the constitutional validity of death penalty provided under Section 302 of the Indian Penal Code read with Section 354, sub-section (3) of the Code of Criminal Procedure, 1973 on the ground that these sections confer an unguided and standardless discretion on the court whether to liquidate an accused out of existence or to let him continue to live and the vesting of such discretion in the court renders the death penalty arbitrary and freakish. This ground of challenge is in my opinion well founded and it furnishes one additional reason why the death penalty must be struck down as violative of Articles 14 and 21. It is obvious on a plain reading of Section 302 of the Indian Penal Code which provides death penalty as alternative punishment for murder that it leaves it entirely to the discretion of the court whether to impose death sentence or to award only life imprisonment to an accused convicted of the offence of murder. This section does not lay down any standards or

principles to guide the discretion of the court in the matter of imposition of death penalty. The critical choice between physical liquidation and lifelong incarceration is left to the discretion of the court and no legislative light is shed as to how this deadly discretion is to be exercised. The court is left free to navigate in an uncharted sea without any compass or directional guidance. The respondents sought to find some guidance in Section 354, sub-section (3) of the Code of Criminal Procedure, 1973 but I fail to see how that section can be of any help at all in providing guidance in the exercise of discretion. On the contrary it makes the exercise of discretion more difficult and uncertain. Section 354, sub-section (3) provides that in case of offence of murder, life sentence shall be the rule and it is only in exceptional cases for special reasons that death penalty may be awarded. But what are the special reasons for which the court may award death penalty is a matter on which Section 354, sub-section (3) is silent nor is any guidance in that behalf provided by any other provision of law. It is left to the judge to grope in the dark for himself and in the exercise of his unguided and unfettered discretion decide what reasons may be considered as 'special reasons' justifying award of death penalty and whether in a given case any such special reasons exist which should persuade the court to depart from the normal rule and inflict death penalty on the accused. There being no legislative policy or principle to guide the court in exercising its discretion in this delicate and sensitive area of life and death, the exercise of discretion of the court is bound to vary from judge to judge. What may appear as special reasons to one judge may not so appear to another and the decision in a given case whether to impose the death sentence or to let off the offender only with life imprisonment would, to a large extent, depend upon who is the judge called upon to make the decision. The reason for this uncertainty in the sentencing process is two-fold. Firstly, the nature of the sentencing process is such that it involves a highly delicate task calling for skills and talents very much different from those ordinarily expected of lawyers. This was pointed out clearly and emphatically by Mr Justice Frankfurter in the course of the evidence he gave before the Royal Commission on Capital Punishment:

> "I myself think that the Bench — we lawyers who become Judges — are not very competent, are not qualified by experience, to impose sentence where any discretion is to be exercised. I do not think it is in the domain of the training of lawyers to know what to do with a fellow after you find out he is a thief. I do not think legal training has given you

> any special competence. I, myself, hope that one of these days, and before long, we will divide the functions of criminal justice. I think the lawyers are people who are competent to ascertain whether or not a crime has been committed. The whole scheme of common law judicial machinery — the rule of evidence, the ascertainment of what is relevant and what is irrelevant and what is fair, the whole question of whether you can introduce prior crimes in order to prove intent — I think lawyers are peculiarly fitted for that task. But all the questions that follow upon ascertainment of guilt, I think require very different and much more diversified talents than the lawyers and judges are normally likely to possess."

Even if considerations relevant to capital sentencing were provided by the legislature, it would be a difficult exercise for the judges to decide whether to impose the death penalty or to award the life sentence. But without any such guidelines given by the legislature, the task of the judges becomes much more arbitrary and the sentencing decision is bound to vary with each judge. Secondly, when unguided discretion is conferred upon the court to choose between life and death, by providing a totally vague and indefinite criterion of 'special reasons' without laying down any principles or guidelines for determining what should be considered to be 'special reasons', the choice is bound to be influenced by the subjective philosophy of the judge called upon to pass the sentence and on his value system and social philosophy will depend whether the accused shall live or die. No doubt the judge will have to give 'special reasons' if he opts in favour of inflicting the death penalty, but that does not eliminate arbitrariness and caprice, firstly because there being no guidelines provided by the legislature, the reasons which may appeal to one judge as 'special reasons' may not appeal to another, and secondly, because reasons can always be found for a conclusion that the judge instinctively wishes to reach and the judge can bona fide and conscientiously find such reasons to be 'special reasons'. It is now recognized on all hands that judicial conscience is not a fixed conscience; it varies from judge to judge depending upon his attitudes and approaches, his predilections and prejudices, his habits of mind and thought and in short all that goes with the expression 'social philosophy'. We lawyers and Judges like to cling to the myth that every decision which we make in the exercise of our judicial discretion is guided exclusively by legal principles and we

refuse to admit the subjective element in judicial decision-making. But that myth now stands exploded and it is acknowledged by jurists that the social philosophy of the judge plays a not inconsiderable part in moulding his judicial decision and particularly the exercise of judicial discretion. There is nothing like complete objectivity in the decision-making process and especially so, when this process involves making of decision in the exercise of judicial discretion. Every judgment necessarily bears the impact of the attitude and approach of the judge and his social value system. It would be pertinent here to quote Justice Cardozo's analysis of the mind of a Judge in his famous lectures on Nature of Judicial Process:

> "We are reminded by William James in a telling page of his lectures on Pragmatism that every one of us has in truth an underlying philosophy of life, even those of us to whom the names and the notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them — inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James' phrase of 'the total push and pressure of the cosmos', which when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own."

It may be noted that the human mind, even at infancy, is no blank sheet of paper. We are born with predispositions and the process of education, formal and informal, and, our own subjective experiences create attitudes which affect us in judging situations and coming to decisions. Jerome Frank says in his book Law and the Modern Mind, in an observation with which I find myself in entire agreement:

> "Without acquired 'slants' preconceptions, life could not go on. Every habit constitutes a pre-judgment; were those pre-judgments which we call habits

> absent in any person, were he obliged to treat every event as an unprecedented crisis presenting a wholly new problem, he would go mad. Interests, points of view, references, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference. . . . An 'open mind' in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being."

It must be remembered that "a Judge does not shed the attributes of common humanity when he assumes the ermine". The ordinary human mind is a mass of preconceptions inherited and acquired, often unrecognized by their possessor. "Few minds are as neutral as a sheet of plain glass and indeed a mind of that quality may actually fail in judicial efficiency, for the warmer tints of imagination and sympathy are needed to temper the cold light of reason, if human justice is to be done." It is, therefore, obvious that when a judge is called upon to exercise his discretion as to whether the accused shall be killed or shall be permitted to live, his conclusion would depend to a large extent on his approach and attitude, his predilections and preconceptions, his value system and social philosophy and his response to the evolving norms of decency and newly developing concepts and ideas in penological jurisprudence. One judge may have faith in the Upanishad doctrine that every human being is an embodiment of the divine and he may believe with Mahatma Gandhi that every offender can be reclaimed and transformed by love and it is immoral and unethical to kill him, while another judge may believe that it is necessary for social defence that the offender should be put out of way and that no mercy should be shown to him who did not show mercy to another. One judge may feel that the Naxalites, though guilty of murders, are dedicated souls totally different from ordinary criminals as they are motivated not by any self-interest but by a burning desire to bring about a revolution by eliminating vested interests and should not therefore be put out of corporal existence while another judge may take the view that the Naxalites being guilty of cold premeditated murders are a menace to the society and to innocent men and women and therefore deserve to be liquidated. The views of judges as to what may be regarded as "special reasons" are bound to differ from judge to judge depending upon his value system and social philosophy with the result that whether a person shall live or die depends very much upon the composition of the Bench which tries his case and this renders the imposition of death penalty arbitrary and capricious.

70. Now this conclusion reached by me is not based merely on theoretical or a priori considerations. On an analysis of decisions given over a period of years we find that in fact there is no uniform pattern of judicial behaviour in the imposition of death penalty and the judicial practice does not disclose any coherent guidelines for the award of capital punishment. The judges have been awarding death penalty or refusing to award it according to their own scale of values and social philosophy and it is not possible to discern any consistent approach to the problem in the judicial decisions. It is apparent from a study of the judicial decisions that some judges are readily and regularly inclined to sustain death sentences, other are similarly disinclined and the remaining waver from case to case. Even in the Supreme Court there are divergent attitudes and opinions in regard to the imposition of capital punishment. If a case comes before one Bench consisting of Judges who believe in the social efficacy of capital punishment, the death sentence would in all probability be confirmed but if the same case comes before another Bench consisting of Judges who are morally and ethically against the death penalty, the death sentence would most likely be commuted to life imprisonment. The former would find and I say this not in any derogatory or disparaging sense, but as a consequence of psychological and attitudinal factors operating on the minds of the Judges constituting the Bench — 'special reasons' in the case to justify award of death penalty while the latter would reject any such reasons as special reasons. It is also quite possible that one Bench may, having regard to its perceptions, think that there are special reasons in the case for which death penalty should be awarded while another Bench may bona fide and conscientiously take a different view and hold that there are no special reasons and that only life sentence should be imposed and it may not be possible to assert objectively and logically as to who is right and who is wrong, because the exercise of discretion in a case of this kind, where no broad standards or guidelines are supplied by the legislature, is bound to be influenced by the subjective attitude and approach of the judges constituting the Breach, their value system, the individual tone of their mind, the colour of their experience and the character and variety of their interests and their predispositions. This arbitrariness in the imposition of death penalty is considerably accentuated by the fragmented Bench structure of our courts where Benches are inevitably formed with different permutations and combinations from time to time and cases relating to the offence of murder come up for hearing sometimes before one Bench, sometimes before another sometimes before a third and so on. Professor Blackshield has in his article on Capital Punishment in India published in Volume 21 ot the Journal of the Indian Law Institute [At pp 137-226 (Issue

of April-June, 1979)] pointed out how the practice of Bench formation contributes to arbitrariness in the imposition of death penalty. It is well known that so far as the Supreme Court is concerned, while the number of Judges has increased over the years, the number of Judges on Benches which hear capital punishment cases has actually decreased. Most cases are now heard by two-Judge Benches. Professor Blackshield has abstracted 70 cases in which the Supreme Court had to choose between life and death while sentencing an accused for the offence of murder and analysing these 70 cases he has pointed out that during the period April 28, 1972 to March 8, 1976 only 11 Judges of the Supreme Court participated in 10 per cent or more of the cases. He has listed these 11 Judges in an ascending order of leniency based on the proportion for each Judge of plus votes (i.e. votes for the death sentence) to total votes and pointed out that these statistics show how the judicial response to the question of life and death varies from judge to judge. It is significant to note that out of 70 cases analysed by Professor Blackshield, 37 related to the period subsequent to the coming into force of Section 354, sub-section (3) of the Code of Criminal Procedure, 1973. If a similar exercise is performed with reference to cases decided by the Supreme Court after March 8, 1976, that being the date up to which the survey carried out by Professor Blackshield was limited, the analysis will reveal the same pattern of incoherence and arbitrariness, the decision to kill or not to kill being guided to a large extent by the composition of the Bench. Take for example Rajendra Prasad case [(1979) 3 SCC 646 : 1979 SCC (Cri) 749 : AIR 1979 SC 916 : 1979 Cri LJ 792] decided on February 9, 1979. In this case, the death sentence imposed on Rajendra Prasad was commuted to life imprisonment by a majority consisting of Krishna Iyer, J. and Desai, J., A.P. Sen, J. dissented and was of the view that the death sentence should be confirmed. Similarly in one of the cases before us, namely, Bachan Singh v. State of Punjab [(1979) 3 SCC 727 : 1979 SCC (Cri) 830 : (1979) 3 SCR 1193] , when it was first heard by a Bench consisting of Kailasam and Sarkaria, JJ., Kailasam, J. was definitely of the view that the majority decision in Rajendra Prasad case [(1979) 3 SCC 646 : 1979 SCC (Cri) 749 : AIR 1979 SC 916 : 1979 Cri LJ 792] was wrong and that is why he referred that case to the Constitution Bench. So also in Dalbir Singh v. State of Punjab [(1979) 3 SCC 745 : 1979 SCC (Cri) 848 : AIR 1979 SC 1384 : (1979) 3 SCR 1059 : 1979 Cri LJ 1058], the majority consisting of Krishna Iyer, J. and Desai, J. took the view that the death sentence imposed on Dalbir Singh should be commuted to life imprisonment while A.P. Sen, J. stuck to the original view taken by him in Rajendra Prasad case [(1979) 3 SCC 646 : 1979 SCC (Cri) 749 : AIR 1979 SC 916 : 1979 Cri LJ 792] and was inclined to confirm the death

sentence, It will thus be seen that the exercise of discretion whether to inflict death penalty or not depends to a considerable extent on the value system and social philosophy of the Judges constituting the Bench.

…

76. But when it was contended that sentencing discretion is inherent in our legal system, and, in fact, it is desirable, because no two cases or criminals are identical and if no discretion is left to the court and sentencing is to be done according to a rigid pre-determined formula leaving no room for judicial discretion, the sentencing process would cease to be judicial and would degenerate into a bed of procrustean cruelty. The argument was that having regard to the nature of the sentencing process, it is impossible to lay down any standards or guidelines which will provide for the endless and often unforeseeable variations in fact situations and sentencing discretion has necessarily to be left to the court and the vesting of such discretion in the court, even if no standards or guidelines are provided by the legislature for structuring or channelling such discretion, cannot be regarded as arbitrary or unreasonable. This argument, plausible though it may seem, is in my opinion not well founded and must be rejected…. Each case presents its own distinctive features, its peculiar combinations of events and its unique configuration of facts. That is why, in the interest of individualised justice, it is necessary to vest sentencing discretion in the court so that appropriate sentence may be imposed by the court in the exercise of its judicial discretion, having regard to the peculiar facts and circumstances of a given case, or else the sentencing process would cease to be just and rational and justice would be sacrificed at the altar of blind uniformity. But at the same time, the sentencing discretion conferred upon the court cannot be altogether uncontrolled or unfettered….The conferment of such sentencing discretion is plainly and indubitably essential for rendering individualised justice. But where the discretion granted to the court is to choose between life and death without any standards or guidelines provided by the legislature, the death penalty does become arbitrary and unreasonable. The death penalty is qualitatively different from a sentence of imprisonment. Whether a sentence of imprisonment is for two years or five years or for life, it is qualitatively the same, namely, a sentence of imprisonment, but the death penalty is totally different. It is irreversible; it is beyond recall or reparation; it extinguishes life. It is the choice between life and death which the court is required to make and this is left to its sole discretion unaided and unguided by any legislative yardstick to determine the choice. The only yardstick which may be said to have been provided by the legislature is that life sentence shall be the rule

and it is only in exceptional cases for special reasons that death penalty may be awarded, but it is nowhere indicated by the legislature as to what should be regarded as 'special reasons' justifying imposition of death penalty. The awesome and fearful discretion whether to kill a man or to let him live is vested in the court and the court is called upon to exercise this discretion guided only by its own perception of what may be regarded as 'special reasons' without any light shed by the legislature. It is difficult to appreciate how a law which confers such unguided discretion on the court without any standards or guidelines on so vital an issue as the choice between life and death can be regarded as constitutionally valid. If I may quote the words of Harlan, J.:

> "Our scheme of ordered liberty is based, like the common law, on enlightened and uniformly applied legal principles, not on ad hoc notions of what is right or wrong in a particular case."

There must be standards or principles to guide the court in making the choice between life and death and it cannot be left to the court to decide upon the choice on an ad hoc notion of what it conceives to be 'special reasons' in a particular case. That is exactly what we mean when we say that the Government should be of laws and not of men and it makes no difference in the application of this principle, whether 'men' belong to the administration or to the judiciary. It is a basic requirement of the equality clause contained in Article 14 that the exercise of discretion must always be guided by standards or norms so that it does not degenerate into arbitrariness and operate unequally on persons similarly situate. Where unguided and unfettered discretion is conferred on any authority, whether it be the executive or the judiciary, it can be exercised arbitrarily or capriciously by such authority, because there would be no standards or principles provided by the legislature with reference to which the exercise of the discretion can be tested. Every form of arbitrariness, whether it be executive waywardness or judicial ad hocism is anathema in our constitutional scheme. There can be no equal protection without equal principles in exercise of discretion. Therefore the equality clause of the Constitution obligates that whenever death sentence is imposed, it must be a principled sentence, a sentence based on some standard or principle and not arbitrary or indignant capital punishment….

77. Sarkaria, J. himself has lamented the impossibility of formulating standards or guidelines in this highly sensitive area and pointed out in the majority judgment: (SCC p. 741, para 171)

> ". . . there is little agreement among penologists and jurists as to what information about the crime and criminal is relevant and what is not relevant for fixing the dose of punishment for a person convicted of a particular offence. According to Cessare Beccaria, who is supposed to be the intellectual progenitor of today's fixed sentencing movement, 'crimes are only to be measured by the injury done to society'. But the 20th Century sociologists do not wholly agree with this view. In the opinion of Von Hirsch, the "seriousness of a crime depends both on the harm done (or risked) by the act and degree of actor's culpability". But how is the degree of that culpability to be measured? Can any thermometer be devised to measure its degree? . . ."

This passage from the majority judgment provides a most complete and conclusive answer to the contention of the respondents that the court may evolve its own standards or principles for guiding the exercise of its discretion. This is not a function which can be satisfactorily and adequately performed by the court more particularly when the judicial perception of what may be regarded as proper and relevant standards or guidelines is bound to vary from judge to judge having regard to his attitude and approach, his predilections and prejudices and his scale of values and social philosophy."

IN THE SUPREME COURT OF INDIA

Muniappan v. State of Tamil Nadu

(1981) 3 SCC 11

Y.V. Chandrachud, C.J. & A.P. Sen, J.

The accused had been sentenced to death by the trial court, which had been confirmed by the High Court. He had approached the Supreme Court on the question of sentence. One of the issues before the Court was the role of the trial judge in the context of Section 235(2), CrPC, and the evidence that can be admitted in a pre-sentence hearing.

Y.V. Chandrachud, C.J.: "2. The judgments of the High Court and the Sessions Court, insofar as the sentence is concerned, leave much to be desired. In the first place, the Sessions Court overlooked the provision contained in Section 354(3) of the Code of Criminal Procedure, 1973, which provides, insofar as is relevant, that when the conviction is for an offence punishable with death, the judgment shall in the case of sentence of death state special reasons for such sentence. The learned Sessions Judge, in a very brief paragraph consisting of two sentences, has this to say on the question of sentence:

> "When the accused was asked on the question of sentence, he did not say anything. The accused has committed terrific double murder and so no sympathy can be shown to him."

…We are also not satisfied that the learned Sessions Judge made any serious effort to elicit from the accused what he wanted to say on the question of sentence. All that the learned Judge says is that "when the accused was asked on the question of sentence, he did not say anything". The obligation to hear the accused on the question of sentence which is imposed by Section 235(2) of the Criminal Procedure Code is not discharged by putting a formal question to the accused as to what he has to say on the question of sentence. The judge must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence. All admissible evidence is before the judge but that evidence itself often furnishes a clue to the genesis of the crime

and the motivation of the criminal. It is the bounden duty of the judge to cast aside the formalities of the court scene and approach the question of sentence from a broad, sociological point of view. The occasion to apply the provisions of Section 235(2) arises only after the conviction is recorded. What then remains is the question of sentence in which not merely the accused but the whole society has a stake. Questions which the judge can put to the accused under Section 235(2) and the answers which the accused makes to those questions are beyond the narrow constraints of the Evidence Act. The court, while on the question of sentence, is in an altogether different domain in which facts and factors which operate are of an entirely different order than those which come into play on the question of conviction. The Sessions Judge, in the instant case, complied with the form and letter of the obligation which Section 235(2) imposes, forgetting the spirit and substance of that obligation."

IN THE SUPREME COURT OF INDIA

Mithu v. State of Punjab

(1983) 2 SCC 277

Y.V. Chandrachud, C.J., S. Murtaza Fazal Ali, V.D. Tulzapurkar, O. Chinnapa Reddy & A. Varadarajan, JJ.

The Supreme Court was asked to decide whether mandatory death penalty enumerated in Section 303 of the IPC violated Article 21 of the Constitution.

Chandrachud, C.J.: "3…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 severity of this legislative judgment 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 Criminal Procedure Code 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 January 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 1973 is to the same effect.

…

12. 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, now 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, apart 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 guideline 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 hallmarks 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 of 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 hanged by the neck until he is dead.

13. 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 proceeds 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.

…

16. 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. . . [McGautha v.California, 28 L Ed 2d 711 : 402 US 183 (1971)] As observed by Palekar, J., who spoke for a Constitution Bench in Jagmohan Singh v. State of U.P. [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : AIR 1973 SC 947 : (1973) 2 SCR 541, 559 : 1973 Cri LJ 370] : [SCC para 26, p. 35: SCC (Cri) p. 184]

> "The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment.... The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused."

…

18. 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 Section 235(2) of the 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."

IN THE SUPREME COURT OF INDIA

Machhi Singh & Ors. v. State of Punjab

(1983) 3 SCC 470

M.P. Thakkar, A. Varadarajan & Syed Murtaza Fazalali, JJ.

The appeal dealt with the conviction and consequent death sentence awarded for killing 17 people. The guidelines laid down in Bachan Singh were interpreted by the Court.

Thakkar, J.:"32. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience 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. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. **Manner of commission of murder**

33. 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. For instance,

(i) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder

for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

35.(a) 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. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of "bride burning" and what are known as "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.

IV. Magnitude of crime

36. 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 of a particular caste, community, or locality, are committed.

V. Personality of victim of murder

37. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

38. In this background the guidelines indicated in Bachan Singh case [Appeals by special leave from the Judgment and Order dated September 1, 1980 of the Punjab & Haryana High Court in Murder References Nos. 14, 18,16 & 19 of 1979 and 1 of 1980 and Criminal Appeals Nos. 933, 1176, 935, 977, 978, 972, 992, 979, 976, 980, 981, 991, 827 & 1105 of 1979] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case [Appeals by special leave

from the Judgment and Order dated September 1, 1980 of the Punjab & Haryana High Court in Murder References Nos. 14, 18,16 & 19 of 1979 and 1 of 1980 and Criminal Appeals Nos. 933, 1176, 935, 977, 978, 972, 992, 979, 976, 980, 981, 991, 827 & 1105 of 1979] :

> "(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
>
> (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
>
> (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

39. In order to apply these guidelines inter alia the following questions may be asked and answered:

> (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
>
> (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

IN THE SUPREME COURT OF INDIA

Bhagirath v. Delhi Administration

(1985) 2 SCC 580

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

An appeal and a writ petition were filed by two people sentenced to life imprisonment for the offence of murder wherein they contended that under Section 428 of the Code of Criminal Procedure, the period of detention undergone by them prior to their conviction should be set off against the life sentence. Hence the primary issue that was to be decided by the Court was whether Section 428 would have application to cases where the accused has been sentenced to life imprisonment i.e. whether life imprisonment qualifies as "imprisonment for a term".

Y.V. Chandrachud, C.J.: "5. … 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 v. State of Maharashtra [AIR 1961 SC 600: (1961) 3 SCR 440, 444 : (1961) 1 Cri LJ 736] 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. … 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 Legislature in enacting the particular provision was to provide that "the period of detention undergone by the 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.

…

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 433-A 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 punishments 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…

11. The second aspect of the matter which has to be borne in mind is the one arising out of the judgment of this Court in Gopal Vinayak Godse [AIR 1961 SC 600 : (1961) 3 SCR 440, 444 : (1961) 1 Cri LJ 736] . 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 authority under Section 432 or Section 433 of 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 [AIR 1961 SC 600 : (1961) 3 SCR 440, 444 : (1961) 1 Cri LJ 736] , imprisonment for the remainder of life.

17. … [W]e 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 433-A and, provided that orders have been passed by the appropriate authority under Section 432 or Section 433 of the Code of Criminal Procedure."

IN THE SUPREME COURT OF INDIA

Allaudin Mian & Ors. v. State of Bihar

(1989) 3 SCC 5

S. Natarajan & A.M. Ahmadi, JJ.

These appeals before the Supreme Court dealt with issues relating to "special reasons" to be given by the Court while imposing the death penalty, as required by Section 354(3), CrPC. They also dealt with the scope and ambit of Section 235(2), CrPC.

A.M. Ahmadi, J.: "9. Section 302, IPC casts a heavy duty on the court to choose between death and imprisonment for life. When the court is called upon to choose between the convicts cry "I want to live" and the prosecutor's demand "he deserves to die" it goes without saying that the court must show a high degree of concern and sensitiveness in the choice of sentence. In our justice delivery system several difficult decisions are left to the presiding officers, sometimes without providing the scales or the weights for the same. In cases of murder, however, since the choice is between capital punishment and life imprisonment the legislature has provided a guideline in the form of sub-section (3) of Section 354 of the Code of Criminal Procedure, 1973…This provision makes it obligatory in cases of conviction for an offence punishable with death or with imprisonment for life or for a term of years to assign reasons in support of the sentence awarded to the convict and further ordains that in case the judge awards the death penalty, "special reasons" for such sentence shall be stated in the judgment. When the law casts a duty on the judge to state reasons it follows that he is under a legal obligation to explain his choice of the sentence. It may seem trite to say so, but the existence of the "special reasons clause" in the above provision implies that the court can in fit cases impose the extreme penalty of death which negatives the contention that there never can be a valid reason to visit an offender with the death penalty, no matter how cruel, gruesome or shocking the crime may be…Where a sentence of severity is imposed, it is imperative that the judge should indicate the basis upon which he considers a sentence of that magnitude justified. Unless there are special reasons, special to the facts of the particular case, which can be catalogued as justifying a severe punishment the judge would not award the death sentence. It may

be stated that if a judge finds that he is unable to explain with reasonable accuracy the basis for selecting the higher of the two sentences his choice should fall on the lower sentence. In all such cases the law casts an obligation on the judge to make his choice after carefully examining the pros and cons of each case…

10. Even a casual glance at the provisions of the Penal Code will show that the punishments have been carefully graded corresponding with the gravity of offences; in grave wrongs the punishments prescribed are strict whereas for minor offences leniency is shown. Here again there is considerable room for manoeuvre because the choice of the punishment is left to the discretion of the judge with only the outer limits stated. There are only a few cases where a minimum punishment is prescribed. The question then is what procedure does the judge follow for determining the punishment to be imposed in each case to fit the crime? The choice has to be made after following the procedure set out in sub-section (2) of Section 235 of the Code…The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the courts are generally required to make the choice from a wide range of discretion in the matter of sentencing. To assist the court in determining the correct sentence to be imposed the legislature introduced sub-section (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality. Mr Garg was, therefore, justified in making a grievance that the trial court actually treated it as a mere formality as is evident from the fact that it recorded the finding of guilt on 31-3-1987, on the same day before the accused could absorb and overcome the shock of conviction they were asked if they had anything to say on the question of sentence and immediately thereafter the decision imposing the death penalty on the two accused was pronounced. In a case of life or death as stated earlier, the presiding officer must show a high decree of concern for the statutory right of the accused and should

not treat it as a mere formality to be crossed before making the choice of sentence. If the choice is made, as in this case, without giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances, etc., before the court, the court's decision on the sentence would be vulnerable. We need hardly mention that in many cases a sentencing decision has far more serious consequences on the offender and his family members than in the case of a purely administrative decision; a fortiori, therefore, the principle of fair play must apply with greater vigour in the case of the former than the latter. An administrative decision having civil consequences, if taken without giving a hearing is generally struck down as violative of the rule of natural justice. Likewise a sentencing decision taken without following the requirements of sub-section (2) of Section 235 of the Code in letter and spirit would also meet a similar fate and may have to be replaced by an appropriate order. The sentencing court must approach the question seriously and must endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record. Only after giving due weight to the mitigating as well as the aggravating circumstances placed before it, it must pronounce the sentence. We think as a general rule the trial courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender…"

IN THE SUPREME COURT OF INDIA

Sevaka Perumal & Anr. v. State of Tamil Nadu

(1991) 3 SCC 471

B.C. Ray & K. Ramaswamy, JJ.

One of the issues before the Supreme Court in this case was whether an adjournment can be granted for the purpose of enabling the accused to show cause against the sentence sought to be imposed.

K. Ramaswamy, J.: "Undoubtedly under Section 235(2) of Code of Criminal Procedure, the accused is entitled to an opportunity to adduce evidence and if need be the case is to be adjourned to another date. There is illegality to convict and to impose sentence on the same day. It is true as contended for the State that under Section 309(2) third proviso brought by Amendment Act, 1978 no adjournment should be granted for the purpose only of enabling the accused person to show cause against sentence to be imposed upon him. Under Section 235(2) when the accused has been given right to be heard on the question of sentence it is a valuable right. To make that right meaningful the procedure adopted should be suitably moulded and (sic) the accused given an opportunity to adduce evidence on the nature of the sentence. The hearing may be on the same day if the parties are ready or be adjourned to a next date but once the court after giving opportunity proposes to impose appropriate sentence there is no need to adjourn the case any further thereon."

IN THE SUPREME COURT OF INDIA

State of Maharashtra v. Sukhdev Singh & Anr.

(1992) 3 SCC 700

A.M. Ahmadi & K. Ramaswamy, JJ.

One of the issues to be decided by the Supreme Court in this case was whether the judge may adjourn the matter for hearing on sentence, after convicting the accused. The impact of the proviso to Section 309(2), CrPC on Section 235(2), CrPC was discussed.

A.M. Ahmadi, J.: "55.…[P]lacing reliance on the decision of this Court in Allauddin Mian v. State of Bihar [(1989) 3 SCC 5 : 1989 SCC (Cri) 490] the learned defence counsel submitted that in the present case also since the conviction and sentence were pronounced on the same day, the capital sentence awarded to the accused should not be confirmed. In the decision relied on, to which one of us (Ahmadi, J.) was a party and who spoke for the Court, it was emphasised that Section 235(2) of the Code being mandatory in character, the accused must be given an adequate opportunity of placing material bearing on the question of sentence before the Court. It was pointed out that the choice of sentence had to be made after giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances, etc., before the Court for otherwise the Court's decision may be vulnerable. It was then said in paragraph 10 at page 21:

> "We think as a general rule the trial courts should after recording the conviction adjourn the mater to a further date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender."

The above decision was rendered on April 13, 1989 whereas the present decision was pronounced on October 21, 1989. Yet, contended learned counsel for the accused the Court did not appreciate the spirit of Section

235(2) of the Code. The ratio of Allauddin Mian case [(1989) 3 SCC 5: 1989 SCC (Cri) 490] was affirmed in Malkiat Singh v. State of Punjab [(1991) 4 SCC 341 : 1991 SCC (Cri) 976 : JT (1991) 2 SC 190, para 18] .

56. Reliance was then placed on the third proviso to Section 309 of the Code which reads as under:

> "Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him."

This proviso must be read in the context of the general policy of expeditious inquiry and trial manifested by the main part of the section. That section emphasises that an inquiry or trial once it has begun should proceed from day to day till the evidence of all the witnesses in attendance has been recorded so that they may not be unnecessarily vexed. The underlying object is to discourage frequent adjournments. But that does not mean that the proviso precludes the court from adjourning the matter even where the interest of justice so demands. The proviso may not entitle an accused to an adjournment but it does not prohibit or preclude the court from granting one in such serious cases of life and death to satisfy the requirement of justice as enshrined in Section 235(2) of the Code. Expeditious disposal of a criminal case is indeed the requirement of Article 21 of the Constitution; so also a fair opportunity to place all relevant material before the court is equally the requirement of the said Article. Therefore, if the court feels that the interest of justice demands that the matter should be adjourned to enable both sides to place the relevant material touching on the question of sentence before the court, the above extracted proviso cannot preclude the court from doing so."

IN THE SUPREME COURT OF INDIA

State of Maharashtra & Anr. v. Najakat Alia Mubarak Ali

(2001) 6 SCC 311

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

The accused was convicted and sentenced to imprisonment in two criminal cases. He had been arrested on the same day for both of them, and remained in jail as an under-trial prisoner during the same period for both. Hence the issue that arose in this case was whether he could claim the benefit of set-off in Section 428 of the CrPC in the second case after already being given the benefit of set-off in the first.

K.T. Thomas, J.: "11. [Section 428 is] extracted below:

> 428. 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, enquiry 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 on 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.

12. The placement of that section just below Section 427 of the Code tempts us to have a peep into the preceding section, which deals with instances wherein one person is sentenced in a case when he has already been undergoing the sentence in another case. The first sub-section of Section 427 says that the sentence in the second conviction shall commence at the expiration of the imprisonment to which the accused has been previously

sentenced, “unless the court directs that the subsequent sentence shall run concurrently with such previous sentence”. The second sub-section to Section 427 of the Code says that when a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term of imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence.

13. Thus the sentence of life imprisonment imposed on the same person in two different convictions would converge into one and thereafter it would flow through one stream alone. Even if the sentence in one of those two cases is not imprisonment for life but only a lesser term the convergence will take place and the post-convergence flow would be through the same channel. In all other cases, it is left to the court to decide whether the sentences in two different convictions should merge into one period or not. If no order is passed by the court the two sentences would run one after the other. No doubt, Section 427 is intended to provide amelioration to the prisoner. When such amelioration is a statutory operation in cases falling under the second sub-section it is a matter of choice for the court when the cases fall within the first sub-section. Nonetheless, the entire section is aimed at providing amelioration to a prisoner. Thus a penumbra of the succeeding section can be glimpsed through the former provision.

14. The purpose of Section 428 of the Code is also for advancing amelioration to the prisoner. We may point out that the section does not contain any indication that if the prisoner was in jail as an undertrial prisoner in a second case the benefit envisaged in the section would be denied to him in respect of the second case. However, learned counsel for the appellant contended that the words “of the same case” in the section would afford sufficient indication that the benefit is intended to cover only one case and not more than that. It must be remembered that the ideology enshrined in Section 428 was introduced for the first time only in the Code of Criminal Procedure, 1973. For understanding the contours of the legislative measure involved in that section, it is advantageous to have a look at the objects and reasons for bringing the above legislative provision. We therefore extract the same here:

> “The Committee has noted the distressing fact that in many cases accused persons are kept in prison for very long period as undertrial prisoners and in some cases the sentence of imprisonment ultimately awarded is a fraction of the period spent in jail as undertrial prisoner. Indeed, there may even be

> cases where such a person is acquitted. No doubt, sometimes courts do take into account the period of detention undergone as undertrial prisoner when passing sentence and occasionally the sentence of imprisonment is restricted to the period already undergone. But this is not always the case so that in many cases the accused person is made to suffer jail life for a period out of all proportion to the gravity of the offence or even to the punishment provided in the statute. The Committee has also noted that a large number of persons in the overcrowded jails of today are undertrial prisoners. The new clause seeks to remedy this unsatisfactory state of affairs. The new clause provides for the setting-off of the period of detention as an undertrial prisoner against the sentence of imprisonment imposed on him. The Committee trusts that the provision contained in the new clause would go a long way to mitigate the evil." (emphasis supplied)

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 undertrial prisoner. In other words, the period of his being in jail as an undertrial 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, enquiry 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, enquiry 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 words "if any" in the section amplify 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, enquiry 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 counts 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 undergoing 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."

IN THE SUPREME COURT OF INDIA

Ramdeo Chauhan v. State of Assam

(2001) 5 SCC 714

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

The Supreme Court in this review petition dealt with the issue of the apparent conflict between Section 235(2) and the proviso to Section 309. The question of whether the Court needs to provide time (by adjournment) for a pre-sentence hearing was discussed, in light of existing precedents on the issue.

R.P. Sethi, J.: "24. Learned counsel for the petitioner again made a futile attempt to challenge the verdict of the trial court under the cloak of technicalities and submitted that as the sentence and conviction were recorded on the same day, the judgment of the trial court was against the law. In support of his contentions he relied upon the judgments of this Court in Muniappan v. State of T.N. [(1981) 3 SCC 11 : 1981 SCC (Cri) 617] , Malkiat Singh v. State of Punjab [(1991) 4 SCC 341 : 1991 SCC (Cri) 976] and State of Maharashtra v. Sukhdev Singh [(1992) 3 SCC 700: 1992 SCC (Cri) 705] .

25. Sub-section (2) of Section 235 of the Code provides that 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. In Muniappan case [(1981) 3 SCC 11 : 1981 SCC (Cri) 617] this Court held that the obligation to hear the accused on the question of sentence is not discharged by putting formal questions to him. The Judge must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence. It was the duty of the Court to cast aside the formalities of the court scene and approach the question of sentence from a broad, sociological point of view. In Malkiat Singh case [(1991) 4 SCC 341 : 1991 SCC (Cri) 976] this Court observed that hearing contemplated under Section 235(2) of the Code is not confined merely to oral hearing but is also intended to afford an opportunity to the prosecution as well as the accused to place facts and materials relating to various factors on the question of sentence and, if desired by either side, to have evidence

adduced to show mitigating circumstances to impose a lesser sentence or aggravating grounds to impose death penalty. It was further observed that sufficient time must be given to the accused or the prosecution on the question of sentence, to show the grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded, as the case may be. It was further observed that the sentence awarded on the same day of finding guilt was not in accordance with law.

26. In both the aforesaid judgments the amendment made in Section 309 of the Code was not taken note of. By the Criminal Procedure Code Amendment Act, 1978, a proviso was added to sub-section (2) of Section 309 to the effect that:

> "Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him."

28. The mandate of the legislature is clear and unambiguous that no adjournment can be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed upon him. In a case punishable with death or imprisonment for life, there is no difficulty for the court where the sentence proposed to be imposed is an alternative sentence of life imprisonment but if it proposes to award the death sentence, it has discretion to adjourn the case in the interests of justice as held in Sukhdev Singh case [(1992) 3 SCC 700 : 1992 SCC (Cri) 705]. I have no doubt in holding that despite the bar of third proviso to sub-section (2) of Section 309, the court, in appropriate cases, can grant adjournment for enabling the accused persons to show cause against the sentence proposed on them particularly if such proposed sentence is a sentence of death. We hold that in all cases where a conviction is recorded in cases triable by the Court of Session or by Special Courts, the court is enjoined upon to direct the accused convict to be immediately taken into custody, if he is on bail, and kept in jail till such time the question of sentence is decided. After the sentence is awarded, the convict is to undergo such sentence unless the operation of the sentence awarded is stayed or suspended by a competent court of jurisdiction. Such a course s necessitated under the present circumstances prevalent in the country and is in consonance with the spirit of law. A person granted bail has no

right to insist to remain at liberty on the basis of the orders passed in his favour prior to his conviction."

Justice K.T. Thomas (Dissenting)[21]: "31. At the outset I may state that I have no doubt in my mind regarding the correctness of the observations of Sethi, J. that the sentence cannot be altered on the reasoning that the trial court did not adjourn the proceedings, after pronouncing the conviction, for the purpose of providing the convicted person time to reflect on the question of sentence. The trial Judge chose to pronounce the sentence on the same day of pronouncing the verdict of conviction. When the Code of Criminal Procedure was amended in 1978 (by Act 45 of 1978) a proviso was introduced to sub-section (2) of Section 309 of the Code by which an interdict has been added that "no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him". We make a note that the said proviso does not make a distinction between offences punishable with death or imprisonment for life and the other offences, in relation to the application of the said proviso. The proviso thus reflects the parliamentary concern that the rule in all cases must be that sentence shall be passed on the same day of pronouncement of judgment in criminal cases as far as possible, and perhaps by way of exception the said rule can be relaxed by adjourning the case to another day for passing orders on the sentence.

32. In Muniappan v. State of T.N. [(1981) 3 SCC 11 : 1981 SCC (Cri) 617] this Court emphasised the need to make a genuine effort to elicit all relevant information from the accused for considering the question whether the extreme penalty is to be awarded or not. In Allauddin Mian v. State of Bihar [(1989) 3 SCC 5 : 1989 SCC (Cri) 490] a two-Judge Bench of this Court [S. Natarajan, J. and A.M. Ahmadi, J. (as he then was)] and again in Malkiat Singh v. State of Punjab [(1991) 4 SCC 341 : 1991 SCC (Cri) 976] a three-Judge Bench (A.M. Ahmadi, V. Ramaswamy and K. Ramaswamy, JJ.) have indicated the need to adjourn the case to a future date after pronouncing the verdict of conviction. In those two decisions the direction contained in the proviso to sub-section (2) of Section 309 of the Code was not considered, presumably because it was not brought to the notice of the Court. Hence in State of Maharashtra v. Sukhdev Singh [(1992) 3 SCC 700 : 1992 SCC (Cri) 705] the two-Judge Bench (A.M. Ahmadi and K. Ramaswamy, JJ.) considered the implication

21 Justice Thomas concurs with Justice R.P. Sethi on the issue of adjourning proceedings for a pre-sentence hearing after convicting the accused. His dissent is with respect to other issues before the Court.

of the said proviso also. Learned Judges observed that the proviso to Section 309(2) does not entitle an accused to adjourn though it does not prohibit the court from granting such adjournment in serious cases. This is what Ahmadi, J. (as he then was) observed for the Bench: (SCC p. 748, para 56)

> "If the court feels that the interest of justice demands that the matter should be adjourned to enable both sides to place the relevant material touching on the question of sentence before the court, the above extracted proviso cannot preclude the court from doing so."

33. It must be remembered that two alternative sentences alone are permitted for imposition as for the offence under Section 302 IPC — imprisonment for life or death. Thus no court is permitted to award a sentence less than imprisonment for life as for the offence of murder. The normal punishment for the offence is life imprisonment and death penalty is now permitted to be awarded only "in the rarest of the rare cases when the lesser alternative is unquestionably foreclosed". (Vide Bachan Singh v. State of Punjab [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] .) The requirement contained in Section 235(2) of the Code (the obligation of the Judge to hear the accused on the question of sentence) is intended to achieve a purpose. The said legislative provision is meant for affording benefit to the convicted person in the matter of sentence. But when the Sessions Judge does not propose to award death penalty to a person convicted of the offence under Section 302 IPC what is the benefit to be secured by hearing the accused on the question of sentence? However much it is argued the Sessions Judge cannot award a sentence less than imprisonment for life for the said offence. If a Sessions Judge who convicts the accused under Section 302 IPC (with or without the aid of other sections) does not propose to award death penalty, we feel that the Court need not waste time on hearing the accused on the question of sentence. We, therefore, choose to use this occasion for reiterating the legal position regarding the necessity to afford opportunity for hearing to the accused on the question of sentence.

(1) When the conviction is under Section 302 IPC (with or without the aid of Section 34 or 149 or 120-B IPC) if the Sessions Judge does not propose to impose death penalty on the convicted person it is unnecessary to proceed to hear the accused on

the question of sentence. Section 235(2) of the Code will not be violated if the sentence of life imprisonment is awarded for that offence without hearing the accused on the question of sentence.

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

(3) The normal rule is that after pronouncing the verdict of guilty the hearing should be made on the same day and the sentence shall also be pronounced on the same day.

(4) In cases where the Judge feels or if the accused demands more time for hearing on the question of sentence (especially when the Judge proposes to impose death penalty) the proviso to Section 309(2) is not a bar for affording such time.

(5) For any reason the court is inclined to adjourn the case after pronouncing the verdict of guilty in grave offences the convicted person shall be committed to jail till the verdict on the sentence is pronounced. Further detention will depend upon the process of law."

IN THE SUPREME COURT OF INDIA

Gulzar v. State of M.P.

(2007) 1 SCC 619

Dr. Arijit Pasayat & S.H. Kapadia, JJ.

The question before the Supreme Court in this case was whether Section 360 of the CrPC is applicable in cases where Sections 3 and 4 of the Probation of Offenders Act can be invoked.

DR. Arijit Pasayat, J.: "10. The residual question is applicability of Sections 3 and 4 of the PO Act and Section 360 of the Code.

11. Where the provisions of the PO Act are applicable the employment of Section 360 of the Code is not to be made. In cases of such application, it would be an illegality resulting in highly undesirable consequences, which the legislature, who gave birth to the PO Act and the Code wanted to obviate. Yet the legislature in its wisdom has obliged the court under Section 361 of the Code to apply one or the other beneficial provisions; be it Section 360 of the Code or the provisions of the PO Act. It is only by providing special reasons that their applicability can be withheld by the court. The comparative elevation of the provisions of the PO Act are further noticed in sub-section (10) of Section 360 of the Code which makes it clear that nothing in the said section shall affect the provisions of the PO Act. Those provisions have a paramountcy of their own in the respective areas where they are applicable.

12. Section 360 of the Code relates only to persons not under 21 years of age convicted for an offence punishable with fine only or with imprisonment for a term of seven years or less, to any person under 21 years of age or any woman convicted of an offence not punishable with sentence of death or imprisonment for life. The scope of Section 4 of the PO Act is much wider. It applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. Section 360 of the Code does not provide for any role for Probation Officers in assisting the courts in relation to supervision and other matters while the PO Act does make such a provision. While Section 12 of the

PO Act states that the person found guilty of an offence and dealt with under Section 3 or 4 of the PO Act shall not suffer disqualification, if any, attached to conviction of an offence under any law, the Code does not contain parallel provision. Two statutes with such significant differences could not be intended to co-exist at the same time in the same area. Such co-existence would lead to anomalous results. The intention to retain the provisions of Section 360 of the Code and the provisions of the PO Act, as applicable at the same time in a given area, cannot be gathered from the provisions of Section 360 or any other provision of the Code. Therefore, by virtue of Section 8(1) of the General Clauses Act, where the provisions of the Act have been brought into force, the provisions of Section 360 of the Code are wholly inapplicable."

IN THE SUPREME COURT OF INDIA

Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra

(2009) 6 SCC 498

S.B. Sinha & Cyriac Joseph, JJ.

The appellant had kidnapped a person for ransom and subsequently killed him along with the help of other co-accused in the case. After killing the victim, the appellant disposed off the body by cutting it into several pieces. The Trial Court had awarded death penalty to the appellant which was confirmed by the Bombay High Court. The Supreme Court had to determine if the instant case fell under the 'rarest of the rare' case test propounded by Bachan Singh.

Sinha, J.: "55. Under Sections 235(2) and 354(3) of the Criminal Procedure Code, there is a mandate as to a full-fledged bifurcated hearing and recording of "special reasons" if the court inclines to award death penalty. In the specific backdrop of sentencing in capital punishment, and that the matter attracts constitutional prescription in full force, it is incumbent on the sentencing court to oversee comprehensive compliance with both the provisions. A scrupulous compliance with both provisions is necessary such that an informed selection of sentence could be based on the information collected and collated at this stage. Please see Santa Singh v. State of Punjab [AIR 1956 SC 256] , Malkiat Singh v. State of Punjab [(1991) 4 SCC 341 : 1991 SCC (Cri) 976] ,Allauddin Mian v. State of Bihar [(1989) 3 SCC 5 : 1989 SCC (Cri) 490 : AIR 1989 SC 1456], Muniappan v. State of T.N. [(1981) 3 SCC 11 : 1981 SCC (Cri) 617] , Jumman Khan v. State of U.P. [(1991) 1 SCC 752 : 1991 SCC (Cri) 283] and Anshad v. State of Karnataka [(1994) 4 SCC 381 : 1994 SCC (Cri) 1204] on this.

56. At this stage, Bachan Singh [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] informs the content of the sentencing hearing. The court must play a proactive role to record all relevant information at this stage. Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This information would include aspects relating to the nature, motive and impact of crime, culpability of convict, etc. Quality of evidence adduced is also a relevant factor. For instance, extent of reliance

on circumstantial evidence or child witness plays an important role in the sentencing analysis. But what is sorely lacking, in most capital sentencing cases, is information relating to characteristics and socio-economic background of the offender. This issue was also raised in the 48th Report of the Law Commission.

57. Circumstances which may not have been pertinent in conviction can also play an important role in the selection of sentence. Objective analysis of the probability that the accused can be reformed and rehabilitated can be one such illustration. In this context, Guideline 4 in the list of mitigating circumstances as borne out by Bachan Singh [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] is relevant. The Court held: (SCC p. 750, para 206)

> "206. (4) The probability that the accused can be reformed and rehabilitated.
>
> The State shall by evidence prove that the accused does not satisfy Conditions (3) and (4) above."

In fine, Bachan Singh [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] mandated identification of aggravating and mitigating circumstance relating to crime and the convict to be collected in the sentencing hearing.

…

118. Justice must be the first virtue of the law of sentencing. A sentencing court must consider itself to be a "forum of principle". The central idea of such a forum is its continuing commitment to inhere a doctrinal approach around a core normative idea. "Principled reasoning" flowing from judicial precedent or legislation is the premise from which the courts derive the power. The movement to preserve substantial judicial discretion to individualise sentences within a range of punishments also has its basis in the court's ability to give principled reasoning.

119. The claim of sentencing to being a principled exercise is very important to the independent and unpartisan image of judiciary. R. v. Willaert [(1953) 105 CCC 172 (Ont CA)] way back in 1953, envisaged the role of judge in sentencing as "an art—a very difficult art—essentially practical, and directly related to the needs of society". We have now come from that description of court to court as "forum of principle". This role is consistent with the constitutional mandate of due process and equal protection. [See Ronald Dworkin, "The Forum of Principle", 56 NYU L. Rev. 469 (1981) for more on "forum of principle"; for more on justice and sentencing see Von Hirsch

and Andrew Ashworth, The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning Proportionate Sentencing: Exploring The Principles, Oxford University Press, 2005.]

…

121. The reasons which are accorded by the court to justify the punishment should be able to address the questions relating to fair distribution of punishment amongst similarly situated convicts. This may be called the problem of distributive justice in capital sentence. In this context, the inquiry under Article 14 becomes significant. Fairness in this context has two aspects: First refers to fair distribution amongst like offenders, and the second relates to the appropriate criteria for the punishment.

…

127. Frequent findings as to arbitrariness in sentencing under Section 302 may violate the idea of equal protection clause implicit under Article 14 and may also fall foul of the due process requirement under Article 21.

128. It is to be noted that we are not focusing on whether wide discretion to choose between life imprisonment and death punishment under Section 302 is constitutionally permissible or not. The subject-matter of inquiry is how discretion under Section 302 may result in arbitrariness in actual sentencing. Section 302 as held by Bachan Singh [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] is not an example of law which is arbitrary on its face but is an instance where law may have been arbitrarily administered.

129. In Swamy Shraddananda (2) [(2008) 13 SCC 767 : (2008) 10 Scale 669] this Court noted arbitrariness in fact prevalent in the capital sentencing process with extraordinary candour: (SCC pp. 789-90, paras 48-53)

> "48. … Coupled with the deficiency of the criminal justice system is the lack of consistency in the sentencing process even by this Court. It is noted above that Bachan Singh [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] laid down the principle of the rarest of rare cases. Machhi Singh [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] , for practical application crystallised the principle into five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty. But the unfortunate reality is that in later decisions neither the rarest of rare cases principle nor the Machhi

Singh [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] categories were followed uniformly and consistently.

49. In Aloke Nath Dutta v. State of W.B. [(2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264 : (2006) 13 Scale 467] Sinha, J. gave some very good illustrations from a number of recent decisions in which on similar facts this Court took contrary views on giving death penalty to the convict (see SCC pp. 279-87, paras 151-78: Scale pp. 504-10, paras 154-82). He finally observed (SCC para 158) that 'courts in the matter of sentencing act differently although the fact situation may appear to be somewhat similar' and further 'it is evident that different Benches had taken different view in the matter' (SCC para 168). Katju, J. in his order passed in this appeal said that he did not agree with the decision in Aloke Nath Dutta [(2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264 : (2006) 13 Scale 467] in that it held that death sentence was not to be awarded in a case of circumstantial evidence. Katju, J. may be right that there cannot be an absolute rule excluding death sentence in all cases of circumstantial evidence (though inAloke Nath Dutta [(2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264 : (2006) 13 Scale 467] it is said 'normally' and not as an absolute rule). But there is no denying the illustrations cited by Sinha, J. which are a matter of fact.

50. The same point is made in far greater detail in a report called, 'Lethal Lottery, The Death Penalty in India' compiled jointly by Amnesty International India and People's Union for Civil Liberties, Tamil Nadu & Puducherry. The report is based on the study of the Supreme Court judgments in death penalty cases from 1950 to 2006. One of the main points made in the report (see Chapters 2 to 4) is about the Court's lack of uniformity and consistency in awarding death sentence.

51. The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its

> commutation by this Court depends a good deal on the personal predilection of the Judges constituting the Bench.
>
> 52. The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system. Thus the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied.
>
> 53. These are some of the larger issues that make us feel reluctant in confirming the death sentence of the appellant."

130. Equal protection clause ingrained under Article 14 applies to the judicial process at the sentencing stage. We share the Court's unease and sense of disquiet in Swamy Shraddananda (2) case [(2008) 13 SCC 767 : (2008) 10 Scale 669] and agree that a capital sentencing system which results in differential treatment of similarly situated capital convicts effectively classifies similar convicts differently with respect to their right to life under Article 21. Therefore, an equal protection analysis of this problem is appropriate. In the ultimate analysis, it serves as an alarm bell because if capital sentences cannot be rationally distinguished from a significant number of cases where the result was a life sentence, it is more than an acknowledgement of an imperfect sentencing system. In a capital sentencing system if this happens with some frequency there is a lurking conclusion as regards the capital sentencing system becoming constitutionally arbitrary. We have to be, thus, mindful that the true import of rarest of rare doctrine speaks of an extraordinary and exceptional case.

131. When the court is faced with a capital sentencing case, a comparative analysis of the case before it with other purportedly similar cases would be in the fitness of the scheme of the Constitution. Comparison will presuppose an identification of a pool of equivalently circumstanced capital defendants. The gravity, nature and motive relating to crime will play a role in this analysis.

132. Next step would be to deal with the subjectivity involved in capital cases. The imprecision of the identification of aggravating and mitigating circumstances has to be minimised. It is to be noted that the mandate of equality clause applies to the sentencing process rather than the outcome. The comparative review must be undertaken not to channel the sentencing discretion available to the courts but to bring in consistency in identification of various relevant circumstances. The aggravating and mitigating circumstances have to be separately identified under a rigorous measure.

133. Bachan Singh [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] when mandates principled precedent-based sentencing, compels careful scrutiny of mitigating circumstances and aggravating circumstances and then factoring in a process by which aggravating and mitigating circumstances appearing from the pool of comparable cases can be compared. The weight which is accorded by the court to particular aggravating and mitigating circumstances may vary from case to case in the name of individualised sentencing, but at the same time reasons for apportionment of weights shall be forthcoming. Such a comparison may point out excessiveness as also will help repel arbitrariness objections in future. A sentencing hearing, comparative review of cases and similarly aggravating and mitigating circumstances analysis can only be given a go-by if the sentencing court opts for life imprisonment."

IN THE HIGH COURT OF BOMBAY

Guerrero Lugo Elvia Grissel & Ors. v. State of Maharashtra

2012 SCC On Line Bom 6

A.M. Khanwilkar & R.G. Ketkar, JJ.

The question posed before the High Court focused on whether a judge has the discretion to impose a sentence less than that mandated in Section 265E, CrPC when a mutually satisfactory disposition has been reached post plea bargaining.

Khanwilkar, J.:"17. We are conscious of the fact that the Magistrate has opined that section 265-E of the Code, in particular clause (d) thereof, gives no discretion to the Court to award sentence lesser than one-fourth of the punishment provided or extendable, as the case may be…

18. Be that as it may, in the impugned judgment, the Magistrate has also rightly proceeded on the premise that the Court has no discretion to award sentence lesser than one-fourth of the punishment provided or extendable, as the case may be…On a bare reading of [Section 265-E], it is noticed that, where a satisfactory disposition of the case has been worked out under section 265-D, the Court has to dispose of the case in the manner provided in this provision.

…

26. Reverting to the question of interpretation and purport of section 265-E of the Code, in particular clause (d) thereof, we cannot be oblivious to the legislative intent and the background in which Chapter XXI-A of the Code has been introduced. The question is: whether the language of clause (d) justifies the stand of the petitioners that the Court has discretion to award sentence to the accused for a period lesser than one-fourth of the punishment provided or extendable, as the case may be, for the offence in question? According to the petitioners, the fact that section 265-E mandates that the Court must hear the parties on the quantum of the punishment, coupled with the expressions "may", "to" and "provided

or extendable" used in clause (d) leaves no manner of doubt that it is a directory provision giving discretion to the Court to award sentence up to one-fourth of the punishment provided or extendable, as the case may be, for the offence in question. In other words, the sentence to be awarded by the Court in the case of plea-bargaining covered by clause (d) can be up to one-fourth of the punishment provided or extendable, as the case may be. The argument, though attractive at the first blush, on deeper examination, in our opinion, deserves to be stated to be rejected.

27. As regards the expression "may" appearing in clause (d), similar expression has been used in clauses (b) and (c) of section 265-E. The use of expression "may" in the setting in which it is placed, will have to be construed as "shall". In that, if the Court, upon hearing the parties, was to be satisfied that section 360 of the Code or the provisions of the Probation of Offenders Act were attracted in the fact situation of the case, it would be the bounden duty of the Court to release the accused on probation or provide the benefit of any such law, as the case may be. In that case, the other two clauses in section 265-E, i.e., clauses (c) and (d), will not come into play at all. But, in a given case, if clause (b) is not applicable or attracted, then, the Court, after hearing the parties, has to satisfy itself that the offence, in respect of which, the accused has pleaded guilty, and has invoked remedy of plea bargaining, provides for any minimum punishment. If minimum punishment is provided under the law for the said offence, then, it would be the bounden duty of the Court to sentence the accused in the manner provided in clause (c). Once clause (c) is attracted, clause (d) will have no application to that case. In one sense, the regime provided in clauses (c) and (d) is mutually exclusive. In matters of plea-bargaining, where the Court is satisfied that neither clause (b) nor clause (c) is applicable, all such specified cases would be covered by clause (d). In other words, clause (d) is a residuary clause covering all those specified cases which are not covered by clause (b) or clause (c). If the case falls in clause (d), then, the Court is obliged to sentence the accused in the manner provided in the said clause. Thus understood, the expression "may" appearing in clause (d) is not indicative of having bestowed discretion in the Court regarding the quantum of sentence, but is to cast obligation on the Court to sentence the accused in the manner provided in the said clause.

28. As regards the expression "to" appearing in clause (d), it is pertinent to note that same expression is used even in clause (c). i.e. "to half of

such minimum punishment". If the argument of the petitioners in respect of expression "to" to mean "up to" was to be accepted, that may result in Court re-writing the said word to mean "up to" or "extent of". That will be impermissible. In our opinion, the expression "to" appearing in clause (d) as much as in clause (c) of section 265-E is a preposition used as a functional word to indicate quantum of sentence. In other words, the quantum of sentence to be imposed by the Court is defined by the respective clauses, leaving no discretion to the Court to impose any lesser sentence. Taking any other view would mean that, even in the matters covered by clause (c), the Court can sentence the accused for a period lesser than half of the minimum punishment. That interpretation will not only be preposterous, but also destructive of the legislative intent.

29. As regards the expression "provided or extendable" occurring in section 265-E(d), we uphold the opinion of the Magistrate that the same are joined with conjunction "or" - which means the Court may sentence the accused with one-fourth of the punishment "provided" or with one-fourth of the punishment "extendable" by the principal provision in the substantive law. In that, these two different terminologies were necessary, as, in some offences, the punishment is extendable up to maximum of certain term, and, in other set of offences, the punishment is not extendable but fixed quantum is provided.

30. We cannot be oblivious to the background in which the enactment in question has been introduced. The Law Commission, in no uncertain terms, observed that guidelines and procedure will have to be incorporated in the Code of Criminal Procedure in respect of scheme for concessional treatment to offenders who plead guilty on their own volition in lieu of a promise to reduce the charge, to drop some of the charges or getting lesser punishment. In our view, if the provision was to be interpreted to have invested discretion in the Court to decide on the quantum of sentence, it would introduce an environment of uncertainty in awarding sentence. That may shake public confidence and would be counter-productive. It would also encourage accused persons gaining impression that they can get away with the specified offences, on paying compensation, if caught by the police and prosecuted. It would result in a situation - "slap first, then say sorry, and get away lightly by paying compensation". That is not what was envisaged by the Law Commission or the Parliament while enacting Chapter XXI-A of the Code. The intent behind Chapter XXI-A of the Code, although, was to help the litigant to end uncertainty, save litigation costs

and anxiety costs, as also to reduce back-breaking burden of the Court and to reduce the congestion in jails; but, at the same time, a conscious decision is taken that we have to depart from the scheme of plea-bargaining prevailing in other countries and adopt such scheme so that substantive sentence of imprisonment in jail deserves to be imposed on an offender who pleads guilty whilst invoking the scheme for concessional treatment. The Law Commission recommended formulation of appropriate guidelines in that behalf. This recommendation of the Law Commission has been mirrored in clauses (d) and (c) respectively, which spell out the quantum of sentence to be awarded by the Court and is in the nature of guidelines formulated by the Legislature.

31. Indeed, it is possible to contend that, the above interpretation may result in a situation where a person, after facing a full-fledged trial, is awarded punishment for lesser period than 21 months, considering the nature of offence and the circumstances in which the said offence had occurred whereas, if that accused were to invoke plea-bargaining, may have to end up in not only paying compensation but also suffering imprisonment for a period of minimum 21 months, subject to adjustments of set off against the sentence of imprisonment. That may give rise to an argument of possibility of inflicting discriminatory treatment to such accused. As a result, the accused persons would be dissuaded from resorting to plea bargaining, and, instead, prefer to fend for themselves to face the long-drawn trial, which may eventually enure to their advantage. Further, that interpretation may give rise to the argument that, although the parent provision in the principal substantive law does not provide for minimum punishment, but, by virtue of clause (d) of section 265-E of the Code, the provision of minimum punishment of one-fourth punishment provided or extendable, as the case may be, for such offence is introduced.

32. None of these submissions commend to us. The status of accused, who pleads not guilty to the charge and claims to be tried is incomparable with the status of the accused, who pleads guilty and invokes remedy of plea-bargaining. In that sense, the two sets of accused cannot be equated or said to be similarly placed. Moreover, the provision, such as section 265-E, providing for sentence is a concession offered to accused who voluntarily resorts to plea-bargaining, so as to avoid the uncertainty of the trial, the term of sentence, if found guilty and also the litigation costs and time. Until the introduction of Chapter XXI-A in the Code, the law of the land was to discourage plea bargaining, being against public policy.

Thus, the argument of discrimination is unavailable to the accused, who, at his own volition, elects the remedy of plea-bargaining. As regards the effect of providing for fixed sentence period in cases of plea-bargaining, even though the principal substantive law does not provide for minimum sentence, we fail to understand as to how this argument can be taken forward by the accused electing remedy of plea bargaining at his own volition. Notably, the validity of section 265-E is not put in issue in the present case. Neither the argument of discrimination, nor the effect of the provision resulting in imposing minimum sentence of one-fourth of the punishment provided or extendable can be taken forward by these petitioners."

IN THE SUPREME COURT OF INDIA

Soman v. State of Kerala

(2013) 11 SCC 382

Aftab Alam & Ranjana P. Desai JJ.

Several people died, even more developed serious sickness and a few others lost their vision completely due to the consumption of spurious alcohol in Kerala. The accused, a vendor of the alcohol, was held guilty under Section 55, 57A and 58 of the Kerala Abkari Act and was sentenced to rigorous imprisonment and a fine. The State appealed and argued for enhancement of sentence. The same was accepted by the High Court which enhanced the sentence of the accused from 2 to 5 years. Hence, a Special Leave Petition was filed before the Supreme Court. The main issue in this case was whether the social consequences of an act and its impact on people is a valid justification for giving a more stringent punishment.

Aftab Alam, J.: "15. Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges…

16. Nonetheless, if one goes through the decisions of this Court carefully, it would appear that this Court takes into account a combination of different factors while exercising discretion in sentencing, that is proportionality, deterrence, rehabilitation, etc. (See Ramashraya Chakravarti v. State of M.P. [(1976) 1 SCC 281 : 1976 SCC (Cri) 1] , Dhananjoy Chatterjee v. State of W.B. [(1994) 2 SCC 220 : 1994 SCC (Cri) 358] ,State of M.P. v. Ghanshyam Singh [(2003) 8 SCC 13 : 2003 SCC (Cri) 1935] , State of Karnataka v. Puttaraja [(2004) 1 SCC 475 : 2004 SCC (Cri) 300] , Union of India v.Kuldeep Singh [(2004) 2 SCC 590 : 2004 SCC (Cri) 597] , Shailesh Jasvantbhai v.State of Gujarat [(2006) 2 SCC 359 : (2006) 1 SCC (Cri) 499] , Siddarama v. State of Karnataka [(2006) 10 SCC 673 : (2007) 1 SCC (Cri) 72] , State of M.P. v. Babulal [(2008) 1 SCC 234 : (2008) 1 SCC

(Cri) 188] , Santosh Kumar Satishbhushan Bariyarv. State of Maharashtra [(2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150] .).

17. In a proportionality analysis, it is necessary to assess the seriousness of an offence in order to determine the commensurate punishment for the offender. The seriousness of an offence depends, apart from other things, also upon its harmfulness. The question is whether the consequences of the offence can be taken as the measure for determining its harmfulness? In addition, quite apart from the seriousness of the offence, can the consequences of an offence be a legitimate aggravating (as opposed to mitigating) factor while awarding a sentence? Thus, to understand the relevance of consequences of criminal conduct from a sentencing standpoint, one must examine: (1) whether such consequences enhanced the harmfulness of the offence; and (2) whether they are an aggravating factor that need to be taken into account by the courts while deciding on the sentence.

18. In Sentencing and Criminal Justice, 5th Edn., Cambridge University Press, 2010, Andrew Ashworth cites the four main stages in the process of assessing the seriousness of an offence, as identified in a previous work by Andrew Von Hirsch and Nils Jareborg (see pp. 108-12):

1. Determining the interest that is violated (i.e. physical integrity, material support, freedom from humiliation or privacy/autonomy)

2. Quantification of the effect on the victim's living standard.

3. Culpability of the offender.

4. Remoteness of the actual harm.

19. Ashworth then examines various specific offences to ascertain how seriousness is typically gauged. The most relevant example is that of drug trafficking, where the author notes the problem that the offence lies fairly remote from causing people's deaths. Ashworth further notes that harsh sentences for drug trafficking offences is justified more by deterrent rationales than proportionality concerns, although even the deterrent rationales are beset with problems (see pp. 128-30).

…

21. Ashworth also examines the impact of unintended consequences on sentencing. He notes that there is a tendency to take those into account

in manslaughter and for causing death by bad driving. The extent to which unintended consequences may be taken into account would depend, for instance, on the extent to which the offender was put on notice of the risk of death. Thus, where it is known that driving dangerously or under the influence of alcohol creates risk for the safety of others, there would be a greater emphasis on resulting death while determining the sentence (see pp. 153-54).

…

27. From the above, one may conclude that:

27.1. Courts ought to base sentencing decisions on various different rationales — most prominent amongst which would be proportionality and deterrence.

27.2. The question of consequences of criminal action can be relevant from both a proportionality and deterrence standpoint.

27.3. Insofar as proportionality is concerned, the sentence must be commensurate with the seriousness or gravity of the offence.

27.4. One of the factors relevant for judging seriousness of the offence is the consequences resulting from it.

27.5. Unintended consequences/harm may still be properly attributed to the offender if they were reasonably foreseeable…"

CHAPTER 4

PAROLE, FURLOUGH AND REMISSIONS

Parole, Furlough and Remissions

Parole and Furlough

Parole and furlough are both methods of granting temporary release from imprisonment. While the CrPC does not mention these terms, they are used frequently in prison manuals. Courts have clarified that the two are distinct concepts, and release under each route has different implications for the total period of imprisonment.

In the context of preventive detention, a Constitution Bench of the Supreme Court has clarified in **Sunil Fulchand Shah v. Union of India**,[1] 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." For this reason, in cases of preventive detention, the total period of detention is not to be extended because the detenue was out on parole.

Applying this ratio to cases of punitive detention, the Supreme Court in **Avtar Singh v. State of Haryana**,[2] has stated that by the same logic, the period of parole will count towards the total period of imprisonment, unless the relevant rules provide differently. In the facts of this case, the Court found that the rules specifically stated that the period of parole would not count towards the total period of imprisonment.

In **Dadu v. State of Maharashtra**,[3] the question before the Court was whether parole amounts to remission of sentence which was prohibited under Section 32A of the NDPSA. Extending the logic that parole is not a holiday from the sentence, but a different mode of undergoing the sentence, the Court held that parole does not amount to the suspension, remission or commutation of the sentence. Hence a person undergoing imprisonment under the NDPSA can be granted parole. The Court also declared Section 32-A unconstitutional to the extent that it takes away the judicial power to suspend sentences pending appeal.

1 (2000) 3 SCC 409
2 (2002) 3 SCC 18
3 (2000) 8 SCC 437

In **State of Haryana v. Mohinder Singh**,[4] the Supreme Court clarified that the period for which a person is out on bail does not count towards the total period of sentence, and therefore provisions of remission will not apply to the period for which a person was on bail.

Another issue that has been frequently raised before the judiciary is the relevant considerations that should inform the administrative decision of whether or not to grant parole or furlough to a prisoner.In **Bhikhabhai Devshi v. State of Gujarat**,[5] the Full Bench of Gujarat High Court held that the object of parole and furlough rules is to humanize the penal system, to enable the prisoner to maintain continuity with his family life, to deal with the family matters, to protect prisoners from evil effects of continuous jail life, to enable them to gain self-confidence,and to maintain constructive hopes and active interest in life. In light of these objects, the Court held that the benefit and privilege of parole or furlough should not be denied to a prisoner solely on the ground of lateness in surrendering after previous release on parole or furlough, without taking into account any circumstances justifying or mitigating the default. Similarly, in **Ramchandra Raghu Naik v. State of Maharashtra**,[6], the Bombay High Court held that where a person has overstayed his furlough, leniency could be granted in certain cases depending upon the facts of each case.

In **Sharad Keshav Mehta v. State of Maharashtra**,[7] the Bombay High Court again emphasized the distinction between parole and furlough to determine the rights of prisoners to temporary release. Holding that "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 Court stated that a prisoner cannot be denied the right to furlough upon meeting the requirements of the law, except for cogent reasons based on objective material.

Remissions

Apart from temporary release, the question of early release through remission has been the subject of various judicial decisions. As a general matter, the Court has held, in **K.M. Nanavati v. State of Bombay**,[8] that the executive's power of remission does not impinge on the judicial function. Reading judicial and executive powers harmoniously, the Court held that when a matter is *subjudice* the executive power of remission remains suspended and courts have the final say in the matter of length

4 (2000) 3 SCC 394
5 AIR 1987 Guj 136
6 2005 SCC Online Bom 2013
7 1989 Cri. L. J. 681
8 (1961) 1 SCR 497

of sentence. But where there is no matter pending before the judiciary, the field of operation regarding remission vests with the Executive.

In the context of life imprisonment, the Court has had to decide what that term of imprisonment should mean, and when, if at all, a person under sentence of life imprisonment can be released. In **Gopal Vinayak Godse v. State of Maharashtra**,[9] the Supreme Court held that unless a life sentence is commuted or remitted by the appropriate authority under the Constitution or the CrPC, a prisoner sentenced to life imprisonment is sentenced to the entire natural life. Similarly, in **Mohd. Munna v. Union of India**,[10] where the petitioner contended that imprisonment for life is equivalent to a period of twenty years, the Supreme Court held that there is no provision either in the Indian Penal Code or in the CrPC whereby life imprisonment could be treated as 14 years or 20 years without there being a formal remission by the appropriate government. In affirmation of earlier decisions, the Court held that life imprisonment was equivalent to imprisonment for life, *subject to remission*.

In **Swamy Shraddananda (II) v. State of Karnataka,**[11] the Supreme Court discussed the creation of a distinct category of sentence- imprisonment for life, with the executive *precluded from passing an order of remission*. The Court held that such sentence could be imposed where the crime falls just below the threshold of the 'rarest of rare' standard required to pronounce a sentence of death, but for which the ordinary sentence of life imprisonment is inadequate. However, the Court clarified that such a sentence could not place fetters on the constitutional powers pertaining to remission in Article 161 and 72.The correctness of the Court's decision in *Swamy Shraddananda* was questioned in *Sangeet v. State of Haryana*.[12] In **Union of India v. V. Sriharan**,[13] a Constitution Bench of the Supreme Court upheld the ratio in *Swamy Shraddananda*.

In **Shankar Kisanrao Khade v. State of Maharashtra**,[14] the Supreme Court held that where the convict had been sentenced to undergo consecutive sentences of imprisonment, and remission had been provided for one sentence, the second sentence will commence immediately after the completion of the sentence that had been remitted.

Another issue before the courts has been the permissibility and extent of judicial review of the executive's remission decisions. In **Maru Ram**

9 (1961) 3 SCR 440
10 (2005) 7 SCC 417
11 (2008) 13 SCC 767
12 (2013) 2 SCC 452
13 2015 SCC Online SC 653
14 (2013) 5 SCC 546

v. Union of India,[15] the Supreme Court held that orders passed under Article 72 and 161 of the Constitution by the President and Governor could not be exercised arbitrarily, and could be subjected to judicial review if it was found that such powers had been exercised on the basis of arbitrary or irrelevant considerations, or had been exercised mala-fide. The Court reiterated this position in **Kehar Singh v. Union of India**.[16] Similarly, in **Satpal v. State of Haryana**,[17] the Supreme Courtdiscussed whether it would be justified in interfering with an order of the Governor under Article 161 of the Constitution if it appeared that extraneous circumstances had been taken into consideration, if the decision betrayed non-application of the mind, or if the order had been passed without the Governor having sought the aid and advice of the Council of Ministers. The Court laid down a list of grounds that would permit such an order to come under the scope of judicial review.

However, in **Epuru Sudhakar v. State of A.P.**,[18] while discussing the scope of judicial review of an order passed under Article 72 or 161 of the Constitution, the Supreme Court rejected the contention that the executive should provide reasons for an order passed under the aforementioned sections to either the accused, the Court, or to both. The Court ultimately held that the President and Governor could not be obligated to provide reasons for the orders passed. However, if the order passed revealed non-application of the mind, the use of irrelevant considerations or was passed mala-fide, such a decision would be subjected to judicial review and overturned.

Finally, the Supreme Court, in **Shatrugan Chauhan v. Union of India,**[19] held that undue delay in execution of sentence would entitle the condemned prisoner to approach the court under Article 32 for commutation of sentence since undue delay in disposal of mercy petitions is a violation of Article 21 of the Constitution. Rejecting the contention that the even if there was undue delay, the matter should be referred back to the executive and that the court could not decide on commutation, the Supreme Court held that it was empowered to provide substantive remedies in case of violation of fundamental rights. Significantly, while declaring its decision in **Devender Pal Singh Bhullar v. State (NCT of Delhi)**[20] *per incurium*, the Court held that undue delay was equally a sufficient a ground for commutation of sentence of a person convicted under special statute such as TADA.

15 (1981) 1 SCC 107
16 (1989) 1 SCC 204
17 (2000) 5 SCC 170
18 (2006) 8 SCC 161
19 (2014) 3 SCC 1
20 (2013) 6 SCC 195

IN THE SUPREME COURT OF INDIA

Gopal Vinayak Godse v. State of Maharshtra & Ors.

(1961) 3 SCR 440

P.B. Gajendragadkar, A.K. Sarkar, K. Subba Rao, K.N. Wanchoo & J.R. Mudholkar JJ.

The petitioner filed a writ under Article 32 of the Constitution, claiming that he was entitled to release as he had served his life sentence. The Court in this case discussed whether in the absence of formal remission by the government, life imprisonment could be regarded as transpiring only for a specific period.

K. Subba Rao, J.: "5. …the next question is whether there is any provision of law where under a sentence for life imprisonment, without any formal remission by appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Indian Penal Code, CrPC or the Prisons Act. Though the Government of India stated before the Judicial Committee in the case cited supra that, having regard to Section 57 of the Indian Penal Code, 20 years' imprisonment was equivalent to a sentence of transportation for life, the Judicial Committee did not express its final opinion on that question. The Judicial Committee observed in that case thus at p. 10:

> "Assuming that the sentence is to be regarded as one of twenty years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application, and it was therefore rightly dismissed, but in saying this, Their Lordships are not to be taken as meaning that a life sentence must in all cases be treated as one of not more than twenty years, or that the convict is necessarily entitled to remission."

Section 57 of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent

to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words "imprisonment for life" for "transportation for life" enable the drawing of any such all embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life.

…

6. It is said that the Bombay Rules governing the remission system substituted a definite period for life imprisonment and, therefore, if the aggregate of the term actually served exceeds the said period, the person would be entitled to be released. To appreciate this contention the relevant Bombay Rules may be read.

> 934. Release — In all cases of premature releases, orders under Section 401, Criminal Procedure Code, will have to be issued by Government before the prisoners can actually be released from jail."
>
> 937. (c) When a life convict or a prisoner in whose case the State Government has passed an order forbidding his release without reference to it, has earned such remission as would entitle him to release but for the provisions of this rule, the Superintendent shall report accordingly to the State Government through the Inspector-General in order that his case may be considered with reference to Section 401 of the Code of Criminal Procedure, 1898.
>
> The remission system — 1419 (c) A sentence of transportation for life shall ordinarily be taken as 15 years' actual imprisonment.
>
> Review of sentences — 1447 (2) Notwithstanding anything contained in Rule 1419 no prisoner who has been sentenced to transportation for life more than 14 years imprisonment or to transportation and imprisonment or to transportation and imprisonment for terms exceeding in the aggregate 14 years shall be released on completion of his term of transportation or

> imprisonment or both, as the case may be, including all remissions unless a report with respect to such prisoner has been made under sub-rule (1) and orders of Government have been received thereon with regard to the date of his final release."

7. It is common case that the said rules were made under the Prisons Act, 1894 and that they have statutory force. But the Prisons Act does not confer on any authority a power to commute or remit sentences; it provides only for the regulation of prisons and for the treatment of prisoners confined therein. Section 59 of the Prisons Act confers a power on the State Government to make rules, inter alia, for rewards for good conduct. Therefore, the rules made under the Act should be construed within the scope of the ambit of the Act. The rules, inter alia, provide for three types of remissions by way of rewards for good conduct, namely, (*i*) ordinarily, (*ii*) special and (*iii*) State. For the working out of the said remissions, under Rule 1419(*c*), transportation for life is ordinarily to be taken as 15 years' actual imprisonment. The rule cannot be construed as a statutory equation of 15 years' actual imprisonment for transportation for life. The equation is only for a particular purpose, namely, for the purpose of "remission system" and not for all purposes. The word "ordinarily" in the rule also supports the said construction. The non obstante clause in sub-rule (2) of Rule 1447 reiterates that notwithstanding anything contained in Rule 1419 no prisoner who has been sentenced to transportation for life shall be released on completion of his term unless orders of the Government have been received on a report submitted to it. This also indicates that the period of 15 years' actual imprisonment specified in the rule is only for the purpose of calculating the remission and that the completion of the term on that basis does not ipso facto confer any right upon the prisoner to release. The order of the Government contemplated in Rule 1447 in the case of a prisoner sentenced to transportation for life can only be an order under Section 401 of the Code of Criminal Procedure, for in the case of a sentence of transportation for life the release of the prisoner can legally be effected only by remitting the entire balance of the sentence. Rules 934 and 937(*c*) provide for that contingency. Under the said rules the orders of an appropriate Government under Section 401 Criminal Procedure Code, are a pre-requisite for a release. No other rule has been brought to our notice which confers an indefeasible right on a prisoner sentenced to transportation for life to an unconditional release on the expiry of a particular term including remissions. The rules under the Prisons Act do not substitute a lesser sentence for a sentence of transportation for life.

8. Briefly stated the legal position is this: Before Act 26 of 1955 a sentence of transportation for life could be undergone by a prisoner by way of rigorous imprisonment for life in a designated prison in India. After the said Act, such a convict shall be dealt with in the same manner as one sentenced to rigorous imprisonment for the same term. Unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of the Indian Penal Code or the Code of Criminal Procedure, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison. The rules framed under the Prisons Act enable such a prisoner to earn remissions — ordinary, special and State — and the said remissions will be given credit towards his term of imprisonment. For the purpose of working out the remissions the sentence of transportation for life is ordinarily equated with a definite period, but it is only for that particular purpose and not for any other purpose. As the sentence of transportation for life or its prison equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predict the time of his death. That is why the Rules provide for a procedure to enable the appropriate Government to remit the sentence under Section 401 of the Code of Criminal Procedure on a consideration of the relevant factors, including the period of remissions earned. The question of remission is exclusively within the province of the appropriate Government; and in this case it is admitted that, though the appropriate Government made certain remissions under Section 401 of the Code of Criminal Procedure, it did not remit the entire sentence. We, therefore, hold that the petitioner has not yet acquired any right to release.

9. The petitioner made an impassioned appeal to us that if such a construction be accepted, he would be at the mercy of the appropriate Government and that the said Government, out of spite, might not remit the balance of his sentence, with the result that he would be deprived of the fruits of remissions earned by him for sustained good conduct, useful service and even donation of blood. The Constitution as well as the Code of Criminal Procedure confer the power to remit a sentence on the executive Government and it is in its exclusive province. We cannot assume that the appropriate Government will not exercise its jurisdiction in a reasonable manner."

IN THE SUPREME COURT OF INDIA

K.M. Nanavati v. State of Bombay

(1961) 1 SCR 497

B.P. Sinha, CJ., J.L. Kapur, P.B. Gajendragadkar, K. Subba Rao & K.N. Wanchoo,JJ.

The defendant was convicted and sentenced to imprisonment for life by the High Court. The Governor passed an order of remission under Article 161 of the Constitution, and also placed certain conditions on the custody of the prisoner. On challenge before the Supreme Court, the question was whether the Governor had, through the exercise of his power under Article 161 of the Constitution, impinged upon the judicial powers of the Court, with special reference to Article 142 of the Constitution. The Court examined the scope and content of Article 161, and analogous provisions in the CrPC.

B.P. Sinha, CJ.:*"*8. The learned Advocate-General of Bombay has argued with his usual vehemence and clarity of expression that the power of pardon, including the lesser power of remission and suspension of a sentence etc. is of a plenary character and is unfettered; that it is to be exercised not as a matter of course, but in special circumstances requiring the intervention of the Head of the Executive; that the power could be exercised at any time after the commission of an offence; that this power being in the nature of exercise of sovereign power is vested in the Head of the State and has, in some respects, been modified by statute; that the power of pardon may be exercised unconditionally or subject to certain conditions to be imposed by the authority exercising the power; that such conditions should not be illegal or impossible of performance or against public policy. It was further argued that the power of pardon is vested in the Head of the State as an index of sovereign authority irrespective of the form of Government. Thus the President of the United States of America and Governors of States, besides, in some cases Committees, have been vested with those powers, which cannot be derogated from by a Legislature. So far as India is concerned, before the Constitution came into effect such powers have been regulated by statute, of course, subject to the power of the Crown itself. After the Constitution, the power is contained in Article 72 in respect of the President, and Article 161 in respect of the Governor of

a State. Articles 72 and 161 are without any words of limitation, unlike the power of the Supreme Court contained in Articles 136, 142, 145 and other Articles of the Constitution. Hence, what was once a prerogative of the Crown has now crystallized into the common law of England and statute in India, for example, Section 401 of the Code of Criminal Procedure, or Articles 72 and 161 of the Constitution. He particularly emphasised that the two powers, namely, the power of the Executive to grant pardon, in its comprehensive sense, and of the Judiciary are completely apart and separate and there cannot be any question of a conflict between them, because they are essentially different, the one from the other. The power of pardon is essentially an executive action. It is exercised in aid of justice and not in defiance of it. With reference to the particular question, now before us, namely, how far the exercise of the executive power of pardon contained in those two Articles of the Constitution can be said to impinge on the judicial functions of this court, it was argued that Rule 5 of Order 21 of the Rules of this court postulates the existence of a sentence of imprisonment and, as in this case, as a result of the Governor's order, there is no such sentence running there could not be any question of the one trespassing into the field of the other. Rule 5 aforesaid of this court represents the well settled practice of this court, as of other Courts, that a person convicted and sentenced to a term of imprisonment should not be permitted to be in contempt of the order of this court, that is to say, should not be permitted to move the appellate court without surrendering to the sentence. But the petitioner is not in such contempt, because Rule 5 did not apply to him. The order of sentence against him having been suspended, he is not disobeying any Rule or process of this court or of the High Court. The power of the Supreme Court to make Rules is subject to two limitations, namely, (*1*) to any law made by Parliament and (*2*) the approval of the President. On the other hand, Articles 72 and 161 enshrine the plenary powers of the sovereign State to grant pardon etc., and are not subject to any limitations. There could, therefore, be no conflict between these two, and if there were any conflict at all, the limited powers of the court must yield to the unlimited powers of the Executive. As regards the condition imposed by the Governor, subject to which the sentence passed against the petitioner had been suspended, the condition was not illegal, because it did not offend against any peremptory or mandatory provisions of law. It is not the same thing to say that the condition was not authorised by law as to say that the condition was illegal, in the sense that it did what was forbidden by law. We were referred to the various provisions of the Indian Navy Act (Act LXII of 1957) to show that there were no provisions which could be said to have been contravened by the condition attached to the order of suspension by the Governor. Furthermore, the naval custody

in which the petitioner continues had been submitted to by the petitioner and what has been consented to cannot be illegal, though it may not have been authorised by law. Lastly, it was contended that the observation of the High Court in the last paragraph of its judgment was entirely uncalled for, because once it is held, as was held by the High Court, that the Governor's order was not unconstitutional, it was not open to the High Court to make observations which would suggest that the Governor had exercised his power improperly. If the exercise of the power by the Governor is not subject to any conditions, and is not justifiable, it was not within the power of the High Court even to suggest that the Governor should not have passed the order in question. The learned Additional Solicitor-General adopted the able arguments of the Advocate-General and added that, in terms, there was no conflict between Articles 142 and 161 of the Constitution.

9. Mr C.B. Aggarwala, to whom the court is obliged for his able assistance to the court, argued that the exercise of the Rule making power by the Supreme Court is not a mere statutory power, but is a constitutional privilege; that the Supreme Court alone could lay down Rules and conditions in accordance with which applications for special leave to appeal to the court could be entertained; that the material Rule governing the present case was made under the constitutional power of the Supreme Court under Article 145 and that the Advocate-General was in error in describing it as subordinate legislation; that the fact that the Rules made by this court under Article 145 of the Constitution require the approval of the President cannot convert them into Rules made under a law enacted in pursuance of power conferred, either by Article 123 or Article 245 of the Constitution; that the underlying idea behind Rule 5 of Order 21 of the Rules of this court is to see that the petitioner to this court or the appellant should remain under the directions of the court; that the Governor by passing the order in question has deprived the Supreme Court of its power in respect of the custody of the convicted person; that the power under Article 161 has to be exercised within the limits laid down by Article 154 of the Constitution. It was also argued that the petitioner could have got his relief from this court itself when he put in his application for special leave and that in such a situation the Executive should not have intervened. In other words, the contention was that, like the courts of Equity, which intervened in aid of justice when law was of no avail to the litigant, the Executive also should exercise their power only where the courts have not been clothed with ample power to grant adequate relief in the particular circumstances governing the case. It was further argued that on a true construction of the provisions of the law and the Constitution, it would appear that the Governor's power extends only up to a stage and no more, that is to say, the Governor could suspend

the operation of the sentence only until the Supreme Court was moved by way of special leave and then it was for the court to grant or to refuse bail to the petitioner. Once the court has passed an order in that respect, the Governor could not intervene so as to interfere with the orders of the court. Alternatively, it was argued that, even assuming that an order of suspension in terms made by the Governor, could at all be passed during the pendency of the application for leave to appeal to this court, such an order could be passed only by the President, and not by the Governor. In any view of the matter, it was further argued, the Governor could pass an order contemplated by Article 161, but could not add a condition, as he did in the present case, which was an illegal condition. It was further argued that the generality of the expressions used in Section 401 of the Criminal Procedure Code has to be out down by the specific provisions of Section 426 of that Code. In other words, when there is an appeal pending or is intended to be preferred, during that limited period, the trial court itself or the appellate court, has to exercise its judicial function in the matter of granting bail etc.; and the appropriate Government is to stay its hands during that time.

10. Before dealing with the main question as to what is the scope of the power conferred upon the Governor by Article 161 of the Constitution, it will be convenient to review in a general way the law of pardon in the background of which the controversy has to be determined. Pardon is one of the many prerogatives which have been recognised since time immemorial as being vested in the sovereign, wherever the sovereignty might lie. Whether the sovereign happened to be an absolute monarch or a popular republic or a constitutional king or queen, sovereignty has always been associated with the source of power — the power to appoint or dismiss public servants, the power to declare war and conclude peace, the power to legislate and the power to adjudicate upon all kinds of disputes. The King, using the term in a most comprehensive sense, has been the symbol of the sovereignty of the State from whom emanate all power, authority and jurisdictions. As kingship was supposed to be of divine origin, an absolute king had no difficulty in proclaiming and enforcing his divine right to govern, which includes the right to Rule, to administer and to dispense justice. It is a historical fact that it was this claim of divine right of kings that brought the Stuart Kings of England in conflict with Parliament as the spokesman of the people. We know that as a result of this struggle between the King, as embodiment of absolute power in all respects, and Parliament, as the champion of popular liberty, ultimately emerged the constitutional head of the Government in the person of the King who, in theory, wields all the power, but, in practice,

laws are enacted by Parliament, the executive power vests in members of the Government, collectively called the Cabinet, and judicial power is vested in a Judiciary appointed by the Government in the name of His Majesty. Thus, in theory, His Majesty or Her Majesty continues to appoint the Judges of the highest courts, the members of the Government and the public servants, who hold office during the pleasure of the sovereign. As a result of historical processes emerged a clear cut division of governmental functions into executive, legislative and judicial. Thus was established the " Rule" of Law " which has been the pride of Great Britain and which was highlighted by Prof. Dicey. The Rule of Law, in contradistinction to the Rule of man, includes within its wide connotation the absence of arbitrary power, submission to the ordinary law of the land, and the equal protection of the laws. As a result of the historical process aforesaid, the absolute and arbitrary power of the monarch came to be canalised into three distinct wings of the Government. There has been a progressive increase in the power, authority and jurisdiction of the three wings of the Government and a corresponding diminution of absolute and arbitrary power of the King. It may, therefore, be said that the prerogatives of the Crown in England, which were wide and varied, have been progressively curtailed with a corresponding increase in the power, authority and jurisdiction of the three wings of Government, so much so that most of the prerogatives of the Crown, though in theory they have continued to be vested in it, are now exercised in his name by the Executive, the legislature and the Judiciary. This dispersal of the Sovereign's absolute power amongst the three wings of Government has now become the norm of division of power; and the prerogative is no greater than what the law allows. In the celebrated decision of the House of Lords in the case of *Attorney-General* v. *De Keyser's Royal Hotel, Limited* [(1920) AC 508] which involved the right of the Crown by virtue of its prerogative, to take possession of private property for administrative purposes in connection with the defence of the realm, it was held by the House of Lords that the Crown was not entitled by virtue of its prerogative or under any statute, to take possession of property belonging to a citizen for the purposes aforesaid, without paying compensation for use and occupation.

IN THE SUPREME COURT OF INDIA

Maru Ram v. Union of India & Ors.

(1981) 1 SCC 107

Y.V. Chandrachud, C.J, P.N. Bhagwati, V.R. Krishna Iyer, Fazal Ali & A.D. Koshal, JJ.

In this case, the Court examined the constitutionality of section 433-A of the CrPC, which states that those convicted for an offence for which the death penalty is a possible sentence, but who have been awarded life imprisonment instead, and those who have had their death sentences commuted, have to be imprisoned for at least fourteen years before they can avail of remission provisions/ commutation. Further, the Court discussed the relationship between section 432, 433, 433-A and Article 72 and 161 of the Constitution, as well as the conditions under which the decisions of the President and the Governor under Article 161 and 72 could be subjected to judicial review.

V.R. Krishna Iyer, J: "3. Before the enactment of Section 433-A in 1978 these "lifers" were treated, in the matter of remissions and release from jail, like others sentenced to life terms for lesser offence which do not carry death penalty as an either/or possibility. There are around 40 offences which carry a maximum sentence of life imprisonment without the extreme penalty of death as an alternative. The rules of remission and release were common for all prisoners, and most States had rules under the Prisons Act, 1894 or some had separate Acts providing for shortening of sentences or variants thereof, which enabled the life sentence, regardless of the offence which cast him into the prison, to get his exit visa long before the full span of his life had run out — often by about eight to ten or twelve years, sometimes even earlier. Then came, in 1978, despite the strident peals of human rights of that time, a parliamentary amendment to the Procedure Code and Section 433-A was sternly woven, with virtual consensus, into the punitive fabric obligating the *actual detention* in prison for full fourteen years as a mandatory minimum in the two classes of cases where the court *could* have punished the offender with death but *did not, or* where the court *did* punish the culprit with death but he survived through

commutation to life imprisonment granted under Section 433(*a*) of the Procedure Code. All the lifers lugged into these two categories — and they form the bulk of life convicts in our prisons — suddenly found themselves legally robbed of their human longing to be set free under the remission scheme. This poignant shock is at the back of the rain of writ petitions under Article 32; and the despondent prisoners have showered arguments against the privative provision (Section 433-A) as constitutional anathema and penological atavism, incompetent for Parliament and violative of fundamental rights and reformatory goals. The single issue, which has proliferated into many at the hands of a plurality of advocates, is whether Section 433-A is void for unconstitutionality and, alternatively, whether the said harsh provision admits of interpretative liberality which enlarges the oasis of early release and narrows down the compulsive territory of 14-year jail term … These generalities only serve as a backdrop to the consideration of the multi-pronged attack on the vires of Section 433-A. For judicial diagnosis, we must read it whole before dissecting into parts:

> "433-A. Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where the sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."
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> Piecemeal understanding, like a little learning, may prove to be a dangerous thing. To get a hang of the whole subject-matter we must read Section 432 and Section 433 too.
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> "432. (1) 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.
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> 433. The appropriate Government may, without the consent of the person sentenced, commute—

(a) a sentence of death, for any other punishment provided by the Indian Penal Code;

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine."

4. The sections above quoted relate to remission and commutation of sentences. There were similar provisions in the earlier Code corresponding to Sections 432 and 433 (Sections 401 and 402 of the 1898 Code), but Section 433-A is altogether new. "Ay, there's the rub". It is obvious that Section 432 clothes the appropriate Government with the power to remit the whole or part of any sentence. The mechanics for exercising this power and the conditions subject to which the power is to be exercised are also imprinted in the section. This is a wide power which, in the absence of Section 433-A, extends to remission of the entire life sentence if government chooses so to do. A liberal or promiscuous use of the power of remission under Section 433 (*a*) may mean that many a murderer or other offender who could have been given death sentence by the court but has been actually awarded only life sentence may legally bolt away the very next morning, the very next year, after a decade or at any other time the appropriate Government is in a mood to remit his sentence. Bizarre freaks of remissions— such, for instance, as the impertinent happenstance of a Home Minister's "hallowed" presence on an official visit to the prison resulting in remissions of sentences — have been brought to our notice, making us stagger at the thought that even high constitutional powers are devalued in practice by those "dressed in a little brief authority" thereby encouraging the fallacious impression that functionaries of our Republic are reincarnated quasi-maharajas of medieval vintage! We will deal with it a little later under Article 161 of the Constitution but mention it here to prove what, perhaps, provoked Parliament to enact Section 433-A. In many States, we are told, lifers falling within the twin tainted categories routinely earned remissions under the extant rules resulting in their release in the matter of a few years. The penological sense of Parliament was apparently outraged by such extreme abbreviations of life sentences where the offence was grave as might have invited even death penalty.

The same situation prevailed in regard to those who had actually been subjected to death penalty but, thanks to Section 433(*a*), had a commuted sentence of life imprisonment. Taking cognizance of such utter punitive laxity in these two graver classes of cases, the Joint Committee, which went into the Indian Penal Code (Amendment) Bill, suggested that a long enough minimum sentence should be suffered by both classes of lifers. The draconian provision (as some counsel have described it) was the product of the Joint Committee's proposal to add a proviso to Section 57 of the Penal Code. Its appropriate place was in the Procedure Code and so Section 433-A was enacted when the Criminal Procedure Code was amended. It was a punitive prescription made to parliamentary measure which prohibited premature release before the lifer suffered actual incarceration for 14 years. No opposition to *this* clause was voiced in Parliament (Sixth Lok Sabha) so far as our attention was drawn, although that was, vocally speaking, a period of high tide of human rights (1978).

…

7. We have to examine the legislative history of Sections 432 and 433 and study the heritage of Articles 72 and 161 of the Constitution. But this we will undertake at the appropriate stage. Before proceeding further, we may briefly formulate the contentions which have been urged by wave after wave of counsel. The principal challenge has been based upon an alleged violation of Articles 72 and 161 by the enactment of Section 433-A …The next contention voiced with convincing vigour by Shri Tarkunde was that Section 433-A violated Article 14 being wholly arbitrary and irrational. Shri Mridul, with persuasive flavour, stressed that Section 433-A lacked legislative competency under the Lists and must be struck down for the additional reason of contravention of Article 20(1) of the Constitution and backed his plea with American authorities. Shri Kakkar made an independent contribution, apart from endorsement of the earlier submissions by other counsel. The main thrust of his argument, which was ingeniously appealing, was that the various provisions for remissions under the Prison Rules and other legislations had their full operation notwithstanding Section 433-A, thanks to the savings provision in Section 5 of the Procedure Code.

8. Dr Singhvi, who brought up the rear, belatedly but eruditely strengthened the arguments of those who had gone before him by reference to the abortive history of the amendment of Section 302 IPC and the necessity of having to read down the text of Section 433-A in the context of the story of its birth. Apart from the legislative vicissitudes in the light of which he

wanted us to interpret Section 433-A restrictively, Dr Singhvi treated us to the provisions of the Irish Constitution and international human rights norms by way of contrast and desired us to give effect to the rules of remission at least as directives for the exercise of the high prerogative powers under Articles 72 and 161 of the Constitution …

…

23. Sentencing is a judicial function but the execution of the sentence, after the courts pronouncement, is ordinarily a matter for the executive under the Procedure Code, going by Entry 2 in List III of the Seventh Schedule. Keeping aside the constitutional powers under Articles 72 and 161 which are "untouchable" and "unapproachable" for any legislature, let us examine the law of sentencing, remission and release. Once a sentence has been imposed, the only way to terminate it before the stipulated term is by action under Sections 432/433 or Articles 72/161. And if the latter power under the Constitution is not invoked, the *only* source of salvation is the play of power under Sections 432 and 433(*a*) so far as a "lifer" is concerned. No release by reduction or remission of *sentence* is possible under the corpus juris as it stands, in any other way. The legislative power of the State under Entry 4 of List II, even if it be stretched to snapping point, can deal only with Prisons and Prisoners, never with truncation of judicial sentences. Remissions by way of reward or otherwise cannot cut down the sentence as such and cannot, let it be unmistakably understood, grant final exit passport for the prisoner except by government action under Section 432(1). The topic of Prisons and Prisoners does not cover release by way of reduction of the sentence itself. That belongs to criminal procedure in Entry 2 of List III although when the sentence is for a fixed term and remission plus the period undergone equal that term the prisoner may win his freedom. Any amount of remission to result in manumission requires action under Section 432(1), read with the Remission Rules. That is why Parliament, tracing the single source of remission of sentence to Section 432, blocked it by the non-obstante clause. No remission, however long, can set the prisoner free at the instance of the State, before the judicial sentence has run out, save by action under the constitutional power or under Section 432. So read, the inference is inevitable, even if the contrary argument be ingenious, that Section 433-A achieves what it wants — arrest the release of certain classes of "lifers" before a certain period, by blocking Section 432. Articles 72 and 161 are, of course, excluded from this discussion as being beyond any legislative power to curb or confine.

24. We are loathed to loading this judgment with citations but limit it to two leading authorities in this part of the case. Two fundamental principles in sentencing jurisprudence have to be grasped in the context of the Indian corpus juris. The first is that sentencing is a judicial function and whatever may be done in the matter of executing that sentence in the shape of remitting, commuting or otherwise abbreviating, the executive cannot alter the sentence itself. In *Rabha case* [(1961) 2 SCR 133, 137-38], a Constitution Bench of this Court illumined this branch of law. What is the jural consequence of a remission of sentence?

> "In the first place, an order of remission does not wipe out the offence; it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by the Court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of remission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power to grant remission is executive power and cannot have the effect which the order of an appellate or revisional Court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court. This distinction is well brought out in the following passage from Weater's constitutional law on the effect of reprieves and pardons vis-à-vis the judgment passed by the court imposing punishment, at p. 176, para 134:
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> > 'A reprieve is a temporary suspension of the punishment fixed by law. A pardon is the remission of such punishment. Both are the exercise of executive functions and should be distinguished from the exercise of judicial power over sentences. "The judicial power

> and the executive power over sentences are readily distinguishable", observed Justice Sutherland, 'To render a judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it qua judgment.'
>
> Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched."

The relevance of this juristic distinction is that remission cannot detract from the quantum or quality of sentence or its direct and side-effects except to the extent of entitling the prisoner to premature freedom if the deduction following upon the remission has that arithmetic effect.

…

27. The next submission urged to show that Section 433-A is bad is based on Article 20(1) of the Constitution. It is a rule of ancient English vintage that ex post facto infliction of heavier penalties than prevailed at the time of commission of the offence is obnoxious. It has incarnated as Article 20(1) in our Constitution. The short question is whether the inflexible insistence on 14 years as a minimum term for release retroactively enlarges the punishment. Another argument addressed to reach the same conclusion is that if at the time of the commission of the offence a certain benign scheme of remissions ruled, the penalty to which he would then have been subjected was not the punishment stated in the Penal Code but that sentence reduced or softened by the remission scheme or short-sentencing provision. On this basis, the lifers would ordinarily have been released well before 14 years which is the harsh but mandatory minimum prescribed by Section 433-A. This indirectly casts a heavier punishment than governed the crime when it was committed.

28. Neither argument has force. The first one fails because Section 302, IPC (or other like offence) fixes the sentence to be life imprisonment.

fourteen years' duration is never heavier than life term. The second submission fails because a remission, in the case of life imprisonment, ripens into a reduction of sentence of the entire balance only when a final release order is made. *Godse* [Alfred Cohn and Roy Udolf : The Criminal Justice System and its Psychology, Van Nostrand Reinhold Co. New York, pp. 298-99] is too emphatic and unmincing to admit of a different conclusion. The haunting distance of death which is the terminus ad quem of life imprisonment makes deduction based on remission indefinite enough not to fix the date with certitude. Thus, even if remissions are given full faith and credit, the date of release may not come to pass unless all the unexpired, uncertain balance is remitted by a Government Order under Section 432. If this is not done, the prisoner will continue in custody. We assume here that the constitutional power is kept sheathed.

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30. A possible confusion creeps into this discussion by equating life imprisonment with 20 years' imprisonment. Reliance is placed for this purpose on Section 55 IPC and on definitions in various Remission Schemes. All that we need say, as clearly pointed out in *Godse* [Alfred Cohn and Roy Udolf : The Criminal Justice System and its Psychology, Van Nostrand Reinhold Co. New York, pp. 298-99] , *is* that these equivalents are meant for the limited objective of computation to help the State exercise its wide powers of total remissions. 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. No greater punishment is inflicted by Section 433-A than the law annexed originally to the crime. 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 (see *Sambha Ji Krishan Ji* v. *State of Maharashtra* [(1974) 1 SCC 196 : 1974 SCC (Cri) 102 : AIR 1974 SC 147] and *State of M.P.* v. *Ratan Singh* [(1976) 3 SCC 470 : 1976 SCC (Cri) 428 : 1976 Supp SCR 552]).

…

39. The stage is now set for considering the contention that Section 433-A violates Article 14 for two reasons. It arbitrarily ignores the *unequal*, yet vital, variations of crimes and criminals so relevant to punishment in our

age of penological enlightenment and subjects them equally to a terrible term of 14 years in jail as a mandatory minimum. Treating unequals equally is anathema for Article 14. Secondly, the section inflicts, with anti-reformative inhumanity and Procrustean cruelty, a prolonged minimum of 14 years' servitude on every lifer arbitrarily, disregarding the audit report on progressive healing registered by some as against others. The capricious insistence on continued detention of a prisoner long after he has been fully resocialised is a penological overkill, purposeless torture and constitutional blunder. These two intertwined arguments cannot be appreciated without investigating the rational penal policy of our system and the brutal impertinence of rigorous incarceration beyond the point of habilitation, what with Mahatma Gandhi's therapeutic approach to criminals and *Maneka Gandhi*'*s*[*Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248] accent on fairness in privative processes where personal liberty is involved.

41. Surely, arbitrary penal legislation will suffer a lethal blow under Article 14. But the main point here is whether Section 433-A harbours this extreme vice of arbitrariness or irrationality. We must remember that Parliament as legislative instrumentality, with the representatives of the people contributing their wisdom to its decisions, has title to an initial presumption of constitutionality. Unless one reaches far beyond un-wisdom to absurdity, irrationality, colourability and the like, the court must keep its hand off.

42. A judicial journey to the penological beginning reveals that social defence is the objective. The triple purposes of sentencing are retribution, draped sometimes as a public denunciation, deterrence, another scary variant, with a Pavlovian touch, and, in our era of human rights, rehabilitation, founded on man's essential divinity and ultimate retrievability by raising the level of consciousness of the criminal and society. We may avoid, for the nonce, theories like "society prepares the crime, the criminal commits it"; or that "crime is the product of social excess" or that "poverty is the mother of crime".

…

44. We emphasise here that remission schemes offer healthy motivation for better behaviour, inner improvement and development of social fibre. While eccentricities of remission reducing a murderer's life term to short spells of 2 or 3 years in custody may scandalise penologists, such fear may not flabbergast any sociologist if by sheer good behaviour, educational striving and correctional success, a prisoner earns remission enough for release after serving 7 or 8 years.

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46. Basic to the submissions of counsel for the petitioners is the humane assumption that the object of sentencing is not deterrent torture simpliciter but mainly the rehabilitation of the prisoner. Human dignity, emphasised in the preamble, compassion, implicit in the prescription of *fair* procedure in Article 21, and the irrationality of arbitrary incarceratory brutality violative of Article 14 invest the demand for a reformatory component in jail regimen with the status of a constitutional requirement. We need not prolong the judgment by substantiation of this proposition because the learned Solicitor-General, with sweet reasonableness and due regard to the precedents of this Court, has not disputed that reform of the prisoner is one of the major purposes of punishment.

47. The sequiter is irresistible. Any provision that wholly or substantially discards the relevancy of restoration of the man mired by criminality is irrational. How is Section 433-A affected by this vice? The argument is that 14 years in prison is an inordinate spell which is not only an unrewarding torment but a negation of reformation — indeed, the promotion of embittered hostility to society and hardening of brutality counter-productive of hopeful humanization.

48. The argument pressed before us is that Section 433-A does injustice to the imperative of reformation of the prisoner. Had his in-prison good behaviour been rewarded by reasonable remissions linked to improved social responsibility, nurtured by familial contacts and liberal parole, cultured by predictable, premature release, the purpose of habilitation would have been served. If law — Section 433-A in this case — rudely refuses to consider the subsequent conduct of the prisoner and forces all convicts, good, bad and indifferent, to serve a fixed and arbitrary minimum it is an angry fiat untouched by the proven criteria of reform. Surely, an avant garde penologist or T.M. oriented jurist would regard enlightened sentencing as abbreviated life behind bars coupled with rehabilitatory exposure inside and outside. Maybe, he may even criticise the draconian duration, blindly running beyond 14 years, as penological illiteracy. Criminologists concentrate on the activisation of the creative intelligence of the culprit by various procedures and by his release from jail at a cut-off point when the jural-neural tests of mental-moral normalcy, otherwise called Rehabilitation Indices, are satisfied. To violate these research results and to be addicted to a 14-year prison term is a penal superstition without any rational support and, therefore, is arbitrary. Why not 20 years? Or a whole life? No material, scientific, cultural or other has been placed

for our consumption by the State indicating that if a murderer does not spend at least 14 endless years inside jail he will be a social menace when released. Sadism and impressionism even if it incarnates as legislation, cannot meet the social science content of Articles 14 and 21 which are part of the suprema lex.

…

50. We have no doubt that reform of the prisoner, as a social defence strategy, is high on the agenda of Indian penal policy reform. The question is whether a 14-year term as a mandatory minimum, is so extremist and arbitrary as to become unconstitutional, even assuming the rehabilitatory recipe to be on our penological pharmacopeia. We cannot go that far as Judges, whatever our personal dispositions may incline us were we legislators.

51. Two broad grounds to negative this extreme position strike us. Deterrence, as one valid punitive component has been accepted in *Sunil Batra* [(1978) 4 SCC 494, 579 : 1979 SCC (Cri) 155, 240] by a five-Judge Bench (see Desai, J., supra). So, a measure of minimum incarceration of 14 years for the gravest class of crimes like murder cannot be considered shocking, having regard to the escalation of horrendous crime in the country and the fact that this Court has upheld even death penalty (limited though to "the rarest of rare cases"). [*Mohammad Giasuddin* v.*State of A.P.*, (1977) 3 SCC 287, 290 : 1977 SCC (Cri) 496, 500] The time has not, perhaps, arrived to exclude deterrence and even public denunciation altogether. Secondly, even for correctional therapy, a long "hospitalisation" in prison may sometimes be needed. To change a man's mind distorted by many baleful events, many primitive pressures, many evil companions and many environmental pollutions, may not be an instant magic but a slow process — assuming that correctional strategies are awarely available in prisons, "a consummation devoutly to be wished" but notoriously, rather victoriously, absent.

52. We agree that many studies by criminologists, high-powered commissions and court pronouncements have brought home the truth of the lie; once a murderer always a murderer and, therefore, early release will spell a hell of manslaughter. Social scientists must accept Robert Ingersoll's tart remark: "In the history of the world, the man who is ahead has always been called a heretic." We, as judges, have no power to legislate but only to invigilate. In the current state of things and ethos of society we have to content ourselves with the thought that, personal opinions apart, a very

long term in prison for a murderer cannot be castigated as so outrageous as to be utterly arbitrary and violative of rational classification between lifers and lifers and as so blatantly barbarous as to be irrational enough to be struck down as ultra vires. Even the submission that no penal alibi justifies a prisoner being kept walled off from the good earth if, by his conduct, attainments and proven normalisation, he has become fit to be a free citizen, cannot spell unconstitutionality. And the uniform infliction of a 14-year minimum on the transformed and the unkempt is an unkind disregard for redemption inside prison. Even so, to overcome the constitutional hurdle much more material, research results and specialist reports, are needed. How to assert who has become wholly habilitated and who not, unless you rely on the Rehabilitation Index? [Freedom Behind Bars — Criminology and Consciousness, Series I, 1979, Maharshi European Research University Press Publication, p. 73] Currently, we have theories, and experiments awaiting social scientists' certificates of certitude.

53. …But courts, when assaying constitutionality, have to wait till the establishment accepts it in some measure. So, we are not now in a position to assert, as court, that at least a 14-year term for a murderer is arbitrary, unusually cruel and unconstitutional. We hold against violation of Article 14. Another argument based on Article 14 may also be briefly dealt with, although we are not carried away by it. In terms, Section 433-A applies only to two classes of life imprisonment. The true content of the provision is that in the two specific categories specified in Section 433-A the prisoner shall actually suffer the minimum jail tenure set in it. There are around forty-one other offences, including attempt to murder, homicide not amounting to murder, grievous hurt, dacoity and breach of trust, where life sentence is the maximum. But the framers of the Penal Code have classified maximum sentences principally on the basis of gravity of the crime. By that token, where a terrible crime has been committed the Penal Code has prescribed death penalty as the maximum. The attack on its constitutionality has recently been repulsed by this Court. [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] The main mass of cases where life imprisonment is actually inflicted by the courts belongs to the "either/or" category where the court has the responsible discretion to impose death penalty or life imprisonment and actually awards only life imprisonment. Even in cases where the court sentences a convict to death the appropriate government often by virtue of Section 433(*a*) reduces the lethal rigour to life term. These classes of cases are categorised separately by Section 433-A. When the crime is so serious as to invite death penalty as a possible sentence, Parliament,

in its wisdom, takes the view that ameliorative judicial award or statutory commutation by the executive should not devalue the sternness of the sentence to be equated with the life sentence awarded for the obviously less serious clauses of offences where the law itself has fixed a maximum of only life imprisonment, not death penalty as a harsher alternative. The logic is lucid although its wisdom, in the light of penological thought, is open to doubt. We have earlier stated the parameters of judicial restraint and, as at present advised, we are not satisfied that the classification is based on an irrational differentia unrelated to the punitive end of social defence. Suffice it to say here, the classification, if due respect to Parliament's choice is given, cannot be castigated as one capricious enough to attract the lethal consequence of Article 13 read with Article 14. Law and Life deal in relatives, not absolutes. No material, apart from humane hunches, has been placed by counsel whose focus has been legal, not social science-oriented, to show that prolonged jail life reaches a point of no return and is unreasonable. On the materials now before us, we do not strike down Section 433-A on the score of capricious classification. Some day, when human sciences have advanced far beyond and non-institutional alternatives have fully developed, parliamentary faith in the 14-year therapy may well change or be challenged as unscientific credulity and superstitious cruelty. But that is a far-away day and futurology is not a forensic speciality…

54. The major submissions which deserve high consideration may now be taken up. They are three and important in their outcome in the prisoners' freedom from behind bars. The first turns on the "prospectivity" (loosely so called) or otherwise of Section 433-A. We have already held that Article 20(1) is not violated but the present point is whether, on a correct construction, those who have been convicted prior to the coming into force of Section 433-A are bound by the mandatory limit. If such convicts are out of its coils their cases must be considered under the remission schemes and "short-sentencing" laws. The second plea, revolves round "pardon jurisprudence", if we may coarsely call it that way, enshrined impregnably in Articles 72 and 161 and the effect of Section 433-A thereon. The power to remit is a constitutional power and any legislation must fail which seeks to curtail its scope and emasculate its mechanics. Thirdly, the exercise of this plenary power cannot be left to the fancy, frolic or frown of Government, State or Central, but must embrace reason, relevance and reformation, as all public power in a republic must. On this basis, we will have to scrutinise and screen the survival value of the various remission schemes and short-sentencing projects, not to test their supremacy over Section 433-A, but

to train the wide and beneficent power to remit life sentences without the hardship of fourteen fettered years.

55. Now to the first point. It is trite law that civilised criminal jurisprudence interdicts retroactive impost of heavier suffering by a later law. Ordinarily, a criminal legislation must be so interpreted as to speak futuristically. We do not mean to enter the area of Article 20(1) which has already been dealt with. What we mean to do is so to read the predicate used in Section 433-A as to yield a natural result, a humane consequence, a just infliction. While there is no vested right for any convict who has received a judicial sentence to contend that the penalty should be softened and that the law which compels the penalty to be carried out in full cannot apply to him, it is the function of the court to adopt a liberal construction when dealing with a criminal statute in the ordinary course of things. This humanely inspired canon, not applicable to certain terribly anti-social categories may legitimately be applied to Section 433-A. (The sound rationale is that expectations of convicted citizens of regaining freedom on existing legal practices should not be frustrated by subsequent legislation or practice unless the language is beyond doubt.) Liberality in ascertaining the sense may ordinarily err on the side of liberty where the quantum of deprivation of freedom is in issue. In short, the benefit of doubt, other things being equal, must go to the citizen in penal statute. With this prefatory caution, we may read the section: "Where a sentence of imprisonment for life *is imposed* on conviction of a person ... such person shall not be released from prison unless he *had served* at least fourteen years of imprisonment". Strict conformity to tense applied by a precision grammarian may fault the draftsman for using the past-perfect tense. That apart, the plain meaning of this clause is that "is" means "is" and, therefore, if a person *is* sentenced to imprisonment for life *after Section 433-A comes into force*, such sentence shall not be released before the 14-year condition set out therein is fulfilled. More precisely, any person who has been convicted before Section 433-A comes into force goes out of the pale of the provision and will enjoy such benefits as accrued to him before Section 433-A entered Chapter XXXII. The other clause in the provision suggests the application of the mandatory minimum to cases of commutation which have already been perfected, and reads: "Where a sentence of death . . . *has been* commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he *had served* at least fourteen years of imprisonment." The draftsman, apparently, is not a grammarian. He uses the tenses without being finical. We are satisfied that even this latter clause merely means that if a sentence of death has been commuted *after this section comes*

into force, such person shall not be released until the condition therein is complied with. "Is" and "has" are not words which are weighed in the scales of grammar nicely enough in this section and, therefore, over-stress on the present tense and the present-perfect tense may not be a clear indication. The general rule bearing on ordinary penal statutes in their construction must govern this case. In another situation, interpreting the import of "has been sentenced" this Court held that "the language of the clause is neutral" regarding prospectivity. [*Boucher Pierre Andre* v. *Supdt., Central Jail, Tihar*, (1975) 1 SCC 192, 195 : 1975 SCC (Cri) 70, 73] It inevitably follows that every person who has been convicted by the sentencing court before December 18, 1978, shall be entitled to the benefits accruing to him from the remission scheme or short-sentencing project as if Section 433-A did not stand in his way. The section uses the word "conviction" of a person and, in the context, it must mean "conviction" by the sentencing court; for that first quantified his deprivation of personal liberty.

…

57. We now move on to the second contention which deals with the power of remission under the Constitution and the fruits of its exercise vis-à-vis Section 433-A. Nobody has a case — indeed can be heard to contend — that Articles 72 and 161 must yield to Section 433-A. Cooley has rightly indicated that "where the pardoning power is vested exclusively in the top executive any law which restricts the power is unconstitutional". Rules to facilitate the exercise of the power stand on a different footing. [Cooley's Constitutional Limitations, Vol. 1, 4th Edn., p. 218] The Constitution is the suprema lex and any legislation, even by Parliament, must bow before it. It is not necessary to delve into the details of these two articles; nor even to trace the antiquity of the royal prerogative which has transmigrated into India through the various Westminster statutes, eventually to blossom as the power of pardon vested in the President or the Governor substantially in overlapping measure and concurrently exercisable.

58. The present provisions (Sections 432 and 433) have verbal verisimilitude and close kinship with the earlier Code of 1898 (Sections 401 and 402). Likewise, the constitutional provisions of today were found even in the Government of India Act, 1935. Of course, in English constitutional law, the sovereign, acting through the Home Secretary, exercises the prerogative of mercy. While the content of the power is the same even under our Constitution, its source and strength and, therefore, its functional features and accountability are different. We will examine this aspect a little later. Suffice it to say that Articles 72 and 161 are traceable to Section 295 of the

Government of India Act, 1935. The Central Law Commission has made certain observations based on *Rabha case* [*Gopal Vinayak Godse* v.*State of Maharashtra*, (1961) 3 SCR 440 : AIR 1961 SC 600 : 1961 Cri LJ 736] to the effect that the effect of granting pardon is not to interfere with the judicial sentence but to truncate its execution. There is no dispute regarding this branch of pardon jurisprudence. What is urged is that by the introduction of Section 433-A, Section 432 is granted a permanent holiday for certain classes of lifers and Section 433(*a*) suffers eclipse. Since Sections 432 and 433(*a*) are a statutory expression and modus operandi of the constitutional power, Section 433-A is ineffective because it detracts from the operation of Sections 432 and 433(*a*) which are the legislative surrogates, as it were, of the pardon power under the Constitution. We are unconvinced by the submissions of counsel in this behalf.

59. It is apparent that superficially viewed, the two powers, one constitutional and the other statutory, are coextensive. But two things may be similar but not the same. That is precisely the difference. We cannot agree that the power which is the creature of the Code can be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States. The source is different, the substance is different, the strength is different, although the stream may be flowing along the same bed. We see the two powers as far from being identical, and, obviously, the constitutional power is "untouchable" and "unapproachable" and cannot suffer the vicissitudes of simple legislative processes. Therefore, Section 433-A cannot be invalidated as indirectly violative of Articles 72 and 161. What the Code gives, it can take, and so, an embargo on Sections 432 and 433(*a*) is within the legislative power of Parliament.

60. Even so, we must remember the constitutional status of Articles 72 and 161 and it is common ground that Section 433-A does not and cannot affect even a wee bit the pardon power of the Governor or the President. The necessary sequel to this logic is that notwithstanding Section 433-A the President and the Governor continue to exercise the power of commutation and release under the aforesaid articles.

61. Are we back to square one? Has Parliament indulged in legislative futility with a formal victory but a real defeat? The answer is "*yes*" and "*no*". Why "yes"? Because the President is symbolic, the Central Government is the reality even as the Governor is the formal head and sole repository of the executive power but is incapable of acting except on, and according to, the advice of his Council of Ministers. The upshot is that the State

Government, whether the Governor likes it or not, can advice and act under Article 161, the Governor being bound by that advice. The action of commutation and release can thus be pursuant to a governmental decision and the order may issue even without the Governor's approval although, under the Rules of Business and as a matter of constitutional courtesy, it is obligatory that the signature of the Governor should authorise the pardon, commutation or release. The position is substantially the same regarding the President. It is not open either to the President or the Governor to take independent decision or direct release or refuse release of anyone of their own choice. It is fundamental to the Westminster system that the Cabinet rules and the Queen reigns being too deeply rooted as foundational to our system no serious encounter was met from the learned Solicitor-General whose sure grasp of fundamentals did not permit him to controvert the proposition, that the President and the Governor, be they ever so high in textual terminology, are but functional euphemisms promptly acting on and *only* on the advice of the Council of Ministers have in a narrow area of power. The subject is now beyond controversy, this Court having authoritatively laid down the law in *Shamsher Singh case* [*Shamsher Singh* v. *State of Punjab*, (1975) 1 SCR 814 : (1974) 2 SCC 831 : 1974 SCC (L&S) 550] . So, we agree, even without reference to Article 367(1) and Sections 3(8)(*b*) and 3(60)(*b*) of the General Clauses Act, 1897, that, in the matter of exercise of the powers under Articles 72 and 161, the two highest dignitaries in our constitutional scheme act and must act not on their own judgment but in accordance with the aid and advice of the ministers. Article 74, after the 42nd Amendment silences speculation and obligates compliance. The Governor vis-à-vis his Cabinet is no higher than the President save in a narrow area which does not include Article 161. The constitutional conclusion is that the Governor is but a shorthand expression for the State Government and the President is an abbreviation for the Central Government.

62. An issue of deeper import demands our consideration at this stage of the discussion. Wide as the power of pardon, commutation and release (Articles 72 and 161) is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. Here, we come upon the second constitutional fundamental which underlies the submissions of counsel. It is that all *public power*, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. We proceed on the basis that these axioms are valid in our constitutional order.

63. The jurisprudence of constitutionally canalised power as spelt out in the second proposition also did not meet with serious resistance from the learned Solicitor-General and, if we may say so rightly. Article 14 is an expression of the egalitarian spirit of the Constitution and is a clear pointer that arbitrariness is anathema under our system. It necessarily follows that the power to pardon, grant remission and commutation, being of the greatest moment for the liberty of the citizen, cannot be a law unto itself but must be informed by the finer canons of constitutionalism. In the *International Airport Authority case* [*RD Shetty* v. *International Airport Authority*, (1979) 3 SCC 489, 511-512] this Court stated: (SCC pp. 511-12, paras 20-21)

> "The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance.
>
> This rule also flows directly from the doctrine of equality embodied in Article 14. It is now well settled as a result of the decisions of this Court in E.P. Royappa v. State of Tamil Nadu [(1974) 4 SCC 3 : 1974 SCC (L&S) 165 : (1974) 2 SCR 348] and Maneka Gandhi v. Union of India [Stroud's Judicial Dictionary Vol 4, 3rd Edn., p. 2836] that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory; it must not be guided by any extraneous or irrelevant considerations, because that would be, denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law."

Mathew, J. in *V. Punnen Thomas* v. *State of Kerala* [AIR 1969 Ker 81 : 1968 Ker LJ 619 : 1968 Ker LT 800] observed:

> "The Government, is not and should not be as free as an individual in selecting the recipients for its largesse. Whatever its activity, the government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal."

If we excerpt again from the *Airport Authority case* [(1979) 3 SCC 489, 504, 505] : (SCC pp. 504 & 505 paras 10 & 11)

> "Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his The Law of the Constitution or the definition given by Hayek in his Road to Serfdom and Constitution of Liberty or the exposition set forth by Harry Jones in his The Rule of Law and the Welfare State, there is as pointed out by Mathew, J., in his article on The Welfare State, Rule of Law and Natural Justice in Democracy, Equality and Freedom [Upendra Baxi, Edn : Eastern Book Co., Lucknow (1978), p. 28] "substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.
>
> ... The discretion of the Government has been held to be not unlimited in that the Government cannot

> give or withhold largesse in its arbitrary discretion or at its sweet will. It is insisted, as pointed out by Prof Reich in an especially stimulating article on The New Property in 73 Yale Law Journal 733, "that Government action be based on standards that are not arbitrary or unauthorised". The Government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licences only in favour of those having grey hair or belonging to a particular political party or professing a particular religious faith. The Government is still the Government when it acts in the matter of granting largesse and it cannot act arbitrarily. It does not stand in the same position as a private individual."

It is the pride of our constitutional order that all power, whatever its source, must, in its exercise, anathematise arbitrariness and obey standards and guidelines intelligible and intelligent and integrated with the manifest purpose of the power. From this angle even the power to pardon, commute or remit is subject to the wholesome creed that guidelines should govern the exercise even of presidential power.

…

65. Pardon, using this expression in the amplest connotation, ordains fair exercise, as we have indicated above. Political vendetta or party favouritism cannot but be interlopers in this area. The order which is the product of extraneous or mala fide factors will vitiate the exercise. While constitutional power is beyond challenge, its actual exercise may still be vulnerable. Likewise, capricious criteria will void the exercise. For example, if the Chief Minister of a State releases everyone in the prisons in his State on his birthday or because a son has been born to him, it will be an outrage on the Constitution to let such madness survive. We make these observations because it has been brought to our notice that a certain Home Minister's visit to a Central Jail was considered so auspicious an omen that all the prisoners in the jail were given substantial remissions solely for this reason. Strangely enough, this propitious circumstance was discovered an year later and remission order was issued long after the Minister graced the penitentiary. The actual order passed on July 18, 1978 by the Haryana Government reads thus: [No. 41/8/78/-JJ(5) dated : Chandigarh, July 28, 1978]

> "In exercise of the powers conferred under Article 161, the Constitution of India, the Governor of Haryana grants special remissions on the same scale and terms as mentioned in Government of India, Ministry of Home Affairs Letter No. U. 13034/59/77 dated June 10, 1977 to prisoners who happened to be confined in Central Jail, Tihar, New Delhi on May 29, 1977, at the time of the visit of Home Minister, Government of India, to said Jail and who have been convicted by the civil courts of Criminal Jurisdiction in Haryana State.
>
> **A. Banerjee**
>
> Secretary to Government of Haryana Jails Department

…

67. All these go to prove that the length of imprisonment is not regenerative of the goodness within and may be proof of the reverse — a calamity which may be averted by exercise of power under Article 161, especially when the circumstances show good behaviour, industrious conduct, social responsibility and humane responses which are usually reflected in the marks accumulated in the shape of remission. In short, the rules of remission may be effective guidelines of a recommendatory nature, helpful to Government to release the prisoner by remitting the remaining term.

…

69. The rule of law, under our constitutional order, transforms all public power into responsible, responsive, regulated exercise informed by high purposes and geared to people's welfare. But the wisdom and experience of the past have found expression in remission rules and short-sentencing laws. No new discovery by Parliament in 1978 about the futility or folly of these special and local experiences, spread over several decades, is discernible. No High-power committee report, no expert body's recommendations, no escalation in recidivism attributable to remissions and releases, have been brought to our notice. Impressionistic reaction to some cases of premature release of murderers, without even a follow-up study of the later life of these quondam convicts, has been made. We find the rise of enlightenment in penological alternatives to closed prisons as the current trend and failure of imprisonment as the universal lament.

We, heart-warmingly, observe experiments in open jails, filled by lifers, liberal paroles and probations, generosity of juvenile justice and licensed release or freedom under leash — a la The U.P. Prisoners' Release on Probation Act, 1938. We cannot view without gloom the reversion to the sadistic superstition that the longer a life convict is kept in a cage the surer will be his redemption. It is our considered view that, beyond an optimum point of, say, eight years — we mean no fixed formula — prison detention benumbs and makes nervous wreck or unmitigated brute of a prisoner. If animal farms are not reformatories, the remission rules and short-sentencing schemes are a humanising wheel of compassion and reduction of psychic tension. We have no hesitation to reject the notion that Articles 72/161 should remain uncanalised. We have to direct the provisional acceptance of the remission and short-sentencing schemes as good guidelines for exercise of pardon power — a jurisdiction meant to be used as often and as systematically as possible and *not to be abused*, much as the temptation so to do may press upon the pen of power.

70. The learned Solicitor-General is right that these Rules are plainly made under the Prisons Act and not under the constitutional power. The former failed under the pressure of Section 433-A. But that, by no means, precludes the States from adopting as working rules the same remission schemes which seem to us to be fairly reasonable. After all, the Government cannot meticulously study each prisoner and the present praxis of marks, until a more advanced and expertly advised scheme is evolved, may work. Section 433-A cannot forbid this method because it is immunised by Article 161. We strongly suggest that, without break, the same Rules and schemes of remission be continued as a transmigration of soul into Article 161, as it were, and benefits extended to all who fall within their benign orbit — save, of course, in special cases which may require other relevant considerations. The wide power of executive clemency cannot be bound down even by self-created rules.

…

72. We conclude by formulating our findings:

(*1*) We repulse all the thrusts on the vires of Section 433-A. Maybe, penologically the prolonged term prescribed by the section is supererogative. If we had our druthers we would have negatived the need for a fourteen-year gestation for reformation. But ours is to construe, not construct, to decode, not to make a code.

(*2*) We affirm the current supremacy of Section 433-A over the Remission Rules and short-sentencing statutes made by the various States.

(*3*) We uphold all remissions and short-sentencing passed under Articles 72 and 161 of the Constitution but release will follow, in life sentence cases, only on Government making in order en masse or individually, in that behalf.

(*4*) We hold that Section 432 and Section 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar power, and Section 433-A, by nullifying wholly or partially these prior provisions does not violate or detract from the full operation of the constitutional power to pardon, commute and the like.

(*5*) We negate the plea that Section 433-A contravenes Article 20(1) of the Constitution.

(*6*) We follow *Godse case* [Alfred Cohn and Roy Udolf : The Criminal Justice System and its Psychology, Van Nostrand Reinhold Co. New York, pp. 298-99] to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by Government.

(*7*) We declare that Section 433-A, in both its limbs (i.e. both types of life imprisonment specified in it), is prospective in effect. To put the position beyond doubt, we direct that the mandatory minimum of 14 years actual imprisonment will not operate against those whose cases were decided by the *trial court before December 18, 1978* when Section 433-A came into force. All "Lifers" whose conviction by the court of first instance was entered prior to that date are *entitled* to consideration by Government for release on the strength of earned remissions although a release can take place only if Government makes an order to that effect. To this extent the battle of the tenses is won by the prisoners. It follows, by the same logic, that short-sentencing legislations, if any, will entitle a prisoner to claim release thereunder if his conviction by the court of first instance was before Section 433-A was brought into effect.

(*8*) The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or Governor on their own. The advice of the appropriate Government binds the Head of the State. No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group.

(*9*) Considerations for exercise of power under Articles 72/161 may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the court examine the exercise.

(*10*) Although the remission rules or short-sentencing provisions proprio vigore may not apply as against Section 433-A, they will override Section 433-A if the Government, Central or State, guides itself by the selfsame rules or schemes in the exercise of its constitutional power. We regard it as fair that until fresh rules are made in keeping with experience gathered, current social conditions and accepted penological thinking — a desirable step, in our view — the present remission and release schemes may usefully be taken as guidelines under Articles 72/161 and orders for release passed. We cannot fault the Government, if in some intractably savage delinquents, Section 433-A is itself treated as a guideline for exercise of Articles 72/161. These observations of ours are recommendatory to avoid a hiatus, but it is for Government, Central or State, to decide whether and why the current Remission Rules should not survive until replaced by a more wholesome scheme.

(*11*) The U.P. Prisoners' Release on Probation Act, 1938, enabling limited enlargement under licence will be effective as legislatively sanctioned imprisonment of a loose and liberal type and such licensed enlargement will be reckoned for the purpose of the 14-year duration. Similar other statutes and rules will enjoy similar efficacy.

(*12*) In our view, penal humanitarianism and rehabilitative desideratum warrant liberal paroles, subject to security safeguards, and other humanizing strategies for inmates so that the dignity and worth of the human person are not desecrated by making mass

jails anthropoid zoos. Human rights awareness must infuse institutional reform and search for alternatives.

(*13*) We have declared the law all right, but law-in-action fulfils itself not by declaration alone and needs the wings of communication to the target community. So, the further direction goes from this Court that the last decretal part is translated and kept prominently in each ward and the whole judgment, in the language of the State, made available to the inmates in the jail library.

(*14*) Section 433-A does not forbid parole or other release within the 14-year span. So to interpret the section as to intensify inner tension and intermissions of freedom is to do violence to language and liberty...."

IN THE HIGH COURT OF GUJARAT

Bhikhabhai Devshi v. State of Gujarat & Others

AIR 1987 Guj. 136

P.R. Gokulakrishnan, S.B. Majmudar & R.A. Mehta, JJ.

The question before the Court was whether the Prison (Bombay Parole and Furlough) Rules, 1959 permits prison authorities to grant furlough to a prisoner who had surrendered late after release on a prior furlough or parole. The Full Bench of High Court in this case discussed the object of parole and furlough in the prison system and in that context examined the issue of denying furlough to a prisoner after his late surrender.

R.A. Mehta, J.: "28. The object of parole and furlough rules is to humanise penal system and to enable the prisoner to maintain continuity with his family life and to deal with the family matters and to save him from evil effects of continuous jail life and to enable him to gain self confidence and to maintain constructive hopes and active interest in life. Since these are the clear objects of furlough system, could it have been intended that the benefit and privilege of furlough should be denied to a prisoner merely on the ground of lateness in surrendering after release on parole or furlough, irrespective of anything and any circumstances justifying or mitigating the default or in any way not showing any tendency to escape or any risk to the society in any manner whatsoever? It is not possible to hold that irrespective of all these circumstances, such a prisoner surrendering late is totally disqualified from the consideration for release on furlough. The cases of prisoners who have surrendered late have to be examined on merits and the prison authority will have the power, duty and discretion to consider and to grant or refuse furlough and, therefore, the word 'shall' in the context of R. 4(10) latter part will have to be read as 'may'.

29. As far as the first part of R. 4(10) is concerned, in respect of prisoners who have escaped or attempted to escape, such prisoners, a class by themselves, cannot be trusted for being released on furlough and, therefore, in such cases, the prison authority would be justified in not considering their request for furlough. However, in cases of late surrender, where there is no element of escape, but merely there is a delay in surrendering,

the question will have to be examined on the facts and circumstances and merits of each case. A given case of a prisoner defaulting in timely surrender, who is wanted by the jail authorities and who is not available at the place where ordinarily he should be and who is apprehended by the police or who surrenders because of the chase by the authority, may fall under the first part where he cannot be trusted to be released on furlough again. But such cases are at the other extreme.

30. Other cases of late surrender may be of voluntary surrenders and the lateness may not be unduly long and not without sufficient cause or reason. In such cases sufficiency of such a cause related to time will certainly have to be considered by the authority. Section 48-A itself provides for cases of later surrender. As seen earlier it provides that if any prisoner fails without sufficient cause to observe any of the conditions on which his sentence was suspended or remitted or furlough or release on parole was granted to him, he shall be deemed to have committed a prison offence and the Superintendent may, after obtaining his explanation, punish such offence by different punishments including the loss of privilege of furlough. Thus, if he shows sufficient cause, it would not be an offence at all. However, even if the cause is not sufficient, the Superintendent will have to consider his explanation and having regard to the insufficient cause or no cause and the degree of gravity of offence in the facts and circumstances of the case, decide about the quantum and nature of punishment. If he does not think it fit to impose the punishment of forfeiture of furlough and to impose higher punishment, R. 4(10) cannot be read as a total and automatic prohibition granting furlough to a defaulting and punished prisoner. That would be clearly and directly contrary to S. 48A of the Prisons Act, 1894. Rules have to be consistent with the Act and in order to harmonise R. 4(10) and make it consistent with the mandate of S. 48A the only way to read the latter part of R. 4(10) is to hold it to be directory and giving discretion to the authority to consider and to grant or refuse furlough in cases of prisoners who have surrendered late. Any other construction to the contrary as is canvassed by the respondent authorities would not only make R. 4(10) latter part unreasonable and arbitrary, but would also directly go against S. 48A of the Act. It is well settled that all the provisions have to be read together and construed harmoniously and this rule can be read harmoniously with the Act so as to achieve the object of the Act and the Rules and the construction which is sought to be placed does not in any way go against any of the objects of the Act or the Rules."

THE SUPREME COURT OF INDIA

Kehar Singh v. Union of India

(1989) 1 SCC 204

R.S. Pathak, C.J., E.S. Venkataramiah, Ranganath Misra, V.N. Venkatachaliah & N.D. Ojha,JJ.

The mercy petition of the petitioner had been rejected by the President, upon which the petitioner filed this petition before the Court. The Court in this case discussed whether the President, under Article 72 of the Constitution, is entitled to determine the merits of the case based on the evidence on record, and if he came to conclusion different from what had been arrived at by the Court with respect to the guilt of the accused or the sentence awarded, whether he could make any modifications to the judicial record. The Court also examined Article 161, 72 and 136 of the Constitution in order to determine if the decisions of the President or the Governor were subject to judicial review, and if so, under what circumstances. The question of whether guidelines were to be laid down in order to steer the decisions of the President under Article 72 was also discussed. The Court also stressed the importance of the power of pardon and remission in light of Article 21 of the Constitution.

R.S. Pathak, C.J.: "5. The first question is whether there is justification for the view that when exercising his powers under Article 72 the President is precluded from entering into the merits of a case decided finally by this Court. It is clear from the record before us that the petition presented under Article 72 was specifically based on the assertion that Kehar Singh was innocent of the crime for which he was convicted. That case put forward before the President is apparent from the contents of the petition and the copies of the oral evidence on the record of the criminal case. An attempt was made by the learned Attorney General to show that the President had not declined to consider the evidence led in the criminal case, but on a plain reading of the documents we are unable to agree with him.

…

7. The Constitution of India, in keeping with modern constitutional practice, is a constitutive document, fundamental to the governance of the country,

whereby, according to accepted political theory, the people of India have provided a constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution. All power belongs to the people, and it is entrusted by them to specified institutions and functionaries with the intention of working out, maintaining and operating a constitutional order. The Preambular statement of the Constitution begins with the significant recital:

> "We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic ... do hereby adopt, enact and give to ourselves this Constitution."

To any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State in most civilised societies is regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State. In England, the power is regarded as the royal prerogative of pardon exercised by the Sovereign, generally through the Home Secretary. It is a power which is capable of exercise on a variety of grounds, for reasons of State as well as the desire to safeguard against judicial error. It is an act of grace issuing from the Sovereign. In the United States, however, after the founding of the Republic, a pardon by the President has been regarded not as a private act of grace but as a part of the constitutional scheme. In an opinion, remarkable for its erudition and clarity, Mr Justice Holmes, speaking for the Court in *W.I. Biddle*v. *Vuco Perovich* [71 L Ed 1161] enunciated this view, and it has since been affirmed in other decisions. The

power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. It is not denied, and indeed it has been repeatedly affirmed in the course of argument by learned counsel, Shri Ram Jethmalani and Shri Shanti Bhushan, appearing for the petitioners that the power to pardon rests on the advice tendered by the Executive to the President, who subject to the provisions of Article 74(1) of the Constitution, must act in accordance with such advice. We may point out that the Constitution Bench of this Court held in *Maru Ram* v. *Union of India* [(1981) 1 SCC 107 : 1981 SCC (Cri) 112 : (1981) 1 SCR 1196] , that the power under Article 72 is to be exercised on the advice of the Central Government and not by the President on his own, and that the advice of the Government binds the Head of the State.

…

10. We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him. In *U.S.*v. *Benz* [75 L Ed 354, 358] Sutherland, J., observed:

> "The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua a judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act

> as much as the imposition of the sentence in the first instance."

The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. It is the nature of the power which is determinative. In *Sarat Chandra Rabha* v.*Khagendranath Nath* [AIR 1961 SC 334 : (1961) 2 SCR 133, 138-140] Wanchoo, J., speaking for the Court addressed himself to the question whether the order of remission by the Governor of Assam had the effect of reducing the sentence imposed on the appellant in the same way in which an order of an appellate or revisional criminal court has the effect of reducing the sentence passed by a trial court, and after discussing the law relating to the power to grant pardon, he said:

> "Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched. In this view of the matter the order of remission passed in this case though it had the effect that the appellant was released from jail before he had served the full sentence of three years' imprisonment and had actually served only about sixteen months' imprisonment, did not in any way affect the order of conviction and sentence passed by the court which remained as it was.

and again:

> Now where the sentence imposed by a trial court is varied by way of reduction by the appellate or revisional court, the final sentence is again imposed by the Court; but where a sentence imposed by the Court is remitted in part under Section 401 of the Code of Criminal Procedure that has not the effect in law of reducing the sentence imposed by the court,

> though in effect the result may be that the convicted person suffers less imprisonment than that imposed by the court. The order of remission affects the execution of the sentence imposed by the court but does not affect the sentence as such, which remains what it was in spite of the order of remission."

It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court.

11. In the course of argument, the further question raised was whether judicial review extends to an examination of the order passed by the President under Article 72 of the Constitution. At the outset we think it should be clearly understood that we are confined to the question as to the area and scope of the President's power and not with the question whether it has been truly exercised on the merits. Indeed, we think that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram* v. *Union of India* [(1981) 1 SCC 107, 154 : 1981 SCC (Cri) 112, 159 : (1981) 1 SCR 1196, 1249] . The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the court. In *Special Reference No.* 1 *of* 1964 [AIR 1965 SC 745 : (1965) 1 SCR 413, 446] , Gajendragadkar, C.J., speaking for the majority of this Court, observed:

> "... whether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution...."

This Court in fact proceeded in *State of Rajasthan* v. *Union of India* [(1977) 3 SCC 592 : AIR 1977 SC 1361 : (1978) 1 SCR 1, 80-81] to hold: (SCC p. 661, para 149)

> "So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so.... This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law."

and in *Minerva Mills Ltd.* v. *Union of India* [(1980) 3 SCC 625 : AIR 1980 SC 1789 : (1981) 1 SCR 206, 286-287] Bhagwati, J., said: (SCC p. 677, para 87)

> "... the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded.... The Constitution has, therefore, created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review...."

It will be noted that the learned Judge observed in *S.P. Sampath Kumar* v. *Union of India* [(1987) 1 SCC 124 : (1987) 2 ATC 82] that this was also the view of the majority Judges in *Minerva Mills Ltd.* v. *Union of India* [(1980) 3 SCC 625 : AIR 1980 SC 1789 : (1981) 1 SCR 206, 286-287] .

…

12. The learned Attorney General of India contends that the power exercised under Article 72 is not justiciable, and that Article 72 is an enabling provision and confers no right on any individual to invoke its protection. The power, he says, can be exercised for political considerations, which are not amenable to judicially manageable standards. In this connection, he has placed *A.K. Roy* v. *Union of India* [(1982) 1 SCC 271 : 1982 SCC

(Cri) 152 : (1982) 2 SCR 272] before us. Reference has also been made to *K.M. Nanavati* v. *State of Bombay* [AIR 1961 SC 112 : (1961) 1 SCR 497 : (1961) 1 Cri LJ 173] to show that when there is an apparent conflict between the power to pardon vested in the President or the Governor and the judicial power of the courts an attempt must be made to harmonise the provisions conferring the two different powers. On the basis of *Gopal Vinayak Godse* v. *State of Maharashtra* [AIR 1961 SC 600 : (1961) 3 SCR 440 : (1961) 1 Cri LJ 736] , he urges that the power to grant remissions is exclusively within the province of the President. He points out that the power given to the President is untrammelled and as the power proceeds on the advice tendered by the Executive to the President, the advice likewise must be free from limitations, and that if the President gives no reasons for his order, the Court cannot ask for the reasons, all of which, the learned Attorney General says, establishes the non-justiciable nature of the order. Then he refers to the appointment of Judges by the President as proceeding from a sovereign power, and we are referred to *Mohinder Singh Gill* v. *State of Punjab* [(1977) 3 SCC 346 : 1977 SCC (Cri) 515 : AIR 1976 SC 2299] , *Joseph Peter* v. *State of Goa, Daman and Diu* [(1977) 3 SCC 380 : 1977 SCC (Cri) 486 : (1977) 3 SCR 771] as well as *Riley* v. *Attorney General of Jamaica* [(1982) 3 All ER 469] and *Council of Civil Service Unions* v. *Minister for the Civil Service* [(1984) 3 All ER 935] , besides *Attorney General* v. *Times Newspapers Ltd.* [(1973) 3 All ER 54] Our attention has been invited to paras 949 to 951 in 8 *Halsbury's Laws of England* to indicate the nature of the power of pardon and that it is not open to the courts to question the manner of its exercise. Reference to a passage in 104 *Law Quarterly Review* was followed by *Horwitz*. v. *Connor, Inspector General of Penal Establishments of Victoria* [(1908) 6 CLR 38] . Reliance was placed on the doctrine of the division of powers in support of the contention that it was not open to the judiciary to scrutinise the exercise of the "mercy" power, and much stress was laid on the observations in *Michael de Freitas* also called *Michael Abdul Malik* v. *George Ramoutar* [(1975) 3 WLR 388, 394] , in *Bandhua Mukti Morcha* v. *Union of India* [(1984) 3 SCC 161 : 1984 SCC (L&S) 389: (1984) 2 SCR 67, 161] and *Rai Sahib Ram Jawaya Kapur* v. *State of Punjab* [AIR 1955 SC 549 : (1955) 2 SCR 225, 235-6] .

13. It seems to us that none of the submissions outlined above meets the case set up on behalf of the petitioner. We are concerned here with the question whether the President is precluded from examining the merits of the criminal case concluded by the dismissal of the appeal by this Court or it is open to him to consider the merits and decide whether he should grant relief under Article 72. We are not concerned with the merits of the

decision taken by the President, nor do we see any conflict between the powers of the President and the finality attaching to the judicial record, a matter to which we have adverted earlier. Nor do we dispute that the power to pardon belongs exclusively to the President and the Governor under the Constitution. There is also no question involved in this case of asking for the reasons for the President's order. And none of the cases cited for the respondents beginning with *Mohinder Singh Gill* [(1977) 3 SCC 346 : 1977 SCC (Cri) 515 : AIR 1976 SC 2299] advance the case of the respondent any further. The point is a simple one, and needs no elaborate exposition. We have already pointed out that the courts are the constitutional instrumentalities to go into the scope of Article 72 and no attempt is being made to analyse the exercise of the power under Article 72 on the merits. As regards *Michael de Freitas* [(1975) 3 WLR 388, 394], that was a case from the Court of Appeal of Trinidad and Tobago, and in disposing it of the Privy Council observed that the prerogative of mercy lay solely in the discretion of the Sovereign and it was not open to the condemned person or his legal representatives to ascertain the information desired by them from the Home Secretary dealing with the case. None of these observations deals with the point before us, and therefore they need not detain us.

14. Upon the considerations to which we have adverted, it appears to us clear that the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review.

15. The next question is whether the petitioner is entitled to an oral hearing from the President on his petition invoking the powers under Article 72. It seems to us that there is no right in the condemned person to insist on an oral hearing before the President. The proceeding before the President is of an executive character, and when the petitioner files his petition it is for him to submit with it all the requisite information necessary for the disposal of the petition. He has no right to insist on presenting an oral argument. The manner of consideration of the petition lies within the discretion of the President, and it is for him to decide how best he can acquaint himself with all the information that is necessary for its proper and effective disposal. The President may consider sufficient the information furnished before him in the first instance or he may send for further material relevant to the issues which he considers pertinent, and he may, if he considers it will assist him in treating with the petition, give an oral hearing to the parties. The matter lies entirely within his discretion. As regards the considerations to be applied by the President to the petition, we need say nothing more

as the law in this behalf has already been laid down by this Court in *Maru Ram* [(1981) 1 SCC 107 : 1981 SCC (Cri) 112 : (1981) 1 SCR 1196]

16. Learned counsel for the petitioners next urged that in order to prevent an arbitrary exercise of power under Article 72 this Court should draw up a set of guidelines for regulating the exercise of the power. It seems to us that there is sufficient indication in the terms of Article 72 and in the history of the power enshrined in that provision as well as existing case law, and specific guidelines need not be spelled out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, for we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme.

…

18. In the result, having regard to the view taken by us on the question concerning the area and scope of the President's power under Article 72 of the Constitution, we hold that the petition invoking that power shall be deemed to be pending before the President to be dealt with and disposed of afresh. The sentence of death imposed on Kehar Singh shall remain in abeyance meanwhile."

IN THE HIGH COURT OF BOMBAY

Sharad Keshav Mehta v. State of Maharashtra

1989 Cri. L. J. 681

M. Pendse & V. Tipnis, JJ.

A writ was filed in the High Court of Bombay challenging the decision of prison authorities to refuse furlough to the petitioner. In its decision, the Court examined the circumstances and considerations based on which furlough can be denied to a prisoner.

Pendse, J.: "1.The petitioner was convicted for committing an offence under S. 302 of the I.P.C. and was sentenced to life imprisonment on Oct. 11, 1983. The petitioner made an application for release on furlough on Oct. 14, 1985 and that application was rejected on Feb. 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.

3. The prisoner was convicted on Oct. 11, 1983 and had, admittedly, completed a period of two years on Oct. 14, 1985 and was, therefore, entitled to be released on furlough. It was urged on behalf of the State Government that R. 17 prescribes 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 cls. (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.

4. It was 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. 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 the release of the prisoner on furlough would disturb public peace and tranquillity, the rejection of the application is, misconceived.

5. 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 bond which is a requirement of R. 6 and Mr. Rane submit that the prisoner produced a relative who was willing to receive him and enter into a surety 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.

6. 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."

IN THE SUPREME COURT OF INDIA

State of Haryana & Ors. v. Mohinder Singh

(2000) 3 SCC 394

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

Appeals were filed before the Supreme Court on two questions: (1) whether a convict is entitled to remission of his sentence for the period during which he is on bail, and (2) whether a prisoner convicted under Section 376, IPC, is entitled to remission of his sentence despite a government circular issued under Section 432, CrPC which does not grant such remission to persons convicted under Section 376 IPC.

D.P. Wadhwa, J.: "5. Before we consider the rival contentions it would be appropriate to set out the circulars granting remission to the prisoners. These circulars have been issued under Section 432 of the Code and their language is same. They were issued on different dates on 22.7.1987, 16.3.1988, 14-8-1989, 14-8-1991, 29-1-1992, 29-4-1993 and 14-8-1995. First such circular dated 22-7-1987 is applicable from 6-7-1987 and is as under:

> "In exercise of the powers conferred under Section 432 of the Code of Criminal Procedure, 1973, the Governor of Haryana hereby grants special remission to the prisoners who happen to be confined in jails in the State of Haryana on 6-7-1987 and who have been convicted by civil courts of criminal jurisdiction (criminal court of competent jurisdiction?) in the State of Haryana. The remission is granted on the following scale:
>
> Remission
>
> (*i*) Those who have been sentenced for a period 1 year exceeding 10 years
>
> (*ii*) Those who have been sentenced for a period 6 months exceeding 2 years and up to 10 years

(*iii*) Those who have been sentenced for a period 3 months up to 2 years

Provided that:

(*i*) No remission will be granted to persons convicted of rape or dowry deaths.

(*ii*) The remission will not exceed 1/4th of the period of sentence.

(*iii*) The minimum effective imprisonment will be three months (or less where the actual sentence is less than 3 months).

2. Remission will also be granted to all the convicts who were on parole/furlough from the jail on 6-7-1987 subject to the condition that they surrender at the jail on the due date after the expiry of parole/furlough period for undergoing unexpired portions of their sentences.

3. Sentence of imprisonment imposed in default of payment of the fine shall not be treated as substantive for the purpose of grant of this remission.

4. All the prisoners convicted by civil courts of criminal jurisdiction (criminal court of competent jurisdiction?) in Haryana but undergoing their sentences in jails outside Haryana shall be entitled to the grant of remission on the above scale.

5. The remission will not be admissible to:

   (*i*) Detenus of any class.

   (*ii*) The persons sentenced under the Foreigners Act, 1948 and the Passport Act, 1967.

   (*iii*) Pakistani nationals.

   (*iv*) The persons sentenced under Sections 2 and 3 of the Criminal Law Amendment Act, 1961 and Sections 121 to 130 of the Indian Penal Code, 1860.

   (*v*) The persons sentenced under Sections 3, 4, 5, 6 to 10 of the Official Secrets Act, 1930.

(*vi*) The persons imprisoned for failing to give security for keeping peace for their good behaviour under Sections 107/109 of the Criminal Procedure Code, 1973.

(*vii*) The persons who committed any major jail offence during the last two years and were punished for the same under the relevant provisions of the Punjab Jail Manual.

(*viii*) The persons who got the benefit of such a remission during the past one year from 6-7-1987. The grant of this remission to life convicts will not affect the provisions of Section 433-A CrPC.

Dated 22-7-1987 M.C. Gupta
Financial Commissioner & Secretary
Chandigarh to Government, Haryana, Jails Department"

…

8. It is not disputed that the circulars have been issued by the State Government in the exercise of powers conferred under Section 432 of the Code. Its authority to issue the circulars has not been questioned. From the language of the aforesaid circular it is relevant to note three points for the purpose of these appeals: (*1*) it grants special remission to the prisoners, who are confined in jails in the State of Haryana on 6-7-1987, (*2*) remission is also to be granted to all the convicts who are even on parole/furlough from the jail on 6-7-1987, and (*3*) the remission of sentence cannot be granted to prisoners convicted of rape or dowry deaths.

9. The circular granting remission is authorised under the law. It prescribes limitations both as regards the prisoners who are eligible and those who have been excluded. Conditions for remission of sentence to the prisoners who are eligible are also prescribed by the circular. Prisoners have no absolute right for remission of their sentence unless except what is prescribed by law and the circular issued thereunder. That special remission shall not apply to a prisoner convicted of a particular offence can certainly be a relevant consideration for the State Government not to exercise power of remission in that case. Power of remission, however, cannot be exercised arbitrarily. Decision to grant remission has to be well informed, reasonable and fair to all concerned.

10. The terms bail, furlough and parole have different connotations. Bail is well understood in criminal jurisprudence. Provisions of bail are

contained in Chapter XXXIII of the Code. It is granted by the officer in charge of a police station or by the court when a person is arrested and is accused of an offence other than a non-bailable offence. The court grants bail when a person apprehends arrest in case of a non-bailable offence or is arrested for a non-bailable offence. When a person is convicted of an offence he can be released on bail by the appellate court till his appeal is decided. If he is acquitted his bail bonds are discharged and if appeal dismissed he is taken into custody. Bail can be granted subject to conditions. It does not appear to be quite material that during the pendency of appeal though his sentence is suspended he nevertheless remains a convict. For the exercise of powers under Section 432 it may perhaps be relevant that the State Government may remit the whole or any part of the punishment to which a person has been sentenced even though his appeal against conviction and sentence was pending at that time. Appeal in that case might have to abate inasmuch as the person convicted has to accept the conditions on which the State Government remits the whole or part of his punishment.

…

15. In *Poonam Lata* v. *M.L. Wadhawan* [(1987) 3 SCC 347 : 1987 SCC (Cri) 506] this Court was considering the nature and scope of parole in a case of preventive detention. It said: (SCC p. 354, para 8)

> "8. There is no denying of the fact that preventive detention is not punishment and the concept of serving out a sentence would not legitimately be within the purview of preventive detention. The grant of parole is essentially an executive function and instances of release of detenus on parole were literally unknown until this Court and some of the High Courts in India in recent years made orders of release on parole on humanitarian considerations. Historically 'parole' is a concept known to military law and denotes release of a prisoner of war on promise to return. Parole has become an integral part of the English and American systems of criminal justice intertwined with the evolution of changing attitudes of the society towards crime and criminals. As a consequence of the introduction of parole into the penal system, all fixed-term sentences of imprisonment of above 18 months are subject to release on licence, that is, parole after

> a third of the period of sentence has been served. In those countries, parole is taken as an act of grace and not as a matter of right and the convict prisoner may be released on condition that he abides by the promise. It is a provisional release from confinement but is deemed to be a part of the imprisonment. Release on parole is a wing of the reformative process and is expected to provide opportunity to the prisoner to transform himself into a useful citizen. Parole is thus a grant of partial liberty or lessening of restrictions to a convict prisoner, but release on parole does not change the status of the prisoner. Rules are framed providing supervision by parole authorities of the convicts released on parole and in case of failure to perform the promise, the convict released on parole is directed to surrender to custody. (See The Oxford Companion to Law, edited by Walker, 1980 Edn., p. 931; Black's Law Dictionary, 5th Edn., p. 1006; Jowitt's Dictionary of English Law, 2nd Edn., Vol. 2, p. 1320; Kenny's Outlines of Criminal Law, 17th Edn., pp. 574-76; The English Sentencing System by Sir Rupert Cross at pp. 31-34, 87 et. seq.; American Jurisprudence, 2nd Edn., Vol. 59, pp. 53-61; Corpus Juris Secundum, Vol. 67; Probation and Parole, Legal and Social Dimensions by Louis P. Carney.) It follows from these authorities that parole is the release of a very long-term prisoner from a penal or correctional institution after he has served a part of his sentence under the continuous custody of the State and under conditions that permit his incarceration in the event of misbehaviour."

16. Para 20.8 in Chapter XX dealing with "System of Remission, Leave and Premature Release" of the Report of the All-India Committee on Jail Reforms, 1980-83 (Vol. I) refers to leave which can be granted to the petitioner. The relevant portion is as under:

> "Different concepts such as parole, furlough, ticket of leave, home leave, etc., are used in different States to denote grant of leave or emergency release to a prisoner from prison. The terminology used is not uniform and is thus confusing. There is also no

> uniformity with regard to either the grounds on which leave is sanctioned or the level of authority empowered to sanction it. There is also a lot of diversity in the procedure for grant of leave. The scales at which these leaves are granted also differ from State to State; for example in some States parole is granted for a period extending up to 15 days while in other States it is restricted to 10 days only."

17. "Furlough" and "parole" are two distinct terms now being used in the Jail Manuals or laws relating to temporary release of prisoners. These two terms have acquired different meanings in the statute with varied results. Dictionary meanings, therefore, are not quite helpful. In this connection we may refer to the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 which has repealed the Punjab Good Conduct Prisoners (Temporary Release) Act, 1962. The Punjab Act was earlier applicable in the State of Haryana. The language of both the Acts is same and it may be useful to refer to Sections 3 and 4 of any of these two Acts to understand the difference between parole and furlough:

> "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, 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.

(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 good 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."

18. It would be thus seen 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 Delhi Jail Manual also uses the same terminology which we may set out as under:

"Part I (Parole)

1.(i) A prisoner may be released on parole for such period as Government may order in cases of serious illness or death of any member of prisoner's family or his nearest relatives. For this purpose the prisoner's family or his nearest relatives mean his/her parents,

brothers, sisters, wife/husband and children. A prisoner may similarly be released on parole to arrange for the marriage of his issue for a period not exceeding four weeks.

(ii) The period spent on parole will not count as part of the sentence.

2.-3. ***

Part II (Furlough)

1.(i) A prisoner who is sentenced to 5 years or more of rigorous imprisonment and who has actually undergone three years' imprisonment excluding remission may be released on furlough. The first spell may be of three weeks and subsequent spells of two weeks each, per annum, provided that—

(a) his conduct in jail has been good; he has earned three annual good conduct remissions and provided further that he continues to earn good conduct remission or maintains good conduct;

(b) that he is not a habitual offender;

(c) that he is not convicted of robbery with violence, dacoity and arson;

(d) that he is not such a person whose presence is considered highly dangerous or prejudicial to public peace and tranquillity by the District Magistrate of his home district.

(ii) The period of furlough will count as sentence undergone except any such period during which the prisoner commits an offence outside.

2.-6. ***"

19. Chapter XX of the Punjab Jail Manual as applicable in the State of Haryana contains the remission system. Paras 633, 633-A, 635, 637, 644 and 645 are relevant for our purpose which we set out hereunder:

"633. Cases in which ordinary remission not earned.—No ordinary remission shall be earned in the following cases, namely:

(1) in respect of any sentence of imprisonment amounting, exclusive of any sentence passed in default of payment of fine, to less than three months;

(2) in respect of any sentence of simple imprisonment except for any continuous period not being less than one month during which the prisoner labours voluntarily:

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633-A. Ordinary remission not earnable for certain offences committed after admission to jail.—If a prisoner is convicted of an offence committed after admission to jail under Section 147, 148, 152, 224, 302, 304, 304-A, 306, 307, 308, 323, 324, 325, 326, 332, 333, 352, 353 or 377 of the Indian Penal Code, or of an assault committed after admission to jail on a warder or other officer or under Section 6 of the Good Conduct Prisoners Probational Release Act, 1926 (10 of 1926), the remission of whatever kind earned by him under these rules up to the date of the said conviction may, with the sanction of the Inspector General of Prisons, be cancelled.

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635. Scale of award of remission.—Ordinary remission shall be awarded on the following scale:

(a) two days per month for thoroughly good conduct and scrupulous attention to all prison regulations.

(b) two days per month for industry and the due performance of the daily task imposed.

***

637. Application of remission of system.—Subject to the provisions of para 634 remission under para 635

shall be calculated from the first day of the calendar month next following the date of prisoner's sentence; any prisoner who after having been released on bail or because its sentence has been temporarily suspended is afterwards readmitted in the jail shall be brought under the remission system on the first day of the calendar month next following his readmission, but shall be credited on his return to jail with any remission which he may have earned previous to his release on bail or the suspension of his sentence. Remission under para 636 shall be calculated from the first day of the next calendar month following the appointment of the prisoner as convict warder, convict overseer or convict night watchman.

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644. Special remission.—(1) Special remission may be given to any prisoner whether entitled to ordinary remission or not other than a prisoner undergoing a sentence referred to in para 632, for special service as for example:

For the existing para the following shall be substituted—

(1) Special remission may be given to any prisoner whether entitled to ordinary remission or not other than a prisoner undergoing a sentence referred to in para 632, for special services as for example—

(a) assisting in detecting or preventing breaches of prison discipline or regulations,

(b) success in teaching handicrafts,

(c) special excellence in, or greatly increased out-turn of work of good quality,

(d) protecting an officer of the prison from attack,

(e) assisting an officer of the prison in the case of outbreak of fire or similar emergency,

(f) economy in wearing clothes,

(g) donating blood to the blood bank provided that the scale of special remission for this service shall be fifteen days for each occasion on which blood is donated subject to the limit laid down in sub-para (3),

(h) voluntarily undergoing vasectomy operation by a prisoner, having three children, provided that the scale of special remission for such service shall be 30 days, subject to the limits laid down in sub-para (3).

(2) Special remission may also be given to any prisoner released under the Good Conduct Prisoners' Probational Release Act, 1926 for special services such as:

(i) special excellence in, or greatly increased out-turn of good quality,

(ii) assisting employer in case of outbreak of fire or protecting his life or property from theft and other meritorious services.

(3) Special remission may be awarded:

(i) by the Superintendent to an amount not exceeding three days in one year;

(ii) by the Chief Probation Officer in the case of prisoners released under the provisions of the Good Conduct Prisoners' Probational Release Act, 1926 to an amount not exceeding 30 days in one year;

(iii) by the Inspector General of the local Government to an amount not exceeding sixty days in one year.

Explanation.—For the purpose of this rule, years shall be reckoned from the date of sentence and any fraction of a year shall be reckoned as a complete year.

(4) An award of special remission shall be entered on the history ticket of the prisoner as soon as possible after it is made, and the reasons for every award of special remission by a Superintendent shall be briefly recorded, and in case of prisoners released under the Good Conduct Prisoners' Probational Release Act, 1926, such entries and reasons thereof shall be recorded by the Probation Officer.

645. Total remission not to exceed one-fourth part of sentence.—The total remission awarded to a prisoner under all these rules shall not without the special sanction of the local Government, exceed one-fourth part of his sentence.

Provided in very exceptional and suitable cases the Inspector General of Prisons may grant remission amounting to not more than one-third of the total sentence."

20. When a circular specifically applies to the prisoners who are undergoing sentence and are confined in jail and even to those who are on parole or furlough we cannot extend this circular to convicts who are on bail and thus carve out another category to which the Court is not entitled under Section 432 of the Code. As noted above, the validity of the circular has not been challenged on any other ground.

21. In the case of Harphool Singh, who was convicted of rape, the circular specifically is not applicable to the prisoner convicted of an offence of rape or other dowry offences. Perhaps, this provision was not brought to the notice of the High Court when it held that the circular would also apply in the case of Harphool Singh. It was submitted by Mr Dayan Krishnan, learned Amicus Curiae that nevertheless Harphool Singh might have already undergone the sentence after earning remission under the Punjab Jail Manual and the present appeal in his case would be infructuous. It will be for the State Government to consider, if Harphool Singh has served

out his sentence in the normal course without getting any remission under the circular on the basis of the impugned judgment of the High Court. It is not disputed that Harphool Singh has already got the benefit of remission to which he was entitled under Chapter XX of the Punjab Jail Manual. He is certainly not entitled to remission under the circular as that is not applicable to a person convicted of an offence under Section 376 IPC.

22. From para 637 as reproduced above a convict on bail is not entitled to the benefit of the remission system. In fact the question is no longer res integra as it is covered by the decision of this Court in *Jai Prakash* v. *State of Haryana* [(1987) 4 SCC 296 : 1987 SCC (Cri) 715] . While considering the scope of para 637 this Court held: (SCC pp. 299-300, para 7)

> "7. On a reading of the aforesaid provision it is manifest that a prisoner who has been released on bail or whose sentence has been temporarily suspended and has afterwards been readmitted in jail will be brought under remission system on the first day of the calendar month next following his readmission. In other words, a prisoner is not eligible for remission of sentence during the period he is on bail or his sentence is temporarily suspended. The submission that the petitioners who were temporarily released on bail are entitled to get the remission earned during the period they were on bail, is not at all sustainable."

IN THE SUPREME COURT OF INDIA

Sunil Fulchand Shah v. Union of India

(2000) 3 SCC 409

A. S. Anand, C.J., G. T. Nanavati, K. T. Thomas, D. P. Wadhwa & S. Rajendra Babu, JJ.

In this appeal against an order of the High Court of Gujarat, the question before the Court was whether, in cases of preventive detention, the period of detention is a fixed period running from the date specified in the detention order and ending with the expiry of that period or the period is automatically extended by any period of parole granted to the detenu.

G. T. Nanavati, J.: "3. Section 3 of the COFEPOSA Act confers power on the Central Government, State Government and their officers if specially empowered, to make an order for detention against a person engaged in certain prejudicial activities specified in that section. Section 10 prescribes the maximum period for detention. It provides that the maximum period for which any person may be detained in pursuance of any detention order to which the provisions of Section 9 do not apply, shall be one year from the date of detention and the maximum period for which any person may be detained in pursuance of any detention order to which the provisions of Section 9 apply, shall be two years from the date of detention. Section 11 of the Act confers power on the State Government and the Central Government to revoke or modify the detention order. Sub-section (2) of that section, however, provides that the revocation of a detention order shall not bar the making of another detention order under Section 3 against the same person. Section 12 authorises the Government to release the person detained for any specified period either without conditions or upon such conditions as that person accepts. The Government has the power under that section to cancel his release. The person so ordered to be released may be required to enter into a bond with sureties for the due observance of the conditions on which he is released. If the person so released fails without sufficient cause to surrender himself he becomes liable to be punished with imprisonment for a term which may extend to two years, or with fine, or with both. Notwithstanding anything contained

in any other law, Section 12 prohibits release of a person against whom a detention order is made, whether on bail or bail bond or otherwise.

4. A bare reading of Section 10 makes it clear that the maximum period for which a person can be preventively detained under the COFEPOSA Act is one year from the date of detention. But if a declaration is made under Section 9(1) of the Act, then the maximum period for which he can be detained is two years from the date of detention. The period of one year or two years, as the case may be, has to be counted from the date of detention and not from the date of the detention order. Though the Act permits revocation of the detention order and making of another detention order against the same person, it does not specifically provide what shall be the maximum period of detention in such a case. But it has been held that the total period of detention cannot exceed one year or two years, as the case may be. Section 12 which confers power on the Government to release temporarily a person detained does not specifically provide as to how that period is to be counted while computing the maximum period of detention.

5. The question as to the date from which the period of detention has to be counted was raised for the first time before this Court in *Adam Kasam Bhaya case* [(1981) 4 SCC 216 : 1981 SCC (Cri) 823 : (1982) 1 SCR 740]. In that case the detenu was detained under COFEPOSA pursuant to order of detention dated 7-5-1979. The High Court of Gujarat quashed the order of detention. The State preferred an appeal to this Court and when it came up for hearing on 15-9-1981, a preliminary objection was raised on behalf of the detenu that, as the maximum period of detention permitted under Section 10 had expired, the appeal had become infructuous. Dealing with that objection this Court held as under: (SCC p. 218, para 5)

> "In our opinion, the submission has no force. In Section 10, both in the first and the second part of the section, it has been expressly mentioned that the detention will be for a period of one year or two years, as the case may be, from the date of detention, and not from the date of the order of detention. If the submission of learned counsel be accepted, two unintended results follow: (1) a person against whom an order of detention is made under Section 3 of the Act can successfully abscond till the expiry of the period and altogether avoid detention; and (2) even if the period of detention is interrupted

> by the wrong judgment of a High Court, he gets the benefit of the invalid order which he should not. The period of one or two years, as the case may be, as mentioned in Section 10 will run from the date of his actual detention, and not from the date of the order of detention. If he has served a part of the period of detention, he will have to serve out the balance. The preliminary objection is overruled."

A similar preliminary objection was raised in the case of *Mohd. Ismail Jumma case* [(1981) 4 SCC 609 : 1982 SCC (Cri) 1 : (1982) 1 SCR 1014] and following the decision in *Adam Kasam Bhaya* [(1981) 4 SCC 216 : 1981 SCC (Cri) 823 : (1982) 1 SCR 740] it was overruled.

6. In *Poonam Lata* [(1987) 3 SCC 347 : 1987 SCC (Cri) 506 : AIR 1987 SC 1383] a contention was raised that the period of parole cannot be added to the period of detention. The reasons put forward in support of this contention were:

(*1*) as there is no provision authorising interruption of running of the period of detention, release on parole does not bring about any change in the situation;

(*2*) preventive detention is not a sentence by way of punishment and, therefore, the concept of serving out which pertains to punitive jurisprudence cannot be imported into the realm of prevention detention; and

(*3*) even though grant of parole to a detenu amounts to a provisional release from confinement, yet the detenu continues to be under restraint as he would still be subject to restrictions imposed on free and unfettered movement.

Dealing with the first reason this Court observed: (SCC p. 359, para 14)

> "Since in our view release on parole is a matter of judicial determination, apparently no provision as contained in the Code of Criminal Procedure relating to the computation of the period of bail was thought necessary in the Act."

Dealing with the other two reasons this Court held as under: (SCC pp. 357-58, para 12)

"The key to the interpretation of Section 10 of the Act is in the words 'may be detained'. The subsequent words 'from the date of detention' which follow the words 'maximum period of one year' merely define the starting point from which the maximum period of detention of one year is to be reckoned in a case not falling under Section 9. There is no justifiable reason why the word 'detain' should not receive its plain and natural meaning. According to the Shorter Oxford English Dictionary, Vol. 1, p. 531, the word 'detain' means 'to keep in confinement or custody'. Webster's Comprehensive Dictionary, International Edn. at p. 349 gives the meaning as 'to hold in custody'. The purpose and object of Section 10 is to prescribe a maximum period for which a person against whom a detention order under the Act is made may be held in actual custody pursuant to the said order. It would not be violated if a person against whom an order of detention is passed is held in actual custody in jail for the period prescribed by the section. The period during which the detenu is on parole cannot be said to be a period during which he has been held in custody pursuant to the order of his detention, for in such a case he was not in actual custody. The order of detention prescribes the place where the detenu is to be detained. Parole brings him out of confinement from that place. Whatever may be the terms and conditions imposed for grant of parole, detention as contemplated by the Act is interrupted when release on parole is obtained. The position would be well met by the appropriate answer to the question 'how long has the detenu been in actual custody pursuant to the order?' According to its plain construction, the purpose and object of Section 10 is to prescribe not only for the maximum period but also the method by which the period is to be computed. The computation has to commence from the date on which the detenu is taken into actual custody but if it is interrupted by an order of parole, the detention would not continue when parole operates and until the detenu is put back into custody. The running of

> the period recommences then and a total period of one year has to be counted by putting the different periods of actual detention together. We see no force in Shri Jethmalani's submission that the period during which the detenu was on parole has to be taken into consideration in computing the maximum period of detention authorised by Section 10 of the Act."

7. In *Pushpadevi* [(1987) 3 SCC 367 : 1987 SCC (Cri) 526 : AIR 1987 SC 1748] this Court reiterated the same view with some more elaboration. With respect to the first reason this Court observed: (SCC pp. 396-97, para 31)

> "It will not be out of place to point out here that in spite of the Criminal Procedure Code providing for release of the convicted offenders on probation of good conduct, it expressly provides, when it comes to a question of giving set-off to a convicted person in the period of sentence, that only the actual pre-trial detention period should count for set-off and not the period of bail even if bail had been granted subject to stringent conditions. In contrast, insofar as preventive detentions under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, are concerned, the Act specifically lays down that a person against whom an order of detention has been passed shall not be released on bail or bail bond or otherwise [vide Section 12(6) of the Act] and that any revocation or modification of the order of detention can be made only by the Government in exercise of its powers under Section 11. Incidentally, it may be pointed out that by reason of sub-section (6) of Section 12 of the Act placing an embargo on the grant of bail to a detenu there was no necessity for the legislature to make a provision similar to sub-section (4) of Section 389 of the Code of Criminal Procedure, 1973 [corresponding to sub-section (3) of Section 425 of the old Code] for excluding the period of bail from the term of detention period."

As regards the status of the detenu who is released on parole this Court observed as under: (SCC p. 396, para 31)

> "Even if any conditions are imposed with a view to restrict the movements of the detenu while on parole, the observance of those conditions can never lead to an equation of the period of parole with the period of detention. One need not look far off to see the reason because the observance of the conditions of parole, wherever imposed, such as reporting daily or periodically before a designated authority, residing in a particular town or city, travelling within prescribed limits alone and not going beyond etc. will not prevent the detenu from moving and acting as a free agent during the rest of the time or within the circumscribed limits of travel and having full scope and opportunity to meet people of his choice and have dealings with them, to correspond with one and all and to have easy and effective communication with whomsoever he likes through telephone, telex etc. Due to the spectacular achievements in modern communication system, a detenu, while on parole, can sit in a room in a house or hotel and have contacts with all his relations, friends and confederates in any part of the country or even any part of the world and thereby pursue his unlawful activities if so inclined. It will, therefore, be futile to contend that the period of parole of a detenu has all the trappings of actual detention in prison and as such both the periods should find a natural merger and they stand denuded of their distinctive characteristics. Any view of the contrary would not only be opposed to realities but would defeat the very purpose of preventive detention and would also lead to making a mockery of the preventive detention laws enacted by the Centre or the States."

With respect to the object and purpose of the preventive detention this Court observed that: (SCC p. 396, para 31)

> "The entire scheme of preventive detention is based on the bounden duty of the State to safeguard the interests of the country and the welfare of the people from the canker of anti-national activities by anti-social elements affecting the maintenance of

> public order or the economic welfare of the country. Placing the interests of the nation above the individual liberty of the anti-social and dangerous elements who constitute a grave menace to society by their unlawful acts, the preventive detention laws have been made for effectively keeping out of circulation the detenus during a prescribed period by means of preventive detention. The objective underlying preventive detention cannot be achieved or fulfilled if the detenu is granted parole and brought out of detention."

8. In *Poonam Lata case* [(1987) 3 SCC 347 : 1987 SCC (Cri) 506 : AIR 1987 SC 1383] this Court referred to its two earlier orders passed in *Harish Makhija* v. *State of U.P.* [(1987) 3 SCC 432 : 1987 SCC (Cri) 563] and *Amritlal Channumal Jain* v. *State of Gujarat* [WPs Nos. 1342-43, 1345-48, 1567 of 1982 and 162 of 1983 decided on 10-7-1985 (SC)] . The order passed in *Harish Makhija case* [(1987) 3 SCC 432 : 1987 SCC (Cri) 563] on 11-2-1985 was as under: (SCC p. 432, para 1)

> "It is obvious that the period of parole cannot be counted towards period of detention. The petitioner should surrender and serve out remaining period of 141 days' detention."

A three-Judge Bench thereafter on 10-7-1985 in *Amritlal Channumal Jain case* [WPs Nos. 1342-43, 1345-48, 1567 of 1982 and 162 of 1983 decided on 10-7-1985 (SC)] directed that:

> "Insofar as these cases are concerned, the period during which the petitioners were on parole shall be taken into account while calculating the total period of detention. The order of detention was passed more then two and half years ago."

9. Rejecting the contention that the ratio laid down by the larger Bench in *Amritlal Channumal Jain case* [WPs Nos. 1342-43, 1345-48, 1567 of 1982 and 162 of 1983 decided on 10-7-1985 (SC)] has to prevail and must be taken as binding, this Court observed as under: (SCC pp. 359-60, para 15)

> "We find it difficult from the observations made by a three-Judge Bench in Amritlal Channumal Jain case [WPs Nos. 1342-43, 1345-48, 1567 of 1982

> and 162 of 1983 decided on 10-7-1985 (SC)] to infer a direction by this Court that the period of parole shall not be added to the period of detention. The words used 'shall be taken into account' are susceptible of an interpretation to the contrary. We find that an order made by a Bench of two Judges of this Court in Harish Makhija case [(1987) 3 SCC 432: 1987 SCC (Cri) 563] unequivocally laid down that the period of parole cannot be counted towards the period of detention. This accords with the view taken by this Court in a Bench of two Judges in State of Gujarat v. Adam Kasam Bhaya [(1981) 4 SCC 216 : 1981 SCC (Cri) 823 : (1982) 1 SCR 740] and State of Gujarat v. Ismail Jumma [(1981) 4 SCC 609 : 1982 SCC (Cri) 1 : (1982) 1 SCR 1014] . In view of these authorities which appear to be in consonance with the object and purpose of the Act and the statutory provisions and also having regard to the fact that the direction made in Amritlal Channumal Jain case [WPs Nos. 1342-43, 1345-48, 1567 of 1982 and 162 of 1983 decided on 10-7-1985 (SC)] is capable of another construction as well, we do not find Shri Jethmalani's contention on this score as acceptable."

With respect to the two orders we may observe that no reasons were given in support of the view taken in those cases. Therefore, it is not necessary to go into the controversy whether this Court laid down any law on the point in *Harish Makhija case* [(1987) 3 SCC 432 : 1987 SCC (Cri) 563] or that the order passed in the case of *Amritlal Channumal Jain case* [WPs Nos. 1342-43, 1345-48, 1567 of 1982 and 162 of 1983 decided on 10-7-1985 (SC)] was binding and ought to have been followed by this Court while deciding *Poonam Lata case* [(1987) 3 SCC 347 : 1987 SCC (Cri) 506 : AIR 1987 SC 1383] .

10. We may also state that in *Adam Kasam Bhaya case* [(1981) 4 SCC 216 : 1981 SCC (Cri) 823 : (1982) 1 SCR 740] the only question that had arisen for consideration was whether the maximum period of detention starts running from the date of the order of detention or the date of actual detention. How the maximum period is to be counted when it is interrupted by the Court's invalid order or by an order of parole was not the question raised or decided in that case. The observation that "if he has served a

part of the period of detention, he will have to serve out the balance" was made in that context only and it cannot be taken as laying down that if the prescribed period of detention is thus interrupted then the detenu has to serve out the balance period of detention.

11. It was contended by the learned Attorney General that Section 10 and particularly the words "may be detained" have to be read in the context of Article 22(7)(*b*) of the Constitution and if they are so read, also keeping in mind the object and purpose of the Act, then correctly interpreted they would mean "may be actually detained". He submitted that Article 22(7)(*b*) is permissive, it being not obligatory on Parliament to prescribe the maximum period of detention. Mr Harish N. Salve, learned Solicitor General appearing for the State of Gujarat also submitted that the Constitution thus contemplates longer period of detention in the sense that in the absence of any limit prescribed by Parliament detention can be for a period longer than one or two years. It is true that Article 22(7)(*b*) has been held permissive and, therefore, there can be a preventive detention legislation which does not provide for the maximum period of detention and a person can be detained thereunder for a period longer than one or two years. That, however, cannot justify the view that the provision prescribing the maximum period of detention should be construed liberally. When Parliament has chosen to fix the maximum period, the question as to how the said period is to be computed will have to be decided by considering the object of the legislation and the relevant provision, the words used in that provision and without being influenced by the nature of power conferred by Article 22(7)(*b*). COFEPOSA, like all other preventive detention laws, has been regarded as a draconian law as it takes away the freedom and liberty of the citizen without a trial and on mere suspicion. It is tolerated in a democracy governed by the rule of law only as a necessary evil. Though the object of such legislation is to protect the nation and the society against anti-national and anti-social activities, the nature of action permitted is preventive and not punitive. The distinction between preventive detention and punitive detention has now been well recognised. Preventive detention is qualitatively different from punitive detention/ sentence. A person is preventively detained without a trial but punitive detention is after a regular trial and when he is found guilty of having committed an offence. The basis of preventive detention is suspicion and its justification is necessity. The basis of sentence is the verdict of the court after a regular trial. When a person is preventively detained his detention can be justified only so long as it is found necessary. When a person is sentenced to suffer imprisonment it is intended that the person so sentenced shall remain in prison for the period stated in the order

imposing sentence. The term specified in the order of sentence is intended to be the actual period of imprisonment. On the other hand, preventive detention being an action of immediate necessity has to be immediate and continuous if it is to be effective and the purpose of detention is to be achieved. The safeguards available to a person against whom an order of detention has been passed are limited and, therefore, the courts have always held that all the procedural safeguards provided by the law should be strictly complied with. Any default in maintaining the time-limit has been regarded as having the effect of rendering the detention order or the continued detention, as the case may be, illegal. The justification for preventive detention being necessity a person can be detained only so long as it is found necessary to detain him. If his detention is found unnecessary, even during the maximum period permissible under the law then he has to be released from detention forthwith. It is really in this context that Section 10 and particularly the words "may be detained" shall have to be interpreted.

12. The object of enacting the COFEPOSA Act is to provide for preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities and for matters connected therewith. The Act was enacted as violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy and thereby a serious adverse effect on the security of the State. The power to detain is to be exercised on being satisfied with respect to any person that with a view to preventing him from being included in any prejudicial activity specified in Section 3, it is necessary to make an order for his detention. The satisfaction of the detaining authority must be genuine. It has, therefore, been held that there must be a live and proximate link between the grounds of detention and the purpose of detention. Unreasonable delay in making of an order of detention may lead to an inference that the subjective satisfaction of the authority was not genuine as regards the necessity to prevent the person from indulging in any prejudicial activity and to make an order of detention for that purpose. So also long and unexplained delay in execution of the order has been held to lead to an inference that satisfaction was not genuine. Once the detaining authority is satisfied regarding the necessity to make an order of detention a quick action is contemplated, and if detention is to be effective then it has to be continuous. Section 8(*b*) requires the appropriate Government to make a reference to the Advisory Board within five weeks from the date of detention of the person under a detention order, in cases where Section 9

does not apply. Considering the object of this provision it can be said that the period of five weeks will have to be counted from the date of detention and it cannot get enlarged or extended because the detenu is provisionally released either by the court or by the Government during that period. Once an order of detention is made and the person is detained pursuant thereto, then suspension is not contemplated and it can only be revoked or modified. That the detention can be effective only if it is not interrupted is indicated by Section 12(6) which provides that notwithstanding anything contained in any other law, no person against whom a detention order is in force shall be released whether on bail or otherwise. However, power has been conferred upon the Government to release the detenu for any specified period. In our opinion, all these provisions clearly indicate the intention of the legislature that once detention starts it must run continuously and that the power to release on bail or otherwise has been taken away as it does not want the period of detention to be curtailed in any manner. I, therefore, see no justification for taking the view that the words "may be detained" in Section 10 contemplate actual detention for the maximum period. If the word "detain" is interpreted to mean actually detained for the maximum period, then it will partake the character of punitive detention and not preventive detention.

13. The reason given by this Court in *Poonam Lata* [(1987) 3 SCC 347: 1987 SCC (Cri) 506 : AIR 1987 SC 1383] that the period during which the detenu is on parole cannot be said to be a period during which he has been held in custody pursuant to the order of his detention, because he was not in actual custody then, does not appear to be sound. The learned Attorney General also contended that the said observation requires reconsideration as it is possible to take the view that a person temporarily released under Section 12 is in constructive custody. The learned Solicitor General also submitted that in spite of an order under Section 12 it can be said that the detenu is not a free person during that period as his freedom and liberty would be subject to the conditions imposed by the Government. A temporary release under Section 12 of the person detained does not change his status as his freedom and liberty are not fully restored. Therefore, the period of temporary release on parole cannot be excluded from the maximum period of detention. Though the purpose and object of Section 10 is to prescribe not only the maximum period of detention but also for the method of computation of the period as contended by the learned Attorney General, the only inference that can be drawn therefrom is that the period of detention has to be computed from the date of actual detention and not from the date of the order of detention.

Since Section 10 does not prescribe any other method, it is not proper to draw a further inference that the maximum period of detention is to be computed by excluding the period during which the detenu was released on parole. It was also contended by the learned Attorney General that the detenu cannot be permitted to take advantage of an order of parole or an invalid judgment of the court. In such a case, there is not the question of extending the period of detention but ensuring that the original period of one year is worked out. It will not amount to punishing the detenu for any wrong done by the court but it would amount to not permitting the detenu to take advantage of an order of parole or a wrong judgment or order of the court. For the reasons already stated above, even this contention cannot be accepted. The Act contemplates a continuous period of detention. If in spite of that any interruption is made in the running of that period then the only effect it can have is to curtail the period of detention. Taking the contrary view that the detenu must serve out the balance period of detention would render the detention punitive after the period of one or two years, as the case may be, counted from the date of (*sic* the) detention comes to an end.

14. I, therefore, hold that *Harish Makhija* [(1987) 3 SCC 432 : 1987 SCC (Cri) 563], *Poonam Lata* [(1987) 3 SCC 347 : 1987 SCC (Cri) 506 : AIR 1987 SC 1383] and *Pushpadevi* [(1987) 3 SCC 367 : 1987 SCC (Cri) 526 : AIR 1987 SC 1748] do not lay down the correct law on the point. I further hold that if the period of detention is interrupted either by an order of provisional release made under Section 12 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.

15. In the result, I allow both the writ petitions and also dispose of the special leave petition in terms of the view that we have taken in this judgment.

Dr A.S. Anand, C.J. [*for himself and K.T. Thomas, D.P. Wadhwa & S. Rajendra Babu, JJ.*) (*concurring*)] : … 17. … [E]ssentially the substantial questions which arise for our consideration are:

Firstly, whether the period of detention is a fixed period running from the dates specified in the detention order and ending with the expiry of that period or the period is automatically extended by any period of parole

granted to the detenu. Secondly, in a case where the High Court allows a habeas corpus petition and directs a detenu to be released and in consequence the detenu is set free and thereafter on appeal the erroneous decision of the High Court is reversed, is it open to this Court to direct the arrest and detention of the detenu, to undergo detention for the period which fell short of the original period of detention intended in the detention order on account of the erroneous High Court order.

18. Brother Nanavati, J. has dealt with various judgments referred to in the order of reference and analysed them. I agree that the judgments in *Harish Makhija* v.*State of U.P.* [(1987) 3 SCC 432: 1987 SCC (Cri) 563], *Poonam Lata* [(1987) 3 SCC 347 : 1987 SCC (Cri) 506 : AIR 1987 SC 1383] and *Pushpadevi* [(1987) 3 SCC 367 : 1987 SCC (Cri) 526 : AIR 1987 SC 1748] do not lay down the correct law because the propositions of law laid down in those judgments, which have been extracted by brother Nanavati, J. have been very widely stated. I do not intend to deal with those judgments and would like to address myself to the questions as noticed above.

19. 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. The period of one or two years, as the case may be, as mentioned in Section 10 will run from the date of the actual detention and not from the date of the order of detention. Any other interpretation would frustrate the object of an order of detention and a clever person may abscond for the entire period mentioned in the order of detention and thereby render the order of detention useless claiming on being apprehended that “the period has already expired”. The view expressed in *Adam Kasam Bhaya case*[(1981) 4 SCC 216 : 1981 SCC (Cri) 823 : (1982) 1 SCR 740] and *Ismail Jumma case* [(1981) 4 SCC 609 : 1982 SCC (Cri) 1 : (1982) 1 SCR 1014] in this behalf lays down the correct law and I adopt that reasoning and hold that the period of detention specified in the order of detention would commence not from the date of the order but from the date of actual detention. That period is the maximum period of detention. Would that period get automatically extended by any period of parole granted to the detenu is the next question. I shall deal with the other observation in *Adam Kasam Bhaya case* [(1981) 4 SCC 216 : 1981 SCC (Cri) 823 : (1982) 1 SCR 740] viz. “if he has served a part of the period of detention, he will have to serve out the balance” separately, in the latter part of this order.

20. 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. Since, preventive detention is a form of precautionary State action, intended to prevent a person from indulging in a conduct, injurious to the society or the security of the State or public order, it 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. However, the power being drastic, the restrictions placed on a person to preventively detain must, consistently with the effectiveness of detention, be minimal. In a democracy governed by the rule of law, the drastic power to detain a person without trial for security of the State and/or maintenance of public order, must be strictly construed. This court, as the guardian of the Constitution, though not the only guardian, has zealously attempted to preserve and protect the liberty of a citizen. However, where individual liberty comes into conflict with an interest of the security of the State or public order, then the liberty of the individual must give way to the larger interest of the nation.

21. It would be relevant at this stage to notice the provisions of Article 22(4)(*a*) and (7) of the Constitution. Article 22(4)(*a*) of the Constitution provides as follows:

> "22. (4)(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:
>
> Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7);"
>
> Clause (7) of Article 22 says:
>
> "22. (7) Parliament may by law prescribe—
>
> (a) the circumstances under which, and the class or classes of cases in which, a person

may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

22. A combined reading of clauses (4) and (7) makes it clear that if a law made by Parliament or the State Legislature authorises the detention of a person for a period not exceeding three months, it does not have to satisfy any other constitutional requirement except that it must be within the legislative competence of Parliament or the State Legislature, as the case may be. (Article 246, Entry 9, List I and Entry 3, List III, of the Seventh Schedule.) The Constitution itself permits Parliament and the State Legislature to make law providing for detention, without trial, up to a period of three months without any safeguards but where the law seeks to provide for detention for a longer period than three months, it must comply with the constitutional safeguards which are found in sub-clauses (*a*) and (*b*) of clause (4), though leaving it to the discretion of the detaining authority to decide what should be the maximum period of detention. Outside limit to the period of detention has, however, been laid down by the proviso which says that nothing in sub-clause (*a*) of clause (4) shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under clause (7). The question whether Parliament is itself bound to prescribe the maximum period of detention under Article 22(7)(*b*) of the Constitution in order that the proviso to Article 22(4)(*a*) might operate, is no longer res integra. The issue was considered by a Constitution Bench of this Court in *Fagu Shaw* v. *State of W.B.* [(1974) 4 SCC 152 : 1974 SCC (Cri) 316 : (1974) 2 SCR 832] and authoritatively answered. Since I respectfully agree with the answer, I need not detain myself to deal with that issue any further.

23. To answer the question whether the period of detention would stand automatically extended by any period of parole granted to a detenu, we

need to examine the concept and effect of parole more particularly in a preventive detention case.

24. Bail and parole have different connotations in law. Bail is well understood in criminal jurisprudence and Chapter XXXIII of the Code of Criminal Procedure 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. In *Halsbury's Laws of England* [Halsbury's Laws of England, 4th Edn., Vol. 11, para 166.] , the following observation succinctly brings out the effect of bail:

The effect of granting bail is not to set the defendant (accused) at liberty but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned.

25. "Parole", however, has a different connotation than bail even though the substantial legal effect of both bail and parole may be the release of a person from detention or custody. The dictionary meaning of "parole" is:

The Concise Oxford Dictionary — (New Edition)

> "The release of a prisoner temporarily for a special purpose or completely before the expiry of a sentence, on the promise of good behaviour; such a promise; a word of honour."

Black's Law Dictionary — (6th Edition)

> "Release from jail, prison or other confinement after actually serving part of sentence; Conditional release from imprisonment which entitles parolee to serve remainder of his term outside confines of an institution, if he satisfactorily complies with all terms and conditions provided in parole order."

According to *The Law Lexicon* [P. Ramanatha Aiyar's The Law Lexicon with Legal Maxims, Latin Terms and Words & Phrases, p. 1410] , "parole" has been defined as:

> "A parole is a form of conditional pardon, by which the convict is released before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on violation of the condition of the parole."

According to *Words and Phrases* [Words & Phrases (Permanent Edition), Vol. 31, pp. 164, 166, 167, West Publishing Co.] :

> " 'Parole' ameliorates punishment by permitting convict to serve sentence outside of prison walls, but parole does not interrupt sentence. *People ex rel Rainone* v. *Murphy* [135 NE 2d 567, 571, 1 NY 2d 367, 153 NYS 2d 21, 26] .

'Parole' does not vacate sentence imposed, but is merely a conditional suspension of sentence. *Wooden* v. *Goheen* [Ky, 255 SW 2d 1000, 1002] .

A 'parole' is not a 'suspension of sentence', but is a substitution, during continuance of parole, of lower grade of punishment by confinement in legal custody and under control of warden within specified prison bounds outside the prison, for confinement within the prison adjudged by the court. *Jenkins* v. *Madigan* [CA Ind, 211 F 2d 904, 906] .

A 'parole' does not suspend or curtail the sentence originally imposed by the court as contrasted with a 'commutation of sentence' which actually modifies it."

26. In this country, there are no statutory provisions dealing with the question of grant of parole. The Code of Criminal Procedure does not contain any provision for grant of parole. By administrative instructions, however, rules have been framed in various States, regulating the grant of parole. Thus, the action for grant of parole is generally speaking, an administrative action. The distinction between grant of bail and parole has been clearly brought out in the judgment of this Court in *State of Haryana* v. *Mohinder Singh* [(2000) 3 SCC 394 : JT (2000) 1 SC 629] to which one of us (Wadhwa, J.) was a party. That distinction is explicit and I respectfully agree with that distinction.

27. 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. COFEPOSA does not contain any provision authorising the grant of parole by judicial intervention. As a matter of fact, Section 12 of COFEPOSA, which enables the administration to grant *temporary release* of a detained person expressly lays down that the *Government may direct* the release of a detenu for any specified period either without conditions or upon such conditions as may be specified in the order granting parole, which the parolee accepts. Sub-section (6) of Section 12 lays down:

> "12. (6) Notwithstanding anything contained in any other law and save as otherwise provided in this section, no person against whom a detention order made under this Act is in force shall be released whether on bail or bail bond or otherwise."

28. Section 12(6) starts with a non obstante clause and mandates that no person against whom a detention order made under COFEPOSA is in force shall be released "whether on bail or bail bond or otherwise". The prohibition is significant and has a purpose to serve. Since the object of preventive detention is to keep a person out of mischief in the interest of the security of the State or public order, judicial intervention to release the detenu during the period an order of detention is in force has to be minimal. Under Section 12(1) or Section 12(1-A), it is for the State to see whether the detenu should be released temporarily or not keeping in view the larger interest of the State and the requirements of detention of an individual. Terms and conditions which may be imposed while granting order of temporary release are also indicated in the other clauses of Section 12 for the guidance of the State. Sub-section (6) in terms prohibits the release of a detenu, during the period an order of detention is in force, "*on bail* or *bail bond* or *otherwise*". The expression "or otherwise" would include release of the detenu even on parole through judicial intervention.

29. Thus, parole, stricto sensu may be granted by way of a temporary release as contemplated by Section 12(1) or Section 12(1-A) 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 and shall be subject to the terms of the rules or the instructions, as the case may be. 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 be subject to those terms and conditions. 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 sub-section (6) of Section 12. Temporary release of a detenu can only be ordered by the Government or an officer subordinate to the Government, whether Central or State. I must, however, add that the bar of judicial intervention to direct temporary release of a detenu would not affect the jurisdiction of the High Courts under Article 226 of the Constitution or of this Court under Article 32, 136 or 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 leave it to the administrative or jail authorities to prescribe the conditions and terms on which parole is to be availed of by the detenu.

30. Since release on parole is only a temporary arrangement by which a detenu is released for a temporary fixed period to meet certain situations, it does not interrupt the period of detention and, thus, needs to be counted towards the total period of detention unless the rules, instructions or terms for grant of parole, prescribe otherwise. The period during which parole is availed of is not aimed to extend the outer limit of the maximum period of detention indicated in the order of detention. The period during which a detenu has been out of custody on temporary release on parole, unless otherwise prescribed by the order granting parole, or by rules or instructions, has to be *included* as a part of the total period of detention because of the very nature of parole. An order made under Section 12 of temporary release of a detenu on parole does not bring the detention to an end for any period — it does not interrupt the period of detention— it only changes the mode of detention by restraining the movement of the detenu in accordance with the conditions prescribed in the order of parole. The detenu is not a free man while out on parole. Even while on parole he continues to serve the sentence or undergo the period of detention in a manner different than from being in custody. He is not a free person. Parole does not keep the period of detention in a state of suspended animation. The period of detention keeps ticking during this

period of temporary release of a detenu also because a parolee remains in legal custody of the State and under the control of its agents, subject at any time, for breach of condition, to be returned to custody. Thus, in cases which are covered by Section 12 of COFEPOSA, the period of temporary release would be governed by the conditions of release whether contained in the order or the rules or instructions and where the conditions do not prescribe it as a condition that the period during which the detenu is out of custody, should be excluded from the total period of detention, it should be counted towards the total period of detention for the simple reason that during the period of temporary release the detenu is deemed to be in constructive custody. In cases falling outside Section 12, if the interruption of detention is by means *not* authorised by law, then the period during which the detenu has been at liberty, cannot be counted towards period of detention while computing the total period of detention and that period has to be excluded while computing the period of detention. The answer to the question, therefore, is 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. The period during which the detenu is on parole, therefore, requires to be counted towards the total period of detention.

31. Coming now to the next question and the other observations made in *Adam Kasam Bhaya case* [(1981) 4 SCC 216 : 1981 SCC (Cri) 823 : (1982) 1 SCR 740] , viz., "if he has served a part of the period of detention, he will have to serve out the balance".

32. 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 prescribed when 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. Where,

however, a long time has *not* lapsed or the period of detention initially fixed in the order of detention has also 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.

33. The summary of my conclusions by way of answer to the questions posed in the earlier portion of this order are:

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 sensu may be granted by way of a temporary release as contemplated by Section 12(1) or Section 12(1-A) 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 be 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 sub-section (6) of Section 12. The bar of judicial intervention to direct temporary release of a detenu would not, however, affect the jurisdiction of the High Courts under Article 226 of the Constitution or of this Court under Article 32, 136 or 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 leave 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, a 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.

34. The above is not a summary of the judgment but shall have to be read along with the judgment."

IN THE SUPREME COURT OF INDIA

Satpal & Anr v. State of Haryana & Ors

(2000) 5 SCC 170

G.B. Pattanaik & U.C. Banerjee, JJ.

Relatives of the victim challenged the order of remission passed by the Governor under Article 161 of the Constitution on grounds of non-application of mind, the influence of extraneous considerations, and because allegedly the order had been passed by the Governor without the aid and advice of the Council of Ministers. In deciding the case, the Court discussed when it would be justified in interfering with a Governor's order of remission.

G.B. Pattanaik, J.: "1.The order of the Governor dated 25-1-1999, granting pardon remitting the unexpired portion of the sentence passed on prisoner Shri Siriyans Kumar Jain, s/o Shri Ram Chand Jain in exercise of power conferred by Article 161 of the Constitution of India read with Section 132 of the Code of Criminal Procedure is being assailed, inter alia on the ground that the power has been exercised without application of mind, and that the said power has been exercised by the Governor on extraneous consideration and even without the aid and advice of the Government, namely, the Minister concerned. The applicants are the brother and widow of the deceased Krishan Kumar who was murdered during the election held in the year 1987 for the post of President of Municipal Committee, Hansi. The prosecution had alleged that a gruesome crime was committed by the accused persons and the entire family of the deceased suffered agony and pain. In the criminal trial the respondent Siriyans Kumar Jain along with four other accused persons belonging to the Bhartiya Janta Party were tried for having committed offence under Section 302 read with Sections 149 and 120-B as well as under Sections 392, 148, 452 and 323 of the Indian Penal Code. The learned Sessions Judge convicted all the five accused persons and on an appeal the High Court of Punjab and Haryana while maintaining the conviction of accused Krishan Kumar Jakhar and Gurvinder Singh acquitted the accused P.K. Chaudhary, Siriyans Jain and Ram Nath Bhumla. The State of Haryana preferred appeal against the acquittal of the aforesaid three accused persons. The Supreme Court by judgment dated 10-12-1998, set aside the acquittal

of accused Siriyans Kumar Jain, Ram Nath Bhumla but upheld the acquittal of P.K. Chaudhary. The Court also directed Siriyans Kumar Jain and Ram Nath Bhumla to surrender to custody in order to serve out the remaining part of their sentence. In setting aside the order of acquittal passed by the High Court the Supreme Court had observed that all the four accused persons had gone together to the place of occurrence and they were armed with weapons with a definite purpose and, therefore, there was no scope for entertaining any doubt regarding their involvement in commission of the crime and also as regards the said crime that the said crime having been committed by them in prosecution of common object of an unlawful assault consisting of them and other persons who had come along with them up to the factory. Immediately after the judgment of this Court dated 10.12.1998, respondent Siriyans Kumar Jain (Respondent 3) in the present writ petition instead of surrendering to serve the sentence, as directed by this Court, filed an application before the Governor invoking his jurisdiction under Article 161 of the Constitution and this application was filed on 15.1.1999. The Secretary to the Governor addressed a letter to the Secretary to the Government of Haryana, Department of Jails requesting for a report in the matter to be placed before His Excellency, the Governor of Haryana. The appropriate authority, namely, Joint Secretary to the Government in the Home Department indicated in his note that the opinion of the Legal Remembrancer should be obtained as to whether this is a fit case for exercising the power under Article 161 of the Constitution or not. The opinion of the Legal Remembrancer was then placed before the Minister concerned and finally the Chief Minister agreed with the views of the Legal Remembrancer and came to the conclusion that this is a fit case where discretion given under Article 161 of the Constitution be exercised and relief prayed for be granted. On the basis of the aforesaid advice of the Chief Minister the Governor finally granted pardon, as already stated.

2. Mr K.T.S. Tulsi, learned Senior Counsel appearing for the petitioners contended that the very order passed by the Governor would indicate total non-application of mind and, therefore, the said order cannot sustain judicial scrutiny and must be set aside. He also contended that if the order of the Governor is examined it will indicate as to the uncanny haste with which the entire matter was disposed of, with scant regard for the judgment of this Court whereunder the Court convicted the present Respondent 3 under Sections 302/149 and 120-B IPC and the final order of the Governor emanated even before Respondent 3 surrendered to serve the sentence though the impugned order categorically indicates that the prisoner is in jail. Mr Tulsi also contended that the Governor has passed the order without being aided and advised by the Council of Ministers and, therefore, the order is vitiated.

3. Mr R.K. Jain, learned Senior Counsel appearing for the State of Haryana and Mr D.D. Thakur, learned Senior Counsel appearing for Respondent 3, however, contended that the power to grant pardon and remission of sentence is essentially an executive function to be exercised by the Head of the State after taking into consideration various matters and the Court is precluded from examining the wisdom or expediency of exercise of the said power. According to the learned counsel the power of judicial review, as has been held by this Court in *Kehar Singh case* [*Kehar Singh* v. *Union of India*, (1989) 1 SCC 204 : 1989 SCC (Cri) 86] is of a very limited nature, namely, whether the authority who had exercised the power had the jurisdiction to exercise the same, and whether the impugned order goes beyond the power conferred by law upon the authority who made it, and this being the position the grounds on which the impugned order is being attacked essentially pertain to the propriety of the Governor in the matter of exercising power under Article 161 after the conviction and sentence passed by this Court and as such, it should not be interfered with.

4. There cannot be any dispute with the proposition of law that the power of granting pardon under Article 161 is very wide and does not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said powers could be exercised. But the said power being a constitutional power conferred upon the Governor by the Constitution is amenable to judicial review on certain limited grounds. The Court, therefore, would be justified in interfering with an order passed by the Governor in exercise of power under Article 161 of the Constitution if the Governor is found to have exercised the power himself without being advised by the Government or if the Governor transgresses the jurisdiction in exercising the same or it is established that the Governor has passed the order without application of mind or the order in question is a mala fide one or the Governor has passed the order on some extraneous consideration. The extent of judicial review in relation to an order of the President under Article 72 of the Constitution of India was the subject-matter of consideration before this Court in *Kehar Singh case* [*Kehar Singh* v. *Union of India*, (1989) 1 SCC 204 : 1989 SCC (Cri) 86] where the Constitution Bench had observed: (SCC p. 217, para 14)

> "It appears to us clear that the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the Court by way of judicial review."

The Court had further indicated that:

> "[A]s regards the considerations to be applied by the President to the petition, we need say nothing more as the law in this behalf has already been laid down by this Court in Maru Ram case [Maru Ram v. Union of India, (1981) 1 SCC 107 : 1981 SCC (Cri) 112] ."

What has been stated in relation to the President's power under Article 72 equally applies to the power of the Governor under Article 161 of the Constitution. In *Maru Ram case* [*Maru Ram* v. *Union of India*, (1981) 1 SCC 107 : 1981 SCC (Cri) 112] the Court came to the conclusion that the power under Articles 72 and 161 can be exercised by the Central and State Governments and not by the President or Governor on their own. The advice of the appropriate Government binds the head of the State. The Court also came to the conclusion that considerations for exercise of power under Articles 72 or 161 may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the Court examine the exercise. In para 62 of the judgment in *Maru Ram case* [*Maru Ram* v. *Union of India*, (1981) 1 SCC 107 : 1981 SCC (Cri) 112] the Court had observed: (SCC p. 147, para 62)

> "62. An issue of deeper import demands our consideration at this stage of the discussion. Wide as the power of pardon, commutation and release (Articles 72 and 161) is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. Here, we come upon the second constitutional fundamental which underlies the submissions of counsel. It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. We proceed on the basis that these axioms are valid in our constitutional order."

It was further held that the power to pardon, grant remission and commutation, being of the greatest moment for the liberty of the citizen, cannot be a law unto itself but must be informed by the finer canons of constitutionalism.

5. A three-Judge Bench of this Court recently considered the question of judicial review against an order granting pardon by the Governor under Article 161 of the Constitution in the case of *Swaran Singh* v. *State of U.P.* [(1998) 4 SCC 75 : 1998 SCC (Cri) 804] In that case an MLA of the State Assembly had been convicted of the offence of murder and within a period of less than two years he succeeded in coming out of the prison as the Governor of Uttar Pradesh granted remission of the remaining long period of his life sentence. The son of the deceased moved the Allahabad High Court challenging the aforesaid action of the Governor and the same having been dismissed the matter had been brought to this Court by grant of special leave petition. This Court had come to the conclusion that the Governor was not told of certain vital facts concerning the prisoner such as his involvement in five other criminal cases of serious offences, the rejection of his earlier clemency petition and the report of the jail authority that his conduct inside the jail was far from satisfactory and out of two years and five months he was supposed to have been in jail, he was in fact on parole during the substantial part thereof. The Court further held that when the Governor was not posted with material facts the Governor was apparently deprived of the opportunity to exercise the powers in a fair and just manner and the order fringes on arbitrariness. The Court, therefore, quashed the order of the Governor with a direction to reconsider the petition of the prisoner in the light of the materials which the Governor had no occasion to know earlier.

6. Bearing in mind the parameters of judicial review in relation to an order granting pardon by the Governor, when we examine the case in hand, the conclusion is irresistible that the Governor had not applied his mind to the material on record and has mechanically passed the order just to allow the prisoner to overcome the conviction and sentence passed by this Court. It is indeed curious to note that the order dated 25-1-1999 clearly indicates that the Governor of Haryana is pleased to grant pardon remitting the unexpired portion of the sentence passed on prisoner Siriyans Kumar Jain confined in the Central Jail, Hissar. But the said prisoner was not confined in the Central Jail, Hissar on that date and on the other hand after obtaining the order of pardon and remission of sentence to give an appearance of compliance with the order of the Supreme Court the said Siriyans Kumar Jain surrendered before the Court of Sessions Judge, Hissar on 2-2-1999 and also was released on the very same day in view of the order of the Governor dated 25-1-1999. If by order dated 25-1-1999, the accused has already been granted pardon and there has been a remission of the sentence then there was no reason for him to go and surrender before the District Judge on 2-2-1999. That apart, the

Governor has not been made aware of as to what is the total period of sentence the accused has really undergone, and if at all has undergone any sentence. When an accused is convicted of the heinous offence of murder and is sentenced to imprisonment for life the authority who has been conferred with power to grant pardon and remission of sentence under Article 161 of the Constitution must be made aware of the period of sentence in fact undergone by the said convict as well as his conduct and behaviour while he has been undergoing the sentence which would all be germane considerations for exercise of the power. Not being aware of such material facts would tend to make an order of granting pardon arbitrary and irrational, as has been held by this Court in *Swaran Singh case* [(1998) 4 SCC 75: 1998 SCC (Cri) 804] . The entire file had been produced before us and we notice the uncanny haste with which the file has been processed and the unusual interest and zeal shown by the authorities in the matter of exercise of power to grant pardon. We also fail to understand how the order in question could show that the prisoner is in jail while in fact he was free at large and had not surrendered to serve the sentence notwithstanding the positive direction of this Court dated 10.12.1998, disposing of the appeal filed by the State.

7. So far as the contention that the Governor passed the order on his own without being advised by the Council of Ministers is concerned, we do not find any substance in the same. We have scrutinised the relevant file that was produced before us and it clearly demonstrates that the matter was examined by the Law Department, the Administrative Department concerned and was finally endorsed by the Chief Minister after which the Governor passed the order. Consequently, there is no substance in the submission of Mr K.T.S. Tulsi, learned Senior Counsel appearing for the petitioners.

8. In the aforesaid premises, we have no hesitation to come to the conclusion that the order in question has been vitiated and the Governor has not been advised properly with all the relevant materials and, therefore, we have no other option than to quash the said order dated 25-1-1999. We accordingly quash the impugned order dated 25-1-1999 and allow this writ petition, but, however quashing of the order does not debar the Governor from reconsidering the matter in the light of the relevant materials and act in accordance with the constitutional provision and discretion."

IN THE HIGH COURT OF BOMBAY

Dadu v. State of Maharashtra

(2000) 8 SCC 437

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

In this challenge to the constitutionality of Section 32A, NDPS Act, the Court considered whether it was constitutional for the legislature to take away the power of the judiciary to suspend a sentence on appeal. The Court also considered whether parole amounts to suspension or remission of sentence, and therefore, whether it is barred by Section 32A.

R.P. Sethi, J.: "1. The constitutional validity of Section 32-A 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 Code of Criminal Procedure (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.

…

4. The vires of the section have been defended by the Union of India on the ground that as Parliament has jurisdiction to enact the law pertaining to the Narcotic Drugs and Psychotropic Substances Act, reasonable restrictions can be imposed upon the right of the convict to file appeal and seek release, remission or commutation. The Act is intended to curb the drug addiction and trafficking which is termed to be eating into the vitals of the economy of the country. The illicit money generated by drug trafficking is being used for illicit activities including encouragement of terrorism. Anti-drug justice has been claimed to be a criminal dimension of social justice. It is submitted that statutory control over narcotic drugs in India was being generally exercised through certain Central enactments, though some of the States had also enacted certain statutes to deal with illicit traffic in drugs. Reference is made to the Opium Act and the Dangerous Drugs Act etc. In the absence of comprehensive law to effectively control psychotropic substances in the manner envisaged by the International Convention of Psychotropic Substances, 1971, a necessity was felt to enact some comprehensive legislation on the subject. With a view to meet the social challenge of great dimensions, Parliament enacted the Act to consolidate and amend the existing provisions relating to control over drug abuse and to provide for enhanced penalties under the Act. The Act provides enhanced and stringent penalties. The offending section is claimed to be not violative of Articles 14, 19 and 21 of the Constitution of India. To fulfil the international obligations and to achieve the objectives of curbing the menace of illegal trafficking, the section was enacted not only to take away the power of the executive under Section 433 of the Code but also the power under the Code to suspend, remit or commute the sentences passed under the Act. The convicts under the Act are stated to be a class in themselves justifying the discrimination without offending guarantee of equality enshrined in the Constitution. To support the constitutional validity of the section, the respondents have also relied upon the Lok Sabha debates on the subject.

5. Before dealing with the main issue regarding the validity of Section 32-A, a side issue, projected in Writ Petition No. 169, is required to be dealt with. The writ petition appears to be based upon the misconception of the provisions of law and in ignorance of the various pronouncements of this Court.

6. Parole is not a suspension of the sentence. The convict continues to be serving the sentence despite granting of parole under the statute,

rules, jail manual or the Government Orders. "Parole" means the release of a prisoner temporarily for a special purpose before the expiry of a sentence, on the promise of good behaviour and return to jail. It is a release from jail, prison or other internment after actually being in jail serving part of sentence.

7. Grant of parole is essentially an executive function to be exercised within the limits prescribed in that behalf. It would not be open to the court to reduce the period of detention by admitting a detenu or convict on parole. The court cannot substitute the period of detention either by abridging or enlarging it. …

…

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 32-A 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 the jail manual applicable in the matter.

12. We will now deal with the crux of the matter relating to the constitutional validity of Section 32-A in the light of the challenge thrown to it. Section 32-A of the Act reads:

> "32-A. No suspension, remission or commutation in any sentence awarded under this Act.— Notwithstanding anything contained in the Code of Criminal Procedure, 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."

13. A perusal of the section would indicate that it deals with three different matters, namely, suspension, remission and commutation of the sentences. Prohibition contained in the section is referable to Sections 389, 432 and 433 of the Code. Section 432 of the Code provides that when any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon

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 in the manner and according to the procedure prescribed therein. Section 433 empowers the appropriate Government to commute:

> "433.(a) a sentence of death, for any other punishment provided by the Indian Penal Code;
>
> (b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;
>
> (c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;
>
> (d) a sentence of simple imprisonment, for fine."

14. However, Section 389 of the Code empowers an appellate court to suspend the sentence pending the appeal and release the appellant on bail. Section 32-A of the Act, therefore, takes away the powers both of the appellate court and the State Executive in the matter of suspending, remitting and commuting the sentence of a person convicted under the Act other than for an offence under Section 27 of the Act. This Court in *Maktool Singh case* [(1999) 3 SCC 321 : 1999 SCC (Cri) 417 : JT (1999) 2 SC 176] held that Section 32-A of the Act was a complete bar for the appellate court to suspend a sentence passed on persons convicted of offences under the Act (except under Section 27) either during the pendency of any appeal or otherwise. It has an overriding effect with regard to the powers of suspension, commutation and remission provided under the Code. After referring to some conflicting judgments of the High Courts, this Court concluded: (SCC p. 328, para 25)

> "25. The upshot of the above discussion is that Section 32-A of the Act has taken away the powers of the court to suspend a sentence passed on persons convicted of offences under the Act (except Section 27) either during pendency of any appeal or otherwise. Similarly, the power of the Government under Sections 432, 433 and 434 of the Criminal Procedure Code have also been taken away. Section 32-A would have an overriding effect with regard to the powers

> of suspension, commutation and remission provided under the Criminal Procedure Code."

15. The restriction imposed under the offending section, upon the executive are claimed to be for a reasonable purpose and object sought to be achieved by the Act. Such exclusion cannot be held unconstitutional, on account of its not being absolute in view of the constitutional powers conferred upon the executive. Articles 72 and 161 of the Constitution empowers the President and the Governor of a State to grant pardons, reprieves, respites or remissions of punishments or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the Union and State exists. For the exercise of aforesaid constitutional powers circulars are stated to have been issued by the appropriate Governments. It is further submitted that the circulars prescribe limitations both as regards the prisoners who are eligible and those who have been excluded. The restriction imposed upon the executive, under the section appears to be for a reasonable purpose and object sought to be achieved by the section. While moving the Amendment Bill, which included Section 32-A, in Parliament on 16-12-1988 the Minister of State in Department of Revenue in the Ministry of Finance explained to Parliament that the country had been facing the problem of transit traffic in illicit drugs which had been escalated in the recent past. The spillover from such traffic had been causing problems of abuse and addiction. The Government was concerned with the developing drug situation for which a number of legislative, administrative and preventive measures had been taken resulting in checking the transit traffic to a considerable extent. However, increased internal drug traffic, diversion of opium from illicit-growing areas and attempts of illicit manufacture of drugs within the country threatened to undermine the effects of the counter-measures taken. Keeping in mind the magnitude of the threat from drug trafficking from the Golden Crescent Region comprising Pakistan, Afghanistan and Iran and the Golden Triangle Region comprising Burma, Thailand and Laos and having regard to the internal situation, a 14-point directive was stated to have been issued by the then Prime Minister on 4-4-1988, as a new initiative to combat drug trafficking and drug abuse. Keeping in mind the working of the 1985 Act, the Cabinet Sub-Committee recommended that the Act be suitably amended, inter alia:

> "(i) to provide for the constitution of a fund for control of drug abuse and its governing

body. The fund is to be financed by such amounts as may be provided by Parliament, the sale proceeds of any property forfeited under the Act and any grants that may be made by any person or institution;

(ii) to provide for death penalty on second conviction in respect of specified offences involving specified quantities of certain drugs;

(iii) to provide that no sentence awarded under the Act, other than Section 27, should be suspended, remitted or commuted;

(iv) to provide for constitution of Special Courts;

(v) to provide that every offence punishable under this Act shall be cognizable and non-bailable;

(vi) to provide immunity from prosecution to the addicts volunteering for treatment for de-addiction or detoxification once in their lifetime;

(vii) to bring certain substances which are neither narcotic drugs nor psychotropic substances but are used in the manufacture or production of these drugs or substances, under the ambit of the Act. Such controlled substances would be regulated by issue or order;

(viii) violation of the provisions relating to the controlled substances would be liable for punishment with rigorous imprisonment for a term which may extend to 10 years and fine which may extend to Rs 1 lakh;

(ix) financing illicit traffic and harbouring drug offenders would be offences liable to punishment at the same level as per drug traffic offences."

The distinction of the convicts under the Act and under other statutes, insofar as it relates to the exercise of executive powers under Sections 432 and 433 of the Code is concerned, cannot be termed to be 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, insofar 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 insofar 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 atleast 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 atleast 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.

18. This Court in *Bhagwan Rama Shinde Gosai* v. *State of Gujarat* [(1999) 4 SCC 421 : 1999 SCC (Cri) 553 : AIR 1999 SC 1859] held that when a convicted person is sentenced to a fixed period of sentence and the appellate court finds that due to practical reasons the appeal cannot be disposed of expeditiously, it can pass appropriate orders for suspension of sentence. The suspension of the sentence by the appellate court has, however, to be within the parameters of the law prescribed by the legislature or spelt out by the courts by judicial pronouncements. The exercise of judicial discretion on well-recognised principles is the safest possible safeguard for the accused which is at the very core of criminal law administered in India. The legislature cannot, therefore, make law to deprive the courts of their legitimate jurisdiction conferred under the procedure established by law.

19. Thomas M. Cooley in his *Treatise on the Constitutional Limitations*, 8th Edn. observed that if the legislature cannot thus indirectly control the action of the courts by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry. In *Denny* v. *Mattoon* [2 Allen 361] it was stated:

> "If, for example, the practical operation of a statute is to determine adversary suits pending between party and party, by substituting in place of the well-settled rules of law the arbitrary will of the legislature, and thereby controlling the action of the Tribunal before which the suits are pending, no one can doubt that it would be an unauthorised act of legislation, because it directly infringes on the peculiar and appropriate functions of the judiciary. It is the exclusive province of courts of justice to apply established principles to cases within their jurisdiction, and to

> enforce their decisions by rendering judgments and executing them by suitable process. The legislatures have no power to interfere with this jurisdiction in such manner as to change the decision of cases pending before courts, or to impair or set aside their judgments, or to take cases out of the settled course of judicial proceeding. It is on this principle that it has been held that the legislature have no power to grant a new trial or direct a rehearing of a cause which has been once judicially settled. The right of a review, or to try new facts which have been determined by a verdict or decree, depends on fixed and well-settled principles, which it is the duty of the court to apply in the exercise of a sound judgment and discretion. These cannot be regulated or governed by legislative action."

20. Cooley further opined that forfeiture of rights and property cannot be adjudged by legislative act, confiscations without a judicial hearing after due notice would be void as not being due process of law. Rights of the parties, without the authority of passing consequential or interim orders in the interest of justice, would not be a substantive one.

21. Offending section is stated to have been enacted in discharge of the international obligations as claimed by the Minister concerned in Parliament. This submission also appears to be without any substance. Countries, parties to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, in the 6th plenary meeting held on 19-12-1988 resolved to adopt means and measure to curb the rising trend in the illicit production or demand for and traffic in narcotic drugs and psychotropic substances which posed a serious threat to the health and welfare of human beings and adversely affected the economic, cultural and political foundations of society. The member countries, inter alia, agreed to adopt such measures as may be necessary to establish as criminal offences in its domestic law when committed intentionally:

> "(a)(i) the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation

or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

(ii) the cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and 1961 Convention as amended;

(iii) the possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above;

(iv) the manufacture, transport, or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

(v) the organisation, management or financing of any of the offences enumerated in (i), (ii), (iii) or (iv) above;

(b)(i) the conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with sub-paragraph (a) of this paragraph, or from an act, of participation in such offence or offences, for the purpose of concealing or disguising the illicit original of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions,

(iii) the concealment or disguise of the true nature, source, location, disposition, movement rights with respect to, or ownership of property, knowing that such property is derived from an offence or

> offences established in accordance with paragraph (a) of this paragraph or from an act of participation in such an offence or offences;"

It was further agreed that subject to the constitutional principles and the basic concept of its legal system each country shall provide for:

> "(i) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with sub-paragraph (a) of this paragraph or from an act of participation in such offence or offences;
>
> (ii) the possession of equipment or materials or substances listed in Table I and Table II, knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
>
> (iii) publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;
>
> (iv) participation in association or conspiracy to commit, attempts to commit and aiding, facilitating and counselling the commission of any of the offences established in accordance with this article."

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, aftercare, rehabilitation or social reintegration. 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."

23. A perusal of the agreement of the Convention to which India is claimed to be a party, clearly and unambiguously shows that the court's jurisdiction with respect to the offences relating to narcotic drugs and psychotropic substances was never intended to be ousted, taken away or curtailed. The declaration was made, subject to "constitutional principles and the basic concepts of its legal system prevalent in the polity of a member country". The international agreement emphasized that the courts of the member countries shall always bear in mind the serious nature of offences sought to be tackled by the declaration while considering the eventuality of early release or partly of persons convicted of such offences. There was no international agreement to put a blanket ban on the power of the court to suspend the sentence awarded to a criminal under the Act, notwithstanding the constitutional principles and basic concepts of its legal system. It cannot be denied that judicial review in our country is the heart and soul of our constitutional scheme. The judiciary is constituted the ultimate interpreter of the Constitution and is assigned the delicate task of determining the extent and scope of the powers conferred on each branch of the Government, ensuring that action of any branch does not transgress its limits. A Constitution Bench of this Court in *S.P. Sampath Kumar* v. *Union of India* [(1987) 1 SCC 124 : (1987) 2 ATC 82] held that : (SCC p. 129, para 3)

> "It is also a basic principle of the rule of law which permeates every provision of the Constitution and which forms its very core and essence that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law and it is the judiciary which has to ensure that the law is observed and there

> is compliance with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercise of the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the rule of law. The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality."

Again in *S.S. Bola* v. *B.D. Sardana* [(1997) 8 SCC 522 : AIR 1997 SC 3127] it was reiterated that judicial review is the basic feature upon which hinges the checks and balances blended with hind sight in the Constitution as people's sovereign power for their protection and establishment of egalitarian social order under the rule of law. The judicial review was, therefore, held to be an integral part of the Constitution as its basic structure. Similarly, the filing of an appeal, its adjudication and passing of appropriate interim orders is concededly a part of the legal system prevalent in our country.

24. In *Ram Charan* v. *Union of India* [(1991) 9 LCD 160 (All)] the Allahabad High Court while dealing with the question of the constitutional validity of Section 32-A 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 the accused was termed to be a right of infructuous appeal. However, the Gujarat High Court in *Ishwar Sinh M. Rajput* v. *State of Gujarat*[(1990) 2 Guj LR 1365 : (1991) 2 Crimes 160] while dealing with the case relating to grant of parole to a convict under the Act found that Section 32-A 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 a reasonable one. It is with specific object to curb deterrently habit-forming, booming 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 32-A violates Article 14 of the Constitution on the ground that it makes unreasonable distinction between a prisoner convicted under the Narcotics Act and a prisoner convicted for any other offence."

25. Judged from any angle, the section insofar as it completely debars the appellate courts from the power to suspend the sentence awarded to a convict under the Act cannot stand the test of constitutionality. Thus Section 32-A insofar as it ousts the jurisdiction of the court to suspend the sentence awarded to a convict under the Act is unconstitutional. We are, therefore, of the opinion that the Allahabad High Court in *Ram Charan case* [(1991) 9 LCD 160 (All)] has correctly interpreted the law relating to the constitutional validity of the section and the judgment of the Gujarat High Court in *Ishwar Sinh M. Rajput case* [(1990) 2 Guj LR 1365 : (1991) 2 Crimes 160] cannot be held to be good law.

26. Despite holding that Section 32-A 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, insofar 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 32-A to be unconstitutional, insofar 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 32-A as void insofar 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. Section 37 of the Act provides:

> "37. Offences to be cognizable and non-bailable.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973—
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless—
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) 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.
>
> (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail."

28. This Court in *Union of India* v. *Ram Samujh* [(1999) 9 SCC 429 : 1999 SCC (Cri) 1522] 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 he is convicted and he is not likely to commit any offence while on bail and during period of suspension of the sentence. The Court further held: (SCC pp. 431-32, paras 6-8)

"6. 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.' (emphasis supplied)

7. 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 those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a 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 NDPS Act, has succinctly observed about the adverse effect of such activities in Durand Didier v.Chief Secy., Union Territory of Goa [(1990) 1 SCC 95 : 1990 SCC (Cri) 65] as under: (SCC p. 104, para 24)

> '24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes

> and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.'
>
> 8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,
>
> (i) there are reasonable grounds for believing that the accused is not guilty of such offence; and
>
> (ii) that he is not likely to commit any offence while on bail are satisfied."

29. Under the circumstances the writ petitions are disposed of by holding that:

(1) Section 32-A 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 judgment."

IN THE SUPREME COURT OF INDIA

Avtar Singh v. State of Haryana

(2002) 3 SCC 18

G.B. Pattanaik, S.N. Phukan & S.N. Variava, JJ.

The appellant, a convict undergoing imprisonment, unsuccessfully sought a direction from High Court for counting the period of parole availed by him towards his total period of imprisonment. He filed an appeal before the Supreme Court, and also filed a writ petition challenging the vires of Section 3(3) of Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 as discriminatory as a prisoner released temporarily under this section was not entitled to count such period of release towards the total period of sentence, whereas temporary release of person on furlough under Section 4 was counted towards his total period of imprisonment. The Supreme Court in this case discussed whether the principles of parole laid down in* Sunil Fulchand Shah*[(2000) 3 SCC 409]in relation to preventive detention would also apply to punitive detention and also examined whether the classification laid down in case of parole and furlough with respect to prisoners under Section 3 and Section 4 of Haryana Good Conduct Prisoners (Temporary Release) Act is discriminatory in nature.

S.N. Phukan, J.:"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* [(2000) 3 SCC 409 : 2000 SCC (Cri) 659] 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* [(2000) 3 SCC 409 : 2000 SCC (Cri) 659] the Constitution Bench by a majority after considering various dictionary

meanings of the word "parole" held that the action for grant of parole, generally speaking is an administrative action and in paragraph 27 of the judgment 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 judgment the above position of parole was further clarified as follows: (SCC p. 432, para 30)

> "30. Since release on parole is only a temporary arrangement by which a detenu is released for a temporary fixed period to meet certain situations, it does not interrupt the period of detention and, thus, needs to be counted towards the total period of detention unless the rules, instructions or terms for grant of parole, prescribe otherwise."
>
> (emphasis supplied)

10. In the same paragraph (at SCC p. 433) the Bench also held that

> "[T]he 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 the courts. Though, the case of *Sunil Fulchand Shah* [(2000) 3 SCC 409: 2000 SCC (Cri) 659] 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 Acts, 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 was 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 the 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 the 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 are 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.

…

17. This Court in *State of Haryana* v. *Mohinder Singh* [(2000) 3 SCC 394: 2000 SCC (Cri) 645] held that "furlough" and "parole" are two distinct terms now being used in the Jail Manuals or laws relating to temporary release of prisoners. …Section 3 has been enacted to meet the urgent pressing personal problems of a prisoner. As noted above, under this section any prisoner irrespective of his period of sentence or detention can be released on parole to meet such a 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 a close look at both the sections it would appear that these sections operate in different fields. Section 3 has been enacted to meet certain situation of the prisoner but Section 4 has been enacted as a reformative measure as a prisoner has to show good

conduct while in incarceration. In our considered 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* [(2000) 3 SCC 409 : 2000 SCC (Cri) 659]. 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 Acts, 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 a prisoner has been taken away without due process of law. Consequently, these contentions of the learned counsel for the appellant are rejected."

IN THE SUPREME COURT OF INDIA

Mohd. Munna v. Union of India & Ors.

(2005) 7 SCC 417

K.G. Balakrishnan & B.N. Srikrishna JJ.

The petitioner was sentenced to life imprisonment. He contended that he had served a term of 20 years, and that therefore under the West Bengal Jail Code he was liable to be released. In this case the Court affirmed that life imprisonment did not amount to 14 years or 20 years, but to imprisonment for life unless an order of remission was passed by the appropriate government.

K.G. Balakrishnan, J.:"2. According to the petitioner, the length of the duration of imprisonment for life is equivalent to 20 years' imprisonment and that too subject to further remission admissible under law. He contends that on completion of this term he was liable to be released under Rule 751(*c*) of the West Bengal Jail Code. He relies on the Explanation to Section 61 of the West Bengal Correctional Services Act, 1992 (West Bengal Act 32 of 1992) whereunder imprisonment for life is equated to a term of 20 years' imprisonment.

…

13. The counsel contended that by virtue of Rule 751(*c*) of the West Bengal Jail Code, the petitioner was liable to be released from jail on completion of twenty years. He also relied on the Explanation to Section 61 of the West Bengal Correctional Services Act, 1992 (W.B. Act 32 of 1992) wherein the imprisonment for life is equated to a term of twenty years' simple imprisonment for the purpose of remission. But there is no provision either in the Indian Penal Code or in the Code of Criminal Procedure whereby life imprisonment could be treated as fourteen years or twenty years without there being a formal remission by the appropriate Government. Section 57 of the Penal Code reads as follows:

> "57. Fractions of terms of punishment.—In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years."

The above section is applicable for the purpose of remission when the matter is considered by the Government under the appropriate provisions. This very plea was placed before the Judicial Committee of the Privy Council in *Kishori Lal* v. *Emperor* [*Kishori Lal* v. *Emperor*, AIR 1945 PC 64: 72 IA 1 : 46 Cri LJ 626] and the Privy Council held as under: (AIR p. 67)

> "Assuming that the sentence is to be regarded as one of 20 years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application and it was therefore rightly dismissed but, in saying this, Their Lordships are not to be taken as meaning that a life sentence must and in all cases be treated as one of not more than 20 years or that the convict is necessarily entitled to remission."

14. The Prisons Rules are made under the Prisons Act and the Prisons Act by itself does not confer any authority or power to commute or remit sentence. It only provides for the regulation of the prisons and for the terms of the prisoners confined therein. Therefore, the West Bengal Correctional Services Act or the West Bengal Jail Code do not confer any special right on the petitioner herein.

15. In *Godse case* [*Gopal Vinayak Godse* v. *State of Maharashtra*, (1961) 3 SCR 440 : AIR 1961 SC 600 : (1961) 1 Cri LJ 736] , the Constitution Bench of this Court held that the sentence of imprisonment for life is not for any definite period and the imprisonment for life must, prima facie, be treated as imprisonment for the whole of the remaining period of the convicted person's natural life. It was also held in AIR para 5 as follows: (SCR pp. 444-45)

> "It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words 'imprisonment for life' for 'transportation for life' enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life."

…

17. Thus, all the contentions raised by the petitioner fail and the petitioner is not entitled to be released on any of the grounds urged in the writ petition so long as there is no order of remission passed by the appropriate Government in his favour. We make it clear that our decision need not be taken as expression of our view that the petitioner is not entitled to any remission at all. The appropriate Government would be at liberty to pass any appropriate order of remission in accordance with law."

IN THE HIGH COURT OF BOMBAY

Ramchandra Raghu Naik v. State of Maharashtra

2005 SCC Online Bom 2013

R.M.S. Khandeparkar & P.V. Kakade, JJ.

The petitioners filed a writ petition challenging rejection of their furlough applications for not surrendering on time on the expiration of their leave when they were earlier granted furlough. The Bombay High Court in this case discussed whether leniency should be granted to a prisoner who has earlier overstayed his furlough leave.

R.M.S. Khanderparkar, J.: "10. … In a case where a prisoner does not report back to the prison after the expiry of the furlough leave period and overstays for a period of 93 days or 604 days, and even thereafter has to be arrested for the purpose of inducting him again in the prison, undoubtedly, it cannot be said that such a person deserves any leniency as regards the Rule 4(10) is concerned. In case of such a person, certainly the Rule 4(10) would apply invariably. It is not to say that even in the case of such person the authorities cannot exercise their discretion. That, however, would depend on facts of each case. For example, in a case where the prisoner is compelled to overstay on account of some serious ailment or illness, either of himself or his family member, or for some other justifiable cause, certainly an exception can be made. But an overstay without any justification and without any reason can hardly be condoned and, therefore, no unwarranted leniency can be shown to such a person or persons while applying Rule 4(10) of the Furlough Rules.

…

12. Referring to Section 48A of the Prisons Act, 1894, it was sought to be contended that the petitioners having been already punished under the said provision of the Prisons Act by forfeiting their remission for the period for which they had overstayed, the petitioners could not be again penalised by applying Rule 4(10) as it amounts to double jeopardy. As far as the provisions of law comprised under Section 48A of the Prisons Act are concerned, the same relate to punishment for breach of conditions on

which either the sentence is suspended or remitted or furlough or release on parole is granted. The Clause (3) thereof provides that if any prisoner fails without sufficient cause to observe any of the conditions on which the furlough leave was granted to him, he shall be deemed to have committed a prison offence and the Superintendent may, after obtaining his explanation, punish for such offence by curtailing the privileges admissible under the remission or furlough or parole system. Undisputedly, in the case in hand, on account of overstay by the petitioners after availing the furlough leave, they were punished under the said provision of law comprised under Section 48A of the Prisons Act. However, Rule 4(10) of the Furlough Rules does not speak of any punishment as such. It merely curtails the entitlement of the benefit of furlough leave to the prisoner. In cases where a prisoner continues to commit default in the matter of surrender on expiry of the furlough leave, once having availed the same, the Rule 4(10) provides that prisoners who had at any time escaped or attempted to escape from the lawful custody or defaulted in any way in surrendering themselves at the appropriate time after release on parole or furlough, shall not be released on furlough. Obviously, this does not speak of any punishment as such. It is well-settled that any entitlement prescribed under the statute can be availed within the parameters prescribed under the statute. If the statute imposes conditions to claim any such benefit under the statute, the same are to be availed on compliance of the conditions and not otherwise. The provisions regarding the entitlement of benefit has to be read along with conditions attached to the same. Being so, the entitlement has to be read along with the conditions provided for. The entitlement of leave would be to the extent it is permissible and would not be available in cases where it is sought to be curtailed by specific provisions in that regard.

13. The Rule 3 of the Furlough Rules deals with the subject of entitlement of furlough. The sub-rule (1) thereof provides that a prisoner, who is sentenced to imprisonment for a period exceeding one year but not exceeding five years, may be released on furlough for a period of two weeks at a time for every year of actual imprisonment undergone. The sub-rule (2) thereof provides 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 for every two years of actual imprisonment undergone. The first proviso to Rule 3 provides that a prisoner sentenced to imprisonment for more than five years but not to imprisonment for life may be released on furlough every year instead of every two years during the last five years of his unexpired period of sentence. And the second proviso provides 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 Note 1 prescribes that the period of imprisonment in the Furlough Rules includes the sentence or sentences awarded in lieu of fine in case the amount of fine is not paid. Further proviso to the said Note provides that if fine is paid during the period of imprisonment and the total sentence thereby reduced to a term not exceeding five years, he shall thereafter be eligible for release every year in accordance with sub-rule (1) instead of every two years under sub-rule (2). The Note 2 provides that the period of imprisonment shall be computed as the total period for which a prisoner is sentenced even though one or more sentences be concurrent. The Note 3 provides that if at any time, a prisoner who could have been granted furlough is either not granted or is refused the same, the period for which he could have been granted the furlough shall not be carried forward but shall lapse. The Note 4 provides that the period of two weeks may be initially extended up to three weeks in the case of prisoners desiring to spend the furlough outside the State of Bombay. And the Note 5 provides that an order sanctioning the release of a prisoner on furlough shall cease to be valid if not given effect to within a period of two months of the date thereof. The Rule 4 of the Furlough Rules speaks of the categories of prisoners who shall not be considered for release on furlough. There are further rules which make elaborate provisions in relation to furlough leave.

14. Evidently, the rules make elaborate provisions regarding entitlement as well as disentitlement of furlough leave to the prisoner. Merely because under certain circumstances the rule provides that a prisoner would not be entitled to furlough leave, that does not amount to a penal provision so as to contend that the implementation of such provision would amount to double jeopardy in the case of a prisoner who is punished under Section 48A of the Prisons Act. The provisions relating to entitlement or disentitlement of furlough leave do not relate to penal action on the part of the authorities. Besides, punishment for jail offence by the jail superintendent would not even bar the prosecution and punishment in the Court for the same offence because the powers of the jail superintendent are in the nature of administrative authority for maintenance of discipline and to inflict summary punishment for breach of discipline and those proceedings are not judicial proceedings. In a case where a military personnel was tried in Court martial proceedings and being found guilty was sentenced to rigorous imprisonment for one year and subsequently was dismissed from service in an action taken under the service Rules, the decision was upheld by the Apex Court in *Union of India* v. *Sunil Kumar Sarkar*, reported in AIR

2001 SC 1092 holding that it does not amount to double jeopardy under Article 20(2) of the Constitution of India and two proceedings operate in two different fields though the crime or the misconduct might arise out of the same act. Hence the contention sought to be raised that on account of the punishment having been imposed under Section 48A of the Prisons Act, the respondents would not be entitled to deny the furlough leave by taking resort to the provisions of law comprised under Rule 4(10) of the Furlough Rules is devoid of substance and has to be rejected.

15. Needless to say that once an application for furlough is rejected, the prisoner may, if he so desire, make a fresh application for furlough, after a period of six months from the date of the rejection of his earlier application. A clear provision in that regard is to be found in Rule 9 of the Furlough Rules. The rejection of the present application by the authorities as also the rejection of the present petition by this Court cannot come in the way of the petitioners in inviting an appropriate order by filing fresh applications, if they so desire. Obviously, in case any such application is filed, the same will have to be decided in accordance with the provisions of law."

IN THE SUPREME COURT OF INDIA

Epuru Sudhakar & Anr. v. Govt. of A.P. & Ors.

(2006) 8 SCC 161

Arijit Pasayat & S.H. Kapadia JJ.

In this case, the petitioner claimed that remission had been granted on the basis of irrelevant considerations and without application of mind. The Court discussed the scope of judicial review of decisions made by the Executive under Article 161 and 72 of the Constitution, and whether the executive was obliged to provide reasons for its orders on remission.

Arijit Pasayat, J.:"3. The writ petition has been filed inter alia alleging that the grant of remission (described in the writ petition as grant of pardon) was illegal, relevant materials were not placed before the Governor, and the impugned order was passed without application of mind. The recommendations made for grant of remission were based on irrelevant and extraneous materials. The factual scenario has not been placed before the Governor in the proper perspective. The sole basis on which Respondent 3 asked for pardon was alleged implication in false cases due to political rivalry. In view of this Court's judgment holding Respondent 2 guilty, the said plea could not have even been considered as a basis for grant of pardon. Since the grant of pardon is based on consideration of irrelevant materials and non-consideration of relevant materials the same is liable to be set aside.

4. Learned counsel for the respondent State and Respondents 2 and 3 has strenuously contended that the petition is the outcome of a political vendetta. All relevant materials have been taken into account by the Governor, a high constitutional authority who passed the order granting remission. It is submitted that the petitioner has confused between pardon and remission of sentence. It is a case where materials existed which warranted the grant of remission and this Court should not interfere in the matter. Considering the limited scope for judicial review the writ petition deserves to be dismissed.

5. Considering the fact that in large number of cases challenge is made to the grant of pardon or remission, as the case may be, we had requested

Mr Soli J. Sorabjee to act as amicus curiae. He has highlighted various aspects relating to the grant of pardon and remission, as the case may be, and the scope for judicial review in such matters. He has suggested that considering the frequency with which pardons and/or the remissions are being granted, in the present political scenario of the country it would be appropriate for this Court to lay down guidelines so that there is no scope for making a grievance about the alleged misuse of power.

6. Learned counsel for the respondents on the other hand submitted that though in *Maru Ram* v. *Union of India* [(1981) 1 SCC 107 : 1981 SCC (Cri) 112] this Court had indicated certain recommendatory guidelines, the same did not find acceptance in *Kehar Singh* v. *Union of India*[(1989) 1 SCC 204 : 1989 SCC (Cri) 86] . As a matter of fact in a later decision in *Ashok Kumar* v. *Union of India* [(1991) 3 SCC 498 : 1991 SCC (Cri) 845] the alleged apparent inconsistencies in the view was highlighted and a three-Judge Bench held that laying down guidelines would be inappropriate.

…

16. The philosophy underlying the pardon power is that "every civilised country recognises, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy". (See *59 American Jurisprudence*, 2nd Edn., p. 5.)

…

21. We shall deal with the extent of power for judicial review as highlighted by learned counsel for the parties and learned amicus curiae before we deal with the factual scenario.

22. It is fairly well settled that the exercise or non-exercise of pardon power by the President or Governor, as the case may be, is not immune from judicial review. Limited judicial review is available in certain cases.

23. In *Maru Ram case* [(1981) 1 SCC 107 : 1981 SCC (Cri) 112] it was held that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power.

24. It is noteworthy that in *Kehar Singh case* [(1989) 1 SCC 204 : 1989 SCC (Cri) 86] the contention that the power of pardon can be exercised for political consideration was unequivocally rejected. In *Maru Ram case* [(1981) 1 SCC 107 : 1981 SCC (Cri) 112] it was held that consideration of religion, caste, colour or political loyalty are totally irrelevant and fraught with discrimination.

25. In *Kehar Singh case* [(1989) 1 SCC 204 : 1989 SCC (Cri) 86] it was held that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations delineated in *Maru Ram case* [(1981) 1 SCC 107 : 1981 SCC (Cri) 112] . The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the court.

26. In *Kehar Singh case* [(1989) 1 SCC 204 : 1989 SCC (Cri) 86] , placing reliance on the doctrine of the division (separation) of powers it was pleaded, that it was not open to the judiciary to scrutinise the exercise of the "mercy" power. In dealing with this submission this Court held that the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the Court by way of judicial review.

27. As regards the considerations to be applied to a petition for pardon/ remission in *Kehar Singh case* [(1989) 1 SCC 204 : 1989 SCC (Cri) 86] this Court observed as follows: (SCC p. 217, para 15)

> "As regards the considerations to be applied by the President to the petition, we need say nothing more as the law in this behalf has already been laid down by this Court in Maru Ram[(1981) 1 SCC 107 : 1981 SCC (Cri) 112] ."

28. In *Swaran Singh* v. *State of U.P.* [(1998) 4 SCC 75 : 1998 SCC (Cri) 804] after referring to the judgments in *Maru Ram case* [(1981) 1 SCC 107 : 1981 SCC (Cri) 112] and *Kehar Singh case* [(1989) 1 SCC 204 : 1989 SCC (Cri) 86] this Court held as follows: (SCC p. 79, para 12)

> "We cannot accept the rigid contention of the learned counsel for the third respondent that this Court has no power to touch the order passed by the Governor under Article 161 of the Constitution. If such power

> was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it."

…

30. The Court held that if the pardon power "was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it" (*Swaran Singh case* [(1998) 4 SCC 75 : 1998 SCC (Cri) 804] , SCC p. 79, para 12). The Court further observed that when the order of the Governor impugned in these proceedings is subject to judicial review within the strict parameters laid down in *Maru Ram case* [(1981) 1 SCC 107 : 1981 SCC (Cri) 112] and reiterated in *Kehar Singh case* [(1989) 1 SCC 204 : 1989 SCC (Cri) 86] "we feel that the Governor shall reconsider the petition of Doodh Nath in the light of those materials which he had no occasion to know earlier" (SCC p. 79, para 13), and left it open to the Governor of Uttar Pradesh to pass a fresh order in the light of the observations made by this Court.

31. In *Satpal* v. *State of Haryana* [(2000) 5 SCC 170 : 2000 SCC (Cri) 920] this Court observed that the power of granting pardon under Article 161 is very wide and does not contain any limitation as to the time at which and the occasion on which and the circumstances in which the said powers could be exercised.

32. Thereafter the Court held as follows: (SCC p. 174, para 4)

> "The said power being a constitutional power conferred upon the Governor by the Constitution is amenable to judicial review on certain limited grounds. The Court, therefore, would be justified in interfering with an order passed by the Governor in exercise of power under Article 161 of the Constitution if the Governor is found to have exercised the power himself without being advised by the Government or if the Governor transgresses the jurisdiction in exercising the same or it is established that the Governor has passed the order without application of mind or the order in question is a mala fide one or the Governor has passed the order on some extraneous consideration."

The principles of judicial review on the pardon power have been restated in *Bikas Chatterjee* v. *Union of India* [(2004) 7 SCC 634 : 2004 SCC (Cri) 2018].

…

34. The position, therefore, is undeniable that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:

(*a*) that the order has been passed without application of mind;

(*b*) that the order is mala fide;

(*c*) that the order has been passed on extraneous or wholly irrelevant considerations;

(*d*) that relevant materials have been kept out of consideration;

(*e*) that the order suffers from arbitrariness.

35. Two important aspects were also highlighted by learned amicus curiae; one relating to the desirability of indicating reasons in the order granting pardon/remission while the other was an equally more important question relating to power to withdraw the order of granting pardon/remission, if subsequently, materials are placed to show that certain relevant materials were not considered or certain materials of extensive value were kept out of consideration. According to learned amicus curiae, reasons are to be indicated, in the absence of which the exercise of judicial review will be affected.

36. So far as desirability to indicate guidelines is concerned in *Ashok Kumar case* [(1991) 3 SCC 498 : 1991 SCC (Cri) 845] it was held as follows: (SCC pp. 518-19, para 17)

> "17. In Kehar Singh case [(1989) 1 SCC 204 : 1989 SCC (Cri) 86] on the question of laying down guidelines for the exercise of power under Article 72 of the Constitution this Court observed in para 16 as under: (SCC pp. 217-18, para 16)
>
> 'It seems to us that there is sufficient indication in the terms of Article 72 and in the history of the power

enshrined in that provision as well as existing case-law, and specific guidelines need not be spelled out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, for we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme.'

These observations do indicate that the Constitution Bench which decided Kehar Singh case[(1989) 1 SCC 204 : 1989 SCC (Cri) 86] was of the view that the language of Article 72 itself provided sufficient guidelines for the exercise of power and having regard to its wide amplitude and the status of the function to be discharged thereunder, it was perhaps unnecessary to spell out specific guidelines since such guidelines may not be able to conceive of all myriad kinds and categories of cases which may come up for the exercise of such power. No doubt in Maru Ram case [(1981) 1 SCC 107 : 1981 SCC (Cri) 112] the Constitution Bench did recommend the framing of guidelines for the exercise of power under Articles 72/161 of the Constitution. But that was a mere recommendation and not a ratio decidendi having a binding effect on the Constitution Bench which decided Kehar Singh case[(1989) 1 SCC 204 : 1989 SCC (Cri) 86] . Therefore, the observation made by the Constitution Bench in Kehar Singh case [(1989) 1 SCC 204 : 1989 SCC (Cri) 86] does not upturn any ratio laid down in Maru Ram case [(1981) 1 SCC 107: 1981 SCC (Cri) 112] . Nor has the Bench in Kehar Singh case [(1989) 1 SCC 204 : 1989 SCC (Cri) 86] said anything with regard to using the provisions of extant Remission Rules as guidelines for the exercise of the clemency powers."

37. In *Kehar Singh case* [(1989) 1 SCC 204 : 1989 SCC (Cri) 86] this Court held that: (SCC p. 216, para 13)

> "There is also no question involved in this case of asking for the reasons for the President's order."

38. The same obviously means that the affected party need not be given the reasons. The question whether reasons can or cannot be disclosed to the Court when the same is challenged was not the subject-matter of consideration. In any event, the absence of any obligation to convey the reasons does not mean that there should not be legitimate or relevant reasons for passing the order.

…

43. Since there is a power of judicial review, however, limited it may be, the same can be rendered to be an exercise in futility in the absence of reasons.

44. The logic applied by this Court in *Bommai case* [(1994) 3 SCC 1] in the context of Article 74(2) is also relevant. It was observed in paras 153 and 434 as follows: (SCC pp. 148 & 297)

> "153. II. Article 74(2) is not a bar against the scrutiny of the material on the basis of which the President had arrived at his satisfaction.
>
> ***
>
> 434. (6) Article 74(2) merely bars an enquiry into the question whether any, and if so, what advice was tendered by the Ministers to the President. It does not bar the Court from calling upon the Union Council of Ministers (Union of India) to disclose to the Court the material upon which the President had formed the requisite satisfaction. The material on the basis of which advice was tendered does not become part of the advice. Even if the material is looked into by or shown to the President, it does not partake the character of advice."

45. So far as the second aspect relating to withdrawal is concerned, it is submitted that though there is no specific reference in this regard in either Article 72 or Article 161 of the Constitution yet by application of the provisions of the General Clauses Act, 1897 (in short "the General Clauses Act") the same would be permissible. It is also highlighted that

similar provisions are specifically provided in Sections 432 and 433 CrPC. Merely because Article 72 and Article 161 of the Constitution have not been so provided specifically that would not mean that such power was not intended to be exercised.

…

47. The scope and ambit of Sections 14 and 21 of the General Clauses Act have been analysed by this Court in *Sampat Prakash* v. *State of J&K* [(1969) 2 SCR 365 : AIR 1970 SC 1118] . It was inter alia held in AIR para 11 as follows: (SCR p. 375 A-B)

> "[*11*.] … This provision is clearly a rule of interpretation which has been made applicable to the Constitution in the same manner as it applies to any Central Act or regulation. On the face of it, the submission that Section 21 cannot be applied to the interpretation of the Constitution will lead to anomalies which can only be avoided by holding that the rule laid down in this section is fully applicable to all provisions of the Constitution."

...

50. Inevitable conclusion, therefore, is that if it comes to the knowledge of the Government that the pardon has been obtained on the basis of manifest mistake or patent misrepresentation or fraud, the same can be rescinded or cancelled.

…

54. Coming to the factual position it is noticed that various materials were placed before the Governor when the request for grant of pardon/ remission was processed at various levels. The views of the district-level officials were obtained. Since they formed the basis of impugned order, it is relevant to take note of some interesting features. The three district-level officials were the Superintendent of Police, the District Collector, Kurnool and the District Probation Officer. Apart from that, the views of the Superintendent of Jail, Central Prison, Cherlapally were obtained. The Collector's report refers to the report given by the Superintendent of Police and reproduces the same in the report contained in letter dated 9-12-2004. He also refers the letter dated 8-12-2004 of the Revenue Divisional Officer who according to him had indicated no objection to release of Respondent

2 on premature basis as his conduct and character was good and he lead ordinary life during the period of his escort parole from 19-5-2004 to 7-8-2004 and the free parole from 20-10-2004 to 6-11-2004. Only on that basis the District Collector recommended premature release.

55. According to learned counsel for the State this was sufficient as the Collector had to act on some material and he acted on the reports of the Superintendent of Police and the Revenue Divisional Officer. The plea is clearly unacceptable. The Collector does not appear to have made any independent enquiry on his own. The report of the District Probation Officer is very interesting. In his report he has stated that if he (Respondent 2) is prematurely released his life would be safe because his wife is a sitting MLA and she is having a police security. Further he was having a stronghold in the village and there is no opposition in Bramhanakotkur Village. Following portion of his report shows as to how extraneous materials which had no relevance formed the foundation of his report:

> "The convict Gouru Venkata Reddy, s/o Janardhan Reddy, Central Prison Cherlapally belongs to upper caste Reddy's family of Bramhanakotkur (village), Nandikotkur Mandal and Taluk. The father of the convict was Janardhan Reddy and mother was Gouru Lakshmi Devi and during enquiry it is revealed that both were dead. The grandmother of the convict Smt Ratnamma is old, aged and there is no male person in the house to look after her. She desires that the convict should come and provide medical treatment to her.
>
> In the past the convict contested in the elections and was defeated with small margin. During enquiry it is revealed that the convict is a Congress worker and due to political conspiracy he was defeated. In the elections conducted later on the wife of convict Smt Saritha Reddy contested and was elected. During enquiry it is revealed that the matters mentioned in the application of the wife of the convict are true. The convict has two sisters. The deceased K. Rama Subbaiah and Ambi Reddy belong to Nandikotkur Village. *In this murder case the convict is not involved but due to political reasons his name was implicated in the case by producing false witnesses and sent to the jail. But later they realised their mistake and the family members of the deceased are maintaining* cordial

> relations. During enquiry it is revealed that there is no danger to the life of the convict from the villagers and also there is no danger to the villagers from the convict if the convict is released as stated by the President of the village, Shri Shaik Ziauddin, Village Secretary, Shri Sanjanna, village elders, Shri Nagaswamy Reddy, Shri K. Venkata Rami Reddy, Shri Khajamoinuddin and Shri Pathan Moutali, etc.
>
> As seen from the past history of the convict he is not a naxalite, dacoit, and habitual offender. He was peacefully carrying out agricultural activities and a good Congress worker. He used to provide employment to a number of persons through agriculture. It is also revealed that the villagers are having good opinion of the convict."

56. Apart from apparently wrong statement made that Respondent 2 was maintaining cordial relationship with the family members of the deceased, he has highlighted that he was a "good Congress worker". Further there is an inference that he was not involved in the murder, was falsely implicated and false witnesses were produced. This inference in the face of this Court's judgment is utterly fallacious. The question of his being a "good Congress worker" has no relevance to the objects sought to be achieved i.e. consideration of the question whether pardon/remission was to be granted. Equally surprising is the statement to the effect that during enquiry it was revealed that the convict is a Congress worker and by political conspiracy he was defeated in the elections conducted earlier.

57. The report of the Superintendent of Police is equally interesting. He has stated that there will be no reaction in Bramhanakotkur Village and Nandikotkur Town if the prisoner releases on prematurely. The report is dated 6-12-2004. Before the elections, the same officer had reported that on account of Respondent 2's release on parole, there was likelihood of breach of peace and law and order if he visits Nandikotkur assembly constituency. The only reason why a pariah becomes a messiah appears to be the change in the ruling pattern. With such a pliable bureaucracy, there is need for deeper scrutiny when power of pardon/remission is exercised.

58. It appears that in the petition filed by Respondent 3 there is no mention about pendency of Criminal Case No. 411 of 2000. Learned counsel for Respondent 1 State submitted that though this fact was not mentioned by Respondent 3 in the petition yet the State Government considered the

effect of the pendency of that petition. This certainly is a serious matter because a person who seeks exercise of highly discretionary power of a high constitutional authority, has to show bona fides and must place materials with clean hands.

59. When the principles of law as noted above are considered in the factual background it is clear that the irrelevant and extraneous materials entered into the decision-making process, thereby vitiating it.

60. The order granting remission which is impugned in the petitions is clearly unsustainable and is set aside. However, it is open to Respondent 1 to treat the petition as a pending one for the purpose of reconsideration. It shall be open to the Governor to take note of materials placed before him by the functionaries of the State, and also to make such enquiries as considered necessary and relevant for the purpose of ascertaining the relevant factors otherwise. The writ petitions are allowed to the extent indicated above. No costs."

…

S.H. Kapadia, J.: "62. Pardons, reprieves and remissions are manifestation of the exercise of prerogative power. These are not acts of grace. They are a part of constitutional scheme. When a pardon is granted, it is the determination of the ultimate authority that public welfare will be better served by inflicting less than what the judgment has fixed.

63. The power to grant pardons and reprieves was traditionally a royal prerogative and was regarded as an absolute power. At the same time, even in the earlier days, there was a general rule that if the king is deceived, the pardon is void, therefore, any separation of truth or suggestion of falsehood vitiated the pardon. Over the years, the manifestation of this power got diluted.

64. The power to grant pardons and reprieves in India is vested in the President and the Governor of a State by virtue of Articles 72 and 161 of the Constitution, respectively.

65. Exercise of executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty. This

discretion, therefore, has to be exercised on public considerations alone. The President and the Governor are the sole judges of the sufficiency of facts and of the appropriateness of granting the pardons and reprieves. However, this power is an enumerated power in the Constitution and its limitations, if any, must be found in the Constitution itself. Therefore, the principle of exclusive cognizance would not apply when and if the decision impugned is in derogation of a constitutional provision. This is the basic working test to be applied while granting pardons, reprieves, remissions and commutations.

66. Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an executive action that mitigates or sets aside the punishment for a crime. It eliminates the effect of conviction without addressing the defendant's guilt or innocence. The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter. It can no longer be said that prerogative power is *ipso facto* immune from judicial review. An undue exercise of this power is to be deplored. Considerations of religion, caste or political loyalty are irrelevant and fraught with discrimination. These are prohibited grounds. The Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central plan in the Rule of Law. Every prerogative has to be subject to the Rule of Law. That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent. The Rule of Law principle comprises a requirement of "Government according to law". The ethos of "Government according to law" requires the prerogative to be exercised in a manner which is consistent with the basic principle of fairness and certainty. Therefore, the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the Governor, as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future.

67. The power under Article 72 as also under Article 161 of the Constitution is of the widest amplitude and envisages myriad kinds and categories of cases with facts and situations varying from case to case. The exercise of power depends upon the facts and circumstances of each case and the necessity or justification for exercise of that power has to be judged from case to case. It is important to bear in mind that every aspect of the exercise

of the power under Article 72 as also under Article 161 does not fall in the judicial domain. In certain cases, a particular aspect may not be justiciable. However, even in such cases there has to exist requisite material on the basis of which the power is exercised under Article 72 or under Article 161 of the Constitution, as the case may be. In the circumstances, one cannot draw the guidelines for regulating the exercise of the power.

68. As stated above, exercise or non-exercise of the power of pardon by the President or the Governor is not immune from judicial review. Though, the circumstances and the criteria to guide exercise of this power may be infinite, one principle is definite and admits of no doubt, namely, that the impugned decision must indicate exercise of the power by application of manageable standards and in such cases courts will not interfere in its supervisory jurisdiction. By manageable standards we mean standards expected in functioning democracy. A pardon obtained by fraud or granted by mistake or granted for improper reasons would invite judicial review. The prerogative power is the flexible power and its exercise can and should be adapted to meet the circumstances of the particular case. The constitutional justification for judicial review, and the vindication of the Rule of Law remain constant in all areas, but the mechanism for giving effect to that justification varies.

69. In conclusion, it may be stated that, there is a clear symmetry between the constitutional rationale for review of statutory and prerogative power. In each case, the courts have to ensure that the authority is used in a manner which is consistent with the Rule of Law, which is the fundamental principle of good administration. In each case, the Rule of Law should be the overarching constitutional justification for judicial review. The exercise of prerogative power cannot be placed in straitjacket formula and the perceptions regarding the extent and amplitude of this power are bound to vary. However, when the impugned decision does not indicate any data or manageable standards, the decision amounts to derogation of an important constitutional principle of Rule of Law."

IN THE SUPREME COURT OF INDIA

Swamy Shraddananda (II) v. State of Karnataka

(2008) 13 SCC 767

B.N. Agrawal, G.S. Singhvi & Aftab Alam JJ.

A two-judge bench of the Supreme Court, while upholding the conviction of the appellant, differed on the sentence. The matter was referred to a three judge bench. The Court, while commuting the death sentence to one of imprisonment for life, and directing that the convict not be released for the rest of his life, discussed the creation of a third category of sentence, where the case falls just below the threshold required to satisfy the 'rarest of rare' standard, but for which the sentence of imprisonment for life is grossly inadequate. The Court held that in such a situation it is empowered to award a sentence of life imprisonment, along with a direction that the convict not be released for the rest of his life, thus precluding the application of section 432 and section 433. However, the Court held that this power of the Court cannot interfere with the executive function of mercy under Article 72 and 161 of the Constitution.

Aftab Alam, J.:"2. How would the sentence of imprisonment for life work out in actuality? The Court may feel that the punishment more just and proper, in the facts of the case, would be imprisonment for life with life given its normal meaning and as defined in Section 45 of the Penal Code, 1860. The Court may be of the view that the punishment of death awarded by the trial court and confirmed by the High Court needs to be substituted by life imprisonment, literally for life or in any case for a period far in excess of fourteen years. The Court in its judgment may make its intent explicit and state clearly that the sentence handed over to the convict is imprisonment till his last breath or, life permitting, imprisonment for a term not less than twenty, twenty-five or even thirty years. But once the judgment is signed and pronounced, the execution of the sentence passes into the hands of the executive and is governed by different provisions of law.

3. What is the surety that the sentence awarded to the convict after painstaking and anxious deliberation would be carried out in actuality? The sentence of imprisonment for life, literally, shall not by application of different kinds of remission, turn out to be the ordinary run-of-the-mill life term that works out to no more than fourteen years. How can the sentence

of imprisonment for life (till its full natural span) given to a convict as a *substitute for the death sentence* be viewed differently and segregated from the ordinary life imprisonment given as the sentence of first choice? These are the questions that arise for consideration in this case.

…

55. We must not be understood to mean that the crime committed by the appellant was not very grave or the motive behind the crime was not highly depraved. Nevertheless, in view of the above discussion we feel hesitant in endorsing the death penalty awarded to him by the trial court and confirmed by the High Court. The absolute irrevocability of the death penalty renders it completely incompatible to the slightest hesitation on the part of the Court. The hangman's noose is thus taken off the appellant's neck.

56. But this leads to a more important question about the punishment commensurate to the appellant's crime. The sentence of imprisonment for a term of 14 years, that goes under the euphemism of life imprisonment is equally, if not more, unacceptable. As a matter of fact, Mr Hegde informed us that the appellant was taken in custody on 28-3-1994 and submitted that by virtue of the provisions relating to remission, the sentence of life imprisonment, without any qualification or further direction would, in all likelihood, lead to his release from jail in the first quarter of 2009 since he has already completed more than 14 years of incarceration. This eventuality is simply not acceptable to this Court. What then is the answer? The answer lies in breaking this standardisation that, in practice, renders the sentence of life imprisonment equal to imprisonment for a period of no more than 14 years; in making it clear that the sentence of life imprisonment *when awarded as a substitute for death penalty* would be carried out strictly as directed by the Court. This Court, therefore, must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed, in appropriate cases as a uniform policy not only by this Court but also by the High Courts, being the superior courts in their respective States. A suggestion to this effect was made by this Court nearly thirty years ago in *Dalbir Singh* v. *State of Punjab* [(1979) 3 SCC 745 : 1979 SCC (Cri) 848] . In para 14 of the judgment this Court held and observed as follows: (SCC p. 753)

> "14. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in Rajendra Prasad case [Rajendra Prasad v. State of U.P., (1979) 3 SCC 646 : 1979 SCC (Cri) 749] . Taking the cue from the

> English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the men's life but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder."
>
> (emphasis added)

We think that it is time that the course suggested in *Dalbir Singh* [(1979) 3 SCC 745 : 1979 SCC (Cri) 848] should receive a formal recognition by the Court.

…

67. On a perusal of the seven decisions discussed above and the decisions referred to therein it would appear that this Court modified the death sentence to imprisonment for life or in some cases imprisonment for a term of twenty years with the further direction that the convict must not be released from prison for the rest of his life or before actually serving out the term of twenty years, as the case may be, mainly on two premises; one, an imprisonment for life, in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for the rest of life of the prisoner and two, a convict undergoing life imprisonment has no right to claim remission. In support of the second premise reliance is placed on the line of decisions beginning from *Gopal Vinayak Godse* v. *State of Maharashtra* [AIR 1961 SC 600 : (1961) 3 SCR 440] and coming down to *Mohd. Munna* v. *Union of India* [(2005) 7 SCC 417 : 2005 SCC (Cri) 1688] .

68. In course of hearing of the appeal before us strong doubts were raised over the application of the second premise for putting a sentence of imprisonment beyond remission. It was contended that to say that a convict undergoing a sentence of imprisonment had no right to claim remission was not the same as the Court, while giving the punishment of imprisonment, suspending the operation of the statutory provisions of remission and restraining the appropriate Government from discharging its statutory function.

…

72. Before us it was submitted that just as the Court could not direct the appropriate Government for granting remission to a convicted prisoner,

it was not open to the Court to direct the appropriate Government not to consider the case of a convict for grant of remission in sentence. It was contended that giving punishment for an offence was indeed a judicial function but once the judgment was pronounced and punishment awarded, the matter no longer remained in the hands of the Court. The execution of the punishment passed into the hands of the executive and under the scheme of the statute the Court had no control over the execution.

…

74. At this stage, it will be useful to take a very brief look at the provisions with regard to sentencing and computation, remission, etc. of sentences. Section 45 of the Penal Code defines "life" to mean the life of the human being, unless the contrary appears from the context. Section 53 enumerates punishments, the first of which is death and the second, imprisonment for life. Sections 54 and 55 give to the appropriate Government the power of commutation of the sentence of death and the sentence of imprisonment for life respectively. Section 55-A defines "appropriate Government". Section 57 provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.

…

76. It is equally well settled that Section 57 of the Penal Code does not in any way limit the punishment of imprisonment for life to a term of twenty years. Section 57 is only for calculating fractions of terms of punishment and provides that imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. (See *Gopal Vinayak Godse* [AIR 1961 SC 600 : (1961) 3 SCR 440] and *Ashok Kumar* [(1991) 3 SCC 498 : 1991 SCC (Cri) 845] .) The object and purpose of Section 57 will be clear by simply referring to Sections 65, 116, 119, 129 and 511 of the Penal Code.

77. This takes us to the issue of computation and remission, etc. of sentences. The provisions in regard to computation, remission, suspension, etc. are to be found both in the Constitution and in the statutes. Articles 72 and 161 of the Constitution deal with the powers of the President and the Governors of the States respectively to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted for any offence. Here it needs to be made absolutely clear that this judgment is not concerned at all with the constitutional provisions that are in the nature of the State's sovereign power. What is said hereinafter relates only to provisions of commutation, remission, etc. as contained in the Code of Criminal Procedure and the Prisons Acts and the rules framed by the different States.

78. Section 432 of the Code of Criminal Procedure deals with the power to suspend or remit sentences and Section 433 with the power to commute sentences. Section 433-A, that was inserted in the Code by an amendment made in 1978, imposes restriction on powers of remission or commutation in certain cases. It reads as follows:

> "433-A. Restriction on powers of remission or commutation in certain cases.—Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment provided by laws or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had at least fourteen years of imprisonment."

79. Section 434 gives concurrent power to the Central Government in case of death sentence and Section 435 provides that in certain cases the State Government must act only after consultation with the Central Government.

80. From the Prisons Acts and the Rules it appears that for good conduct and for doing certain duties, etc. inside the jail the prisoners are given some days' remission on a monthly, quarterly or annual basis. The days of remission so earned by a prisoner are added to the period of his actual imprisonment (including the period undergone as an undertrial) to make up the term of sentence awarded by the Court. This being the position, the first question that arises in mind is how remission can be applied to imprisonment for life. The way in which remission is allowed, it can only apply to a fixed term and life imprisonment, being for the rest of life, is by nature indeterminate.

…

88. It is thus to be seen that both in Karnataka and Bihar remission is granted to life convicts by *deemed* conversion of life imprisonment into a fixed term of 20 years. The deemed conversion of life imprisonment into one for fixed term by executive orders issued by the State Governments apparently flies in the face of a long line of decisions by this Court and we are afraid no provision of law was brought to our notice to sanction such a course. It is thus to be seen that life convicts are granted remission and released from prison on completing the fourteen-year term without any sound legal basis. One can safely assume that the position would be

no better in the other States. This Court can also take judicial notice of the fact that remission is allowed to life convicts in the most mechanical manner without any sociological or psychiatric appraisal of the convict and without any proper assessment as to the effect of the early release of a particular convict on the society. The grant of remission is the rule and remission is denied, one may say, in the rarest of rare cases.

89. Here, it may be noted that this has been the position for a very long time. As far back as in 1973, in *Jagmohan Singh* [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : AIR 1973 SC 947] a Constitution Bench of this Court made the following observation: (SCC p. 28, para 14)

> "14. … In the context of our criminal law which punishes murder, one cannot ignore the fact that life imprisonment works out in most cases to a dozen years of imprisonment and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty."

Five years after *Jagmohan* [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : AIR 1973 SC 947] , Section 433-A was inserted in the Code of Criminal Procedure, 1973 imposing a restriction on the power of remission or commutation in certain cases. After the introduction of Section 433-A another Constitution Bench of this Court in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898] made the following observation: (SCC pp. 735-36, para 156)

> "156. It may be recalled that in Jagmohan [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : AIR 1973 SC 947] this Court had observed that, in practice, life imprisonment amounts to 12 years in prison. Now, Section 433-A restricts the power of remission and commutation conferred on the appropriate Government under Sections 432 and 433, so that a person who is sentenced to imprisonment for life or whose death sentence is commuted to imprisonment for life must serve actual imprisonment for a minimum of 14 years."

Thus all that is changed by Section 433-A is that before its insertion an imprisonment for life in most cases worked out to a dozen years of imprisonment and after its introduction it works out to fourteen years' imprisonment. But the observation in *Jagmohan* [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : AIR 1973 SC 947] that this cannot be accepted as an adequate substitute for the death penalty still holds true.

…

92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh *or it may be highly disproportionately inadequate*. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898] besides being in accord with the modern trends in penology.

94. In the light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be."

IN THE SUPREME COURT OF INDIA

Shankar Kisanrao Khade v. State of Maharashtra

(2013) 5 SCC 546

K.S.P. Radhakrishnan & Madan B. Lokur JJ.

In this case relating to the appropriate sentence to be imposed on the appellant, the Supreme Court, inter alia, discussed remission of a sentence in a case where multiple sentences of imprisonment are directed to run consecutively. It held that since imprisonment for life is equivalent to imprisonment for the rest of the convict's life, in a case where consecutive sentences have been awarded, if there is remission of one of the sentences, and the early release of the convict is mandated by the competent authority, the second sentence will commence immediately. Further, the Court discussed the creation of a third category of prisoners that had been previously dealt with in Swamy Shraddhananda v. State of Karnataka those who were to undergo imprisonment for the rest of their lives, and who the Court precluded from be granted remission by the appropriate government.

Madan B. Lokur, J.: "124. *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] is more than clear that the crime is important (cruel, diabolic, brutal, depraved and gruesome) but the criminal is also important and this, unfortunately has been overlooked in several cases in the past (as mentioned in *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra* [(2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150]) and even in some of the cases referred to above. It is this individualised sentencing that has made this Court wary, in the recent past, of imposing death penalty and instead substituting it for fixed term sentences exceeding 14 years (the term of 14 years or 20 years being erroneously equated with life imprisonment) or awarding consecutive sentences. Some of these cases, which are not necessarily cases of rape and murder, are mentioned below.

Minimum fixed term sentences

125. There have been several cases where life sentence has been awarded by this Court with a minimum fixed term of incarceration. Many of them

have been discussed in *Swamy Shraddananda (2)* [*Swamy Shraddananda (2)* v. *State of Karnataka*, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] and so it is not necessary to refer to them individually. *Swamy Shraddananda (2)* [*Swamy Shraddananda (2)* v. *State of Karnataka*, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] refers to *Aloke Nath Dutta* v. *State of W.B.* [(2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264] which in turn refers to five different cases. I propose to refer to them at this stage.

…

128. In *Mohd. Munna* v. *Union of India* [(2005) 7 SCC 417 : 2005 SCC (Cri) 1688] the convict had undergone 21 years of incarceration. This Court held that he was not entitled to release as a matter of course but was required to serve out his sentence till the remainder of his life subject to remissions by the appropriate authority or the State Government.

129. *Swamy Shraddananda (2)* [*Swamy Shraddananda (2)* v. *State of Karnataka*, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] also refers to *Jayawant Dattatraya Suryarao* v. *State of Maharashtra* [(2001) 10 SCC 109 : 2002 SCC (Cri) 897] , in which it was directed that: (*Jayawant Dattatraya case* [(2001) 10 SCC 109 : 2002 SCC (Cri) 897] , SCC p. 150, para 69)

> "69. … the [convict] will not be entitled to any commutation or premature release under Section 433-A of the Criminal Procedure Code, the Prisoners Act, Jail Manual or any other statute and the Rules made for the purpose of commutation and remissions."

Similarly, in *Nazir Khan* v. *State of Delhi* [(2003) 8 SCC 461 : 2003 SCC (Cri) 2033] , while sentencing the convicts to imprisonment for 20 years it was held that they would not be entitled to any remission from this period.

…

Consecutive sentence cases

138.*Ravindra Trimbak Chouthmal* v. *State of Maharashtra* [(1996) 4 SCC 148 : 1996 SCC (Cri) 608] , is perhaps among the earliest cases where consecutive sentences were awarded. This was not a case of rape and murder but one of causing a dowry death of his pregnant wife. It was held that it was not the "rarest of rare" cases "because dowry death has ceased to belong to*that* species of killing". The death sentence was, therefore, not

upheld. Since the accused had attempted to cause disappearance of the evidence by severing the head and cutting the body into nine pieces, this Court directed that he should undergo the sentence for that crime after serving out his life sentence. It was held: (SCC p. 151, paras 10-12)

> "10. We have given considered thought to the question and we have not been able to place the case in that category which could be regarded as the 'rarest of the rare' type. This is so because dowry death has ceased to belong to that species of killing. The increasing number of dowry deaths would bear this. To halt the rising graph, we, at one point, thought to maintain the sentence; but we entertain doubt about the deterrent effect of a death penalty. We, therefore, resist ourselves from upholding the death sentence, much though we would have desired annihilation of a despicable character like the appellant before us. We, therefore, commute the sentence of death to one of RI for life.
>
> 11. But then, it is a fit case, according to us, where, for the offence under Sections 201/34, the sentence awarded, which is RI for seven years being the maximum for a case of the present type, should be sustained, in view of what had been done to cause disappearance of the evidence relating to the commission of murder—the atrocious way in which the head was severed and the body was cut in nine pieces. These cry for maximum sentence. Not only this, the sentence has to run consecutively, and not concurrently, to show our strong disapproval of the loathsome, revolting and dreaded device adopted to cause disappearance of the dead body. To these sentences, we do not, however, desire to add those awarded for offences under Sections 316 and 498-A/34, as killing of the child in the womb was not separately intended, and Section 498-A offence ceases to be of significance and importance in view of the murder of Vijaya.

> 12. The result is that the appeal stands allowed to the extent that the sentence of death is converted to one of imprisonment for life. But then, the sentence of seven years' RI for the offence under Sections 201/34 IPC would start running after the life imprisonment has run its course as per law."

Since imprisonment for life means that the convict will remain in jail till the end of his normal life, what this decision mandates is that if the convict is to be released earlier by the competent authority for any reason, in accordance with procedure established by law, then the second sentence will commence immediately thereafter.

…

143. Off and on, the issue has been the interpretation of "life sentence" — does it mean imprisonment for only 14 years or 20 years or does it mean for the life of the convict. This doubt has been laid to rest in several cases, more recently in *Sangeet* [*Sangeet* v. *State of Haryana*, (2013) 2 SCC 452] where it has been unequivocally laid down that a sentence of imprisonment for life means imprisonment for the rest of the normal life of the convict. The convict is not entitled to any remission in a case of sentence of life imprisonment, as is commonly believed. However, if the convict is sought to be released before the expiry of his life, it can only be by following the procedure laid down in Section 432 of the Code of Criminal Procedure or by the Governor exercising power under Article 161 of the Constitution or by the President exercising power under Article 72 of the Constitution. There is no other method or procedure. Whether the statutory procedure under Section 432 of the Code of Criminal Procedure can be stultified for a period of 20 years or 30 years needs further discussion as observed in *Sangeet* [*Sangeet* v. *State of Haryana*, (2013) 2 SCC 452] , which did not deal with the constitutional power. This side issue does not arise in the present case also, and is therefore, not being discussed.

…

147. The significance of these figures is that even though the courts have awarded death penalty in appropriate cases applying the rarest of rare principle, the death sentence has been commuted in many of them. The reasons for commuting the death sentence by the executive are not in the public domain and therefore it is not possible to know what weighed with

the executive in commuting the death sentence of each convict. Was the reason for commutation that the crime and the criminal did not fall in the category of rarest of rare and if so what was the basis for coming to this conclusion when the competent court has come to a different conclusion?

…

149. It does prima facie appear that two important organs of the State, that is, the judiciary and the executive are treating the life of convicts convicted of an offence punishable with death with different standards. While the standard applied by the judiciary is that of the rarest of rare principle (however subjective or Judge-centric it may be in its application), the standard applied by the executive in granting commutation is not known. Therefore, it could happen (and might well have happened) that in a given case the Sessions Judge, the High Court and the Supreme Court are unanimous in their view in awarding the death penalty to a convict, any other option being unquestionably foreclosed, but the executive has taken a diametrically opposite opinion and has commuted the death penalty. This may also need to be considered by the Law Commission of India."

IN THE SUPREME COURT OF INDIA

Shatrughan Chauhan & Anr. v. Union of India & Ors.

(2014) 3 SCC 1

P. Sathasivam, C.J., Ranjan Gogoi & Shiva Kirti Singh JJ.

Writ petitions were filed seeking commutation of the death sentences imposed on the appellants, on account of infringement of fundamental rights due to the failure of the executive under Article 161 and 72 to dispose of mercy petitions within a reasonable period of time. The Court in this case extensively examined the powers of the executive under Articles 161 and 72, and the permissibility of subjecting the decisions of the executive to judicial review in the case of violation of fundamental rights. It was held that the failure of the executive to dispose of death penalty related mercy petitions within a reasonable period of time entitled the convicts to file a writ seeking commutation of the sentence.

P. Sathasivam, C.J.:"3. In all the writ petitions, the main prayer consistently relates to the issuance of a writ of declaration declaring that execution of sentence of death pursuant to the rejection of the mercy petitions by the President of India is unconstitutional and to set aside the death sentence imposed upon them by commuting the same to imprisonment for life. Further, it is also prayed for declaring the order passed by the Governor/President of India rejecting their respective mercy petitions as illegal and unenforceable. In view of the similarity of the reliefs sought for in all the writ petitions, we are not reproducing every prayer hereunder, however, while dealing with individual claims, we shall discuss factual details, the reliefs sought for and the grounds urged in support of their claim at the appropriate place. Besides, in the writ petition filed by PUDR, PUDR prayed for various directions in respect of procedure to be followed while considering the mercy petitions, and in general for protection of the rights of the death row convicts. We shall discuss discretely the aforesaid prayers in the ensuing paragraphs.

…

9. At the outset, the petitioners herein justly elucidated that they are not challenging the final verdict of this Court wherein death sentence was imposed. In fact, they asserted in their respective petitions that if the sentence had been executed then and there, there would have been no grievance or cause of action. However, it was not and the supervening events that occurred after the final confirmation of the death sentence are the basis of filing these petitions.

10. It is a time-honoured principle, as stipulated in *Ramana Dayaram Shetty* v. *International Airport Authority of India* [(1979) 3 SCC 489] , that no matter, whether the violation of fundamental right arises out of an executive action/inaction or action of the legislature, Article 32 can be utilised to enforce the fundamental rights in either event. In the given case, the stand of the petitioners herein is that exercise of the constitutional power vested in the executive specified under Articles 72/161 has violated the fundamental rights of the petitioners herein. This Court, as in the past, entertained the petitions of the given kind and issued appropriate orders as in *T.V. Vatheeswaran*v. *State of T.N.* [*T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342] , *Sher Singh* v. *State of Punjab* [*Sher Singh* v. *State of Punjab*, (1983) 2 SCC 344 : 1983 SCC (Cri) 461] ,*Triveniben* v. *State of Gujarat* [*Triveniben* v. *State of Gujarat*, (1988) 4 SCC 574 : 1989 SCC (Cri) 25] , etc. Accordingly, we accede to the stand of the petitioners and hold that the petitions are maintainable.

…

12. The memoir and scope of Articles 72/161 of the Constitution was extensively considered in *Kehar Singh* v. *Union of India* [*Kehar Singh* v. *Union of India*, (1989) 1 SCC 204 : 1989 SCC (Cri) 86] in the following words: (SCC pp. 210-11, para 7)

> "7. The Constitution of India, in keeping with modern constitutional practice, is a constitutive document, fundamental to the governance of the country, whereby, according to accepted political theory, the people of India have provided a constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution. All power belongs to the people, and it is entrusted by them to specified institutions and functionaries with the intention of working out, maintaining and operating a constitutional order. The

Preambular statement of the Constitution begins with the significant recital:

'We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic … do hereby adopt, enact and give to ourselves this Constitution.'

To any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the legislature, the executive and the judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State. In England, the power is regarded as the royal prerogative of pardon exercised by the sovereign, generally through the Home Secretary. It is a power which is capable of exercise on a variety of grounds, for reasons of State as well as the desire to safeguard against judicial error. It is an act of grace issuing from the Sovereign. In the United States, however, after the founding of the Republic, a pardon by the President has been regarded not as a private act of grace but as a part of

> the constitutional scheme. In an opinion, remarkable for its erudition and clarity, Mr Justice Holmes, speaking for the Court in Biddle v. Perovich [71 L Ed 1161 : 274 US 480 (1927)] enunciated this view, and it has since been affirmed in other decisions. The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. It is not denied, and indeed it has been repeatedly affirmed in the course of argument by learned counsel, Shri Ram Jethmalani and Shri Shanti Bhushan, appearing for the petitioners that the power to pardon rests on the advice tendered by the executive to the President, who subject to the provisions of Article 74(1) of the Constitution, must act in accordance with such advice."

13. In *Kehar Singh case* [*Kehar Singh* v. *Union of India*, (1989) 1 SCC 204: 1989 SCC (Cri) 86] , the Constitution Bench also considered whether the President can, in exercise of the power under Article 72 of the Constitution, scrutinise the evidence on record and come to a different conclusion than the one arrived at by the Court and held as under: (SCC pp. 212-14 & 218, paras 10 & 16)

> "10. We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an

> extension of it. And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him. … The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. It is the nature of the power which is determinative. … It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of the opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court.
>
> ***
>
> 16. … the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme."

14. Both Articles 72 and 161 repose the power of the People in the highest dignitaries i.e. the President or the Governor of a State, as the case may be, and there are no words of limitation indicated in either of the two Articles. The President or the Governor, as the case may be, in exercise of power under Articles 72/161 respectively, may examine the evidence afresh and this exercise of power is clearly independent of the judiciary. This Court, in numerous instances, clarified that the executive is not sitting as the Court of appeal, rather the power of President/Governor to grant remission of sentence is an act of grace and humanity in appropriate cases i.e. distinct, absolute and unfettered in its nature.

15. In this context, the deliberations in *Epuru Sudhakar* v. *State of A.P.* [*Epuru Sudhakar* v. *State of A.P.*, (2006) 8 SCC 161 : (2006) 3 SCC (Cri) 438] are relevant which are as under: (SCC pp. 172-73, paras 16-17)

> "16. The philosophy underlying the pardon power is that:
>
> 'every civilised country recognises, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy'. (See 59 American Jurisprudence, 2nd Edn., p. 5.)
>
> 17. The rationale of the pardon power has been felicitously enunciated by the celebrated Holmes, J. of the United States Supreme Court in Biddle v. Perovich [71 L Ed 1161 : 274 US 480 (1927)] in these words: (L Ed at p. 1163)
>
> '… A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.'"

16. Articles 72/161 of the Constitution entail remedy to all the convicts and are not limited to only death sentence cases and must be understood accordingly. It contains the power of reprieve, remission, commutation and pardon for all offences, though death sentence cases invoke the strongest sentiment since it is the only sentence that cannot be undone once it is executed.

17. Shri Andhyarujina, learned Senior Counsel, who assisted the Court as amicus commenced his submissions by pointing out that the power reposed in the President under Article 72 and the Governor under Article 161 of the Constitution is not a matter of grace or mercy, but is a constitutional duty of great significance and the same has to be exercised with great care and circumspection keeping in view the larger public interest. He referred to the judgment of the US Supreme Court in *Biddle* v. *Perovich* [71 L Ed 1161 : 274 US 480 (1927)] as also the judgments of this Court in *Kehar Singh* [*Kehar Singh* v. *Union of India*, (1989) 1 SCC 204 : 1989 SCC (Cri)

86] and *Epuru Sudhakar* [*Epuru Sudhakar* v. *State of A.P.*, (2006) 8 SCC 161 : (2006) 3 SCC (Cri) 438] .

…

19. In concise, the power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is a constitutional duty. As a result, it is neither a matter of grace nor a matter of privilege but is an important constitutional responsibility reposed by the People in the highest authority. The power of pardon is essentially an executive action, which needs to be exercised in the aid of justice and not in defiance of it. Further, it is well settled that the power under Articles 72/161 of the Constitution of India is to be exercised on the aid and advice of the Council of Ministers.

…

21. In this context, in *Epuru Sudhakar* [*Epuru Sudhakar* v. *State of A.P.*, (2006) 8 SCC 161 : (2006) 3 SCC (Cri) 438] , this Court held thus: (SCC pp. 181-82, para 36)

> "36. So far as desirability to indicate guidelines is concerned in Ashok Kumar case [Ashok Kumar v. Union of India, (1991) 3 SCC 498 : 1991 SCC (Cri) 845] it was held as follows: (SCC pp. 518-19, para 17)
>
> '17. In Kehar Singh case [Kehar Singh v. Union of India, (1989) 1 SCC 204 : 1989 SCC (Cri) 86] on the question of laying down guidelines for the exercise of power under Article 72 of the Constitution this Court observed in para 16 as under: (SCC pp. 217-18)
>
> "16. … It seems to us that there is sufficient indication in the terms of Article 72 and in the history of the power enshrined in that provision as well as existing case law, and specific guidelines need not be spelled out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, for we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and

> passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme."
>
> These observations do indicate that the Constitution Bench which decided Kehar Singh case [Kehar Singh v. Union of India, (1989) 1 SCC 204 : 1989 SCC (Cri) 86] was of the view that the language of Article 72 itself provided sufficient guidelines for the exercise of power and having regard to its wide amplitude and the status of the function to be discharged thereunder, it was perhaps unnecessary to spell out specific guidelines since such guidelines may not be able to conceive of all myriad kinds and categories of cases which may come up for the exercise of such power. No doubt in Maru Ram case [Maru Ram v. Union of India, (1981) 1 SCC 107: 1981 SCC (Cri) 112] the Constitution Bench did recommend the framing of guidelines for the exercise of power under Articles 72/161 of the Constitution. But that was a mere recommendation and not a ratio decidendi having a binding effect on the Constitution Bench which decided Kehar Singh case [Kehar Singhv. Union of India, (1989) 1 SCC 204 : 1989 SCC (Cri) 86] . Therefore, the observation made by the Constitution Bench in Kehar Singh case [Kehar Singh v. Union of India, (1989) 1 SCC 204: 1989 SCC (Cri) 86] does not upturn any ratio laid down in Maru Ram case [Maru Ram v. Union of India, (1981) 1 SCC 107 : 1981 SCC (Cri) 112]. Nor has the Bench in Kehar Singh case [Kehar Singh v. Union of India, (1989) 1 SCC 204 : 1989 SCC (Cri) 86] said anything with regard to using the provisions of extant remission rules as guidelines for the exercise of the clemency powers.'"

22. Nevertheless, this Court has been of the consistent view that the executive orders under Articles 72/161 should be subject to limited judicial review based on the rationale that the power under Articles 72/161 is per se above judicial review but the manner of exercise of power is certainly subject to judicial review. Accordingly, there is no dispute as to the settled legal proposition that the power exercised under Articles 72/161 could

be the subject-matter of limited judicial review. (Vide *Kehar Singh* [*Kehar Singh* v. *Union of India*, (1989) 1 SCC 204 : 1989 SCC (Cri) 86], *Ashok Kumar* [*Ashok Kumar* v. *Union of India*, (1991) 3 SCC 498 : 1991 SCC (Cri) 845] , *Swaran Singh* v. *State of U.P.* [(1998) 4 SCC 75 : 1998 SCC (Cri) 804 : AIR 1998 SC 2026] , *Satpal* v. *State of Haryana* [(2000) 5 SCC 170: 2000 SCC (Cri) 920 : AIR 2000 SC 1702] and *Bikas Chatterjee* [*Bikas Chatterjee* v. *Union of India*, (2004) 7 SCC 634 : 2004 SCC (Cri) 2018] .)

23. Though the contours of power under Articles 72/161 have not been defined, this Court, in *Narayan Dutt* v. *State of Punjab* [(2011) 4 SCC 353: (2011) 2 SCC (Cri) 243] , para 24, has held that the exercise of power is subject to challenge on the following grounds: (SCC p. 361)

> "(a) if the Governor had been found to have exercised the power himself without being advised by the Government,
>
> (b) if the Governor transgressed his jurisdiction in exercising the said power,
>
> (c) if the Governor had passed the order without applying his mind,
>
> (d) the order of the Governor was mala fide, or
>
> (e) the order of the Governor was passed on some extraneous considerations."

24. The above propositions are a culmination of views settled by this Court that:

24.1. Power should not be exercised mala fide. (Vide *Maru Ram* v. *Union of India* [*Maru Ram*v. *Union of India*, (1981) 1 SCC 107 : 1981 SCC (Cri) 112] , paras 62, 63 & 65.)

24.2. No political considerations are behind exercise of power. In this context, in *Epuru Sudhakar* [*Epuru Sudhakar* v. *State of A.P.*, (2006) 8 SCC 161 : (2006) 3 SCC (Cri) 438] , this Court held thus: (SCC pp. 181-82, paras 34-35 & 37-38)

> "34. The position, therefore, is undeniable that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:

(a) that the order has been passed without application of mind;

(b) that the order is mala fide;

(c) that the order has been passed on extraneous or wholly irrelevant considerations;

(d) that relevant materials have been kept out of consideration;

(e) that the order suffers from arbitrariness.

35. Two important aspects were also highlighted by learned amicus curiae; one relating to the desirability of indicating reasons in the order granting pardon/ remission while the other was an equally more important question relating to power to withdraw the order of granting pardon/remission, if subsequently, materials are placed to show that certain relevant materials were not considered or certain materials of extensive value were kept out of consideration. According to learned amicus curiae, reasons are to be indicated, in the absence of which the exercise of judicial review will be affected.

***

37. In Kehar Singh case [Kehar Singh v. Union of India, (1989) 1 SCC 204 : 1989 SCC (Cri) 86] this Court held that: (SCC p. 216, para 13)

'13. … There is also no question involved in this case of asking for the reasons for the President's order.'

38. The same obviously means that the affected party need not be given the reasons. The question whether reasons can or cannot be disclosed to the Court when the same is challenged was not the subject-matter of consideration. In any event, the absence of any obligation to convey the reasons does not mean that there should not be legitimate or relevant reasons for passing the order."

25. A perusal of the above case law makes it clear that the President/ Governor is not bound to hear a petition for mercy before taking a decision

on the petition. The manner of exercise of the power under the said Articles is primarily a matter of discretion and ordinarily the courts would not interfere with the decision on merits. However, the courts retain the limited power of judicial review to ensure that the constitutional authorities consider all the relevant materials before arriving at a conclusion.

26. It is the claim of the petitioners herein that the impugned executive orders of rejection of mercy petitions against 15 accused persons were passed without considering the supervening events which are crucial for deciding the same. The legal basis for taking supervening circumstances into account is that Article 21 inheres a right in every prisoner till his last breath and this Court will protect that right even if the noose is being tied on the condemned prisoner's neck. (Vide *Sher Singh* [*Sher Singh* v. *State of Punjab*, (1983) 2 SCC 344 : 1983 SCC (Cri) 461], *Triveniben* [*Triveniben* v. *State of Gujarat*, (1988) 4 SCC 574 : 1989 SCC (Cri) 25],*Vatheeswaran* [*T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342] and*Jagdish* v. *State of M.P.* [(2009) 9 SCC 495 : (2010) 1 SCC (Cri) 21])

27. Certainly, delay is one of the permitted grounds for limited judicial review as stipulated in the stare decisis. Henceforth, we shall scrutinise the claim of the petitioners herein and find out the effect of supervening circumstances in the case on hand.

…

(*i*) ***Delay***

30. It is a prerequisite to comprehend the procedure adopted under Articles 72/161 for processing the mercy petition so that we may be in a position to appreciate the aspect of delay as one of the supervening circumstances.

31. The death row convicts invariably approached the Governor under Article 161 of the Constitution of India with a mercy petition after this Court finally decided the matter. During the pendency of the mercy petition, the execution of death sentence was stayed. As per the procedure, once the mercy petition is rejected by the Governor, the convict prefers mercy petition to the President. Thereafter, the mercy petition received in the President's office is forwarded to the Ministry of Home Affairs. Normally, the mercy petition consists of one or two pages giving grounds for mercy. To examine the mercy petition so received and to arrive at a conclusion, the documents like copy of the judgments of the trial court, the High Court

and the Supreme Court are requested from the State Government. The other documents required include details of the decision taken by the Governor under Article 161 of the Constitution, recommendations of the State Government in regard to grant of mercy petition, copy of the records of the case, nominal role of the convict, health status of the prisoner and other related documents. All these details are gathered from the State/ prison authorities after the receipt of the mercy petition and, according to the Union of India, it takes a lot of time and involves protracted correspondence with the prison authorities and the State Government. It is also the claim of the Union of India that these documents are then extensively examined and in some sensitive cases, various pros and cons are weighed to arrive at a decision. Sometimes, the person concerned or at their instance some of their relatives, file mercy petitions repeatedly which cause undue delay. In other words, according to the Union of India, the time taken in examination of mercy petitions may depend upon the nature of the case and the scope of inquiry to be made. It may also depend upon the number of mercy petitions submitted by or on behalf of the accused. It is the claim of the respondents that there cannot be a specific time-limit for examination of mercy petitions.

32. It is also the claim of the respondents that Article 72 envisages no limit as to time within which the mercy petition is to be disposed of by the President of India. Accordingly, it is contended that since no time-limit is prescribed for the President under Article 72, the courts may not go into it or fix any outer limit. It is also contended that the power of the President under Article 72 is discretionary which cannot be taken away by any statutory provision and cannot be altered, modified or interfered with, in any manner, whatsoever, by any statutory provision or authority. The powers conferred on the President are special powers overriding all other laws, rules and regulations in force. Delay by itself does not entail the person under sentence of death to request for commutation of sentence into life imprisonment.

33. It is also pointed out that the decision taken by the President under Article 72 is communicated to the State Government/Union Territory concerned and to the prisoner through State Government/Union Territory. It is also brought to our notice that as per Schedule VII List II Entry 4 to the Constitution of India, “Prisons … and persons detained therein” is a State subject. Therefore, all steps for execution of capital punishment including informing the convict and his/her family, etc. are required to be taken care of by the State Governments/Union Territories concerned in accordance with their jail manual/rules, etc.

34. On the contrary, it is the plea of the petitioners that after exhausting of the proceedings in the courts of law, the aggrieved convict gets right to make a mercy petition before the Governor and the President of India highlighting his grievance. If there is any undue, unreasonable and prolonged delay in disposal of his mercy petition, the convict is entitled to approach this Court by way of a writ petition under Article 32 of the Constitution. It is vehemently asserted that the execution of death penalty in the face of such an inordinate delay would infringe fundamental right to life under Article 21 of the Constitution, which would invite the exercise of the jurisdiction by this Court.

35. The right to life is the most fundamental of all rights. The right to life, as guaranteed under Article 21 of the Constitution of India, provides that no person shall be deprived of his life and liberty except in accordance with the procedure established by law. According to the learned counsel for the Union of India, death sentence is imposed on a person found guilty of an offence of heinous nature after adhering to the due procedure established by law which is subject to appeal and review. Therefore, delay in execution must not be a ground for commutation of sentence of such a heinous crime. On the other hand, the argument of the learned counsel for the petitioners/death convicts is that human life is sacred and inviolable and every effort should be made to protect it. Therefore, inasmuch as Article 21 is available to all the persons including convicts and continues till the last breath if they establish and prove the supervening circumstances viz. undue delay in disposal of mercy petitions, undoubtedly, this Court, by virtue of power under Article 32, can commute the death sentence into imprisonment for life. As a matter of fact, it is the stand of the petitioners that in a petition filed under Article 32, even without a presidential order, if there is unexplained, long and inordinate delay in execution of death sentence, the grievance of the convict can be considered by this Court.

…

38. This is not the first time when the question of such a nature is raised before this Court. In *Ediga Anamma* v. *State of A.P.* [(1974) 4 SCC 443: 1974 SCC (Cri) 479] , Krishna Iyer, J. spoke of the "*brooding horror of 'hanging' which has been haunting the prisoner in the condemned cell for years*". Chinnappa Reddy, J. in *Vatheeswaran* [*T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342] said that prolonged delay in execution of a sentence of death had a dehumanising effect and this had the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way so as to offend the fundamental right

under Article 21 of the Constitution. Chinnappa Reddy, J. quoted the Privy Council's observation [*Riley* v. *Attorney General of Jamaica*, (1983) 1 AC 719 : (1982) 3 WLR 557 : (1982) 3 All ER 469 : 1982 Cri Law Review 679 (PC)] in a case of such an inordinate delay in execution viz.: (*Vatheeswaran case* [*T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342] , SCC p. 72, para 10)

> "10. '… The anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional and physical integrity and health of the individual [has to be seen].' (Riley case [Riley v. Attorney General of Jamaica, (1983) 1 AC 719 : (1982) 3 WLR 557: (1982) 3 All ER 469 : 1982 Cri Law Review 679 (PC)], AC p. 735C)"

Thereby, a Bench of two Judges of this Court held that the delay of two years in execution of the sentence after the judgment of the trial court will entitle the condemned prisoner to plead for commutation of sentence of death to imprisonment for life.

39. Subsequently, in *Sher Singh* [*Sher Singh* v. *State of Punjab*, (1983) 2 SCC 344 : 1983 SCC (Cri) 461] , which was a decision of a Bench of three Judges, it was held that a condemned prisoner has a right of fair procedure at all stages, trial, sentence and incarceration but delay alone is not good enough for commutation and two years' rule could not be laid down in cases of delay.

40. Owing to the conflict in the two decisions, the matter was referred to a Constitution Bench of this Court for deciding the two questions of law viz. (*i*) whether the delay in execution itself will be a ground for commutation of sentence and (*ii*) whether two years' delay in execution will automatically entitle the condemned prisoner for commutation of sentence. In *Triveniben* v.*State of Gujarat* [*Triveniben* v. *State of Gujarat*, (1988) 4 SCC 574 : 1989 SCC (Cri) 25] , this Court held thus: (SCC p. 576, para 2)

> "2. … Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances that ensued after sentence was finally confirmed by the judicial process and will

> have no jurisdiction to reopen the conclusions reached by the court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in Vatheeswaran case [T.V. Vatheeswaran v. State of T.N., (1983) 2 SCC 68 : 1983 SCC (Cri) 342] cannot be said to lay down the correct law and therefore to that extent stands overruled."

41. While giving full reasons which is reported in *Triveniben* v. *State of Gujarat* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] this Court, in para 22, appreciated the aspect of delay in execution in the following words: (SCC p. 697)

> "22. It was contended that the delay in execution of the sentence will entitle a prisoner to approach this Court as his right under Article 21 is being infringed. It is well settled now that a judgment of court can never be challenged under Article 14 or Article 21 and therefore the judgment of the court awarding the sentence of death is not open to challenge as violating Article 14 or Article 21 as has been laid down by this Court in Naresh Shridhar Mirajkar v. State of Maharashtra [AIR 1967 SC 1] and also in A.R. Antulay v. R.S. Nayak [(1988) 2 SCC 602: 1988 SCC (Cri) 372] the only jurisdiction which could be sought to be exercised by a prisoner for infringement of his rights can be to challenge the subsequent events after the final judicial verdict is pronounced and it is because of this that on the ground of long or inordinate delay a condemned prisoner could approach this Court and that is what has consistently been held by this Court. But it will not be open to this Court in exercise of jurisdiction under Article 32 to go behind or to examine the final verdict reached by a competent court convicting and

> sentencing the condemned prisoner and even while considering the circumstances in order to reach a conclusion as to whether the inordinate delay coupled with subsequent circumstances could be held to be sufficient for coming to a conclusion that the execution of the sentence of death will not be just and proper. The nature of the offence, circumstances in which the offence was committed will have to be taken as found by the competent court while finally passing the verdict. It may also be open to the court to examine or consider any circumstances after the final verdict was pronounced if it is considered relevant. The question of improvement in the conduct of the prisoner after the final verdict also cannot be considered for coming to the conclusion whether the sentence could be altered on that ground also."

42. Though the learned counsel appearing for the Union of India relied on certain observations of Shetty, J. who delivered concurring judgment in *Triveniben case* [*Triveniben* v.*State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] , particularly, para 76, holding that: (*Triveniben case* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] , SCC p. 715)

> "76. … The inordinate delay, may be a significant factor, but that by itself cannot render the execution unconstitutional",

after careful reading of the majority judgment authored by Oza, J., particularly, para 2 of the order dated 11-10-1988 [*Triveniben* v. *State of Gujarat*, (1988) 4 SCC 574 : 1989 SCC (Cri) 25] and para 22 of the subsequent order dated 7-2-1989 [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] , we reject the said stand taken by the learned counsel for the Union of India.

43. In *Vatheeswaran* [*T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342] , the dissenting opinion of the two Judges in the Privy Council case [*Riley* v. *Attorney General of Jamaica*, (1983) 1 AC 719: (1982) 3 WLR 557 : (1982) 3 All ER 469 : 1982 Cri Law Review 679 (PC)], relied upon by this Court, was subsequently accepted as the correct law by the Privy Council in *Pratt* v. *Attorney General for Jamaica* [(1994) 2 AC 1 : (1993) 3 WLR 995 : (1993) 4 All ER 769 (PC)] , after 22 (*sic* 11)

years. There is no doubt that judgments of the Privy Council have certainly received the same respectful consideration as the judgments of this Court. For clarity, we reiterate that except the ratio relating to delay exceeding two years in execution of sentence of death, all other propositions are acceptable, in fact, followed in subsequent decisions and should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and plead for commutation of the sentence.

44. In view of the above, we hold that undue long delay in execution of sentence of death will entitle the condemned prisoner to approach this Court under Article 32. However, this Court will only examine the circumstances surrounding the delay that has occurred and those that have ensued after the sentence was finally confirmed by the judicial process. This Court cannot reopen the conclusion already reached but may consider the question of inordinate delay to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life.

45. Keeping a convict in suspense while consideration of his mercy petition by the President for many years is certainly an agony for him/her. It creates adverse physical conditions and psychological stresses on the convict under sentence of death. Indisputably, this Court, while considering the rejection of the clemency petition by the President, under Article 32 read with Article 21 of the Constitution, cannot excuse the agonising delay caused to the convict only on the basis of the gravity of the crime.

46. India has been a signatory to the Universal Declaration of Human Rights, 1948 as well as to the United Nations Covenant on Civil and Political Rights, 1966. Both these conventions contain provisions outlawing cruel and degrading treatment and/or punishment. Pursuant to the judgment of this Court in *Vishaka* v. *State of Rajasthan* [(1997) 6 SCC 241 : 1997 SCC (Cri) 932] , international covenants to which India is a party are a part of domestic law unless they are contrary to a specific law in force. It is this expression ("cruel and degrading treatment and/or punishment") which has ignited the philosophy of *Vatheeswaran* [*T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342] and the cases which follow it. It is in this light, the Indian cases, particularly, the leading case of *Triveniben* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] has been followed in the Commonwealth countries. It is useful to refer the following foreign judgments which followed the proposition: (*i*) *Pratt* v. *Attorney General for Jamaica* [(1994) 2 AC 1 : (1993) 3 WLR 995 : (1993) 4 All ER 769 (PC)] , (*ii*)*Catholic Commission for Justice & Peace in Zimbabwe* v. *Attorney General* [(1993) 4 SA 239 (Zimbabwe

SC)], (*iii*) *Soering* v. *United Kingdom* [Application No. 14038 of 1988: (1989) 11 EHRR 439], (*iv*) *Attorney General* v. *Susan Kigula* [Constitutional Appeal No. 3 of 2006, decided on 21-1-2009 (Uganda SC)], (*v*) *Herman Mejia* v. *Attorney General* [AD 2006 Action No. 296, decided on 11-6-2001 (Belize SC)] ...

…

47. It is clear that after the completion of the judicial process, if the convict files a mercy petition to the Governor/President, it is incumbent on the authorities to dispose of the same expeditiously. Though no time-limit can be fixed for the Governor and the President, it is the duty of the executive to expedite the matter at every stage viz. calling for the records, orders and documents filed in the court, preparation of the note for approval of the Minister concerned, and the ultimate decision of the constitutional authorities. This Court, in *Triveniben* [*Triveniben* v.*State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] , further held that in doing so, if it is established that there was prolonged delay in the execution of death sentence, it is an important and relevant consideration for determining whether the sentence should be allowed to be executed or not.

48. Accordingly, if there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as the constitutional authorities have failed to take note of/consider the relevant aspects, this Court is well within its powers under Article 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone however, only after satisfying that the delay was not caused at the instance of the accused himself. To this extent, the jurisprudence has developed in the light of the mandate given in our Constitution as well as various Universal Declarations and directions issued by the United Nations.

49. The procedure prescribed by law, which deprives a person of his life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention preventive or punitive. In this line, although the petitioners were sentenced to death based on the procedure established by law, the inexplicable delay on account of executive is inexcusable. Since it is well established that Article 21 of the Constitution does not end with the pronouncement of sentence but extends to the stage of execution of that sentence, as already asserted, prolonged delay in execution of sentence of death has a dehumanising effect on the accused. Delay caused by circumstances beyond the prisoners' control

mandates commutation of death sentence. In fact, in *Vatheeswaran* [*T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342] , particularly, in para 10, it was elaborated where amongst other authorities, the minority view of Lords Scarman and Brightman in the 1982 Privy Council case of *Riley* v. *Attorney General of Jamaica* [*Riley* v. *Attorney General of Jamaica*, (1983) 1 AC 719 : (1982) 3 WLR 557 : (1982) 3 All ER 469 : 1982 Cri Law Review 679 (PC)] , by quoting: (*Vatheeswaran case* [*T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342] , SCC p. 72)

> "*10*. '… *Sentence of death is one thing: sentence of death followed by lengthy imprisonment prior to execution is another*.'" (*Riley case* [*Riley* v. *Attorney General of Jamaica*, (1983) 1 AC 719 : (1982) 3 WLR 557 : (1982) 3 All ER 469 : 1982 Cri Law Review 679 (PC)] , AC p. 735 B)

The appropriate relief in cases where the execution of death sentence is delayed, the Court held, is to vacate the sentence of death. In para 13, the Court made it clear that Articles 14, 19 and 21 supplement one another and the right which was spelled out from the Constitution was a substantive right of the convict and not merely a matter of procedure established by law. This was the consequence of the judgment in *Maneka Gandhi* v. *Union of India* [*Maneka Gandhi* v.*Union of India*, (1978) 1 SCC 248] which made the content of Article 21 substantive as distinguished from merely procedural.

50. Another argument advanced by the learned ASG is that even if the delay caused seems to be undue, the matter must be referred back to the executive and a decision must not be taken in the judicial side. Though we appreciate the contention argued by the learned ASG, we are not inclined to accept the argument. The concept of supervening events emerged from the jurisprudence set out in *Vatheeswaran* [*T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342] and *Triveniben* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] . The word "judicial review" is not even mentioned in these judgments and the death sentences have been commuted purely on the basis of supervening events such as delay. Under the ground of supervening events, when Article 21 is held to be violated, it is not a question of judicial review but of protection of fundamental rights and the courts give substantial relief not merely procedural protection. The question of violation of Article 21, its effects and the appropriate relief is the domain of this Court. There is no

question of remanding the matter for consideration because this Court is the custodian and enforcer of fundamental rights and the final interpreter of the Constitution. Further, this Court is best equipped to adjudicate the content of those rights and their requirements in a particular fact situation. This Court has always granted relief for violation of fundamental rights and has never remanded the matter. For example, in cases of preventive detention, violation of free speech, externment, refusal of passport, etc. the impugned action is quashed, declared illegal and violative of Article 21, but never remanded. It would not be appropriate to say at this point that this Court should not give relief for the violation of Article 21.

51. At this juncture, it is pertinent to refer the records of the disposal of mercy petitions compiled by Mr Bikram Jeet Batra and others, which are attached as annexures in almost all the petitions herein. At the outset, this document reveals that the mercy petitions were disposed of more expeditiously in former days than in the present times. Mostly, until 1980, the mercy petitions were decided in minimum of 15 days and in maximum of 10-11 months. Thereafter, from 1980 to 1988, the time taken in disposal of mercy petitions was gradually increased to an average of 4 years. It is exactly at this point of time, that cases like *Vatheeswaran* [*T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342] and *Triveniben* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] were decided which gave way for developing the jurisprudence of commuting the death sentence based on undue delay. It is also pertinent to mention that this Court has observed in these cases that when such petitions under Article 72 or 161 are received by the authorities concerned, it is expected that these petitions shall be disposed of expeditiously.

52. In *Sher Singh* [*Sher Singh* v. *State of Punjab*, (1983) 2 SCC 344 : 1983 SCC (Cri) 461] Their Lordships have also impressed the Government of India and all the State Governments for speedy disposal of petitions filed under Articles 72 and 161 and issued directions in the following manner: (SCC pp. 357-58, para 23)

> "*23*. We must take this opportunity to impress upon the Government of India and the State Governments that petitions filed under Articles 72 and 161 of the Constitution or under Sections 432 and 433 of the Criminal Procedure Code must be disposed of expeditiously. *A self-imposed rule should be followed by the executive authorities rigorously,*

> *that every such petition shall be disposed of within a period of three months from the date on which it is received*. Long and interminable delays in the disposal of these petitions are a serious hurdle in the dispensation of justice and indeed, such delays tend to shake the confidence of the people in the very system of justice."

…

54. We sincerely hope and believe that the mercy petitions under Articles 72/161 can be disposed of at a much faster pace than what is adopted now, if the due procedure prescribed by law is followed in verbatim. Although, no time frame can be set for the President for disposal of the mercy petition but we can certainly request the Ministry concerned to follow its own rules rigorously which can reduce, to a large extent, the delay caused.

55. Though guidelines to define the contours of the power under Articles 72/161 cannot be laid down, however, the Union Government, considering the nature of the power, set out certain criteria in the form of circular as under for deciding the mercy petitions:

55.1. Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification);

55.2. Cases in which the appellate court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction;

55.3. Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified;

55.4. Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence;

55.5. Is there any difference of opinion in the Bench of the High Court Judges necessitating reference to a larger Bench;

55.6. Consideration of evidence in fixation of responsibility in gang murder case;

55.7. Long delays in investigation and trial, etc.

56. These guidelines and the scope of the power set out above make it clear that it is an extraordinary power not limited by the judicial determination of the case and is not to be exercised lightly or as a matter of course. We also suggest, in view of the jurisprudential development with regard to delay in execution, another criteria may be added so as to require consideration of the delay that may have occurred in disposal of a mercy petition. In this way, the constitutional authorities are made aware of the delay caused at their end which aspect has to be considered while arriving at a decision in the mercy petition. The obligation to do so can also be read from the fact that, as observed by the Constitution Bench in *Triveniben* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] , delays in the judicial process are accounted for in the final verdict of the Court terminating the judicial exercise.

57. Another vital aspect, without mention of which the present discussion will not be complete, is that, as aforesaid, Article 21 is the paramount principle on which rights of the convict are based, this must be considered along with the rights of the victims or the deceased's family as also societal consideration since these elements form part of the sentencing process as well. It is the stand of the respondents that the commutation of sentence of death based on delay alone will be against the victim's interest.

…

60. All these aspects were emphatically considered by this Court while pronouncing the final verdict against the petitioners herein thereby upholding the sentence of death imposed by the High Court. Nevertheless, the same accused (the petitioners herein) are before us now under Article 32 petition seeking commutation of sentence on the basis of undue delay caused in execution of their levied death sentence, which amounts to torture and henceforth violative of Article 21 of the Constitution. We must clearly see the distinction under both circumstances. Under the former scenario, the petitioners herein were the persons who were accused of the offence wherein the sentence of death was imposed but in the latter scenario, the petitioners herein approached this Court as a victim of violation of guaranteed fundamental rights under the Constitution seeking commutation of sentence. This distinction must be considered and appreciated.

61. As already asserted, this Court has no jurisdiction under Article 32 to reopen the case on merits. Therefore, in the light of the aforesaid elaborate discussion, we are of the cogent view that undue, inordinate and unreasonable delay in execution of death sentence does certainly

attribute to torture which indeed is in violation of Article 21 and thereby entails as the ground for commutation of sentence. However, the nature of delay i.e. whether it is undue or unreasonable must be appreciated based on the facts of individual cases and no exhaustive guidelines can be framed in this regard.

Rationality of distinguishing between the Penal Code, 1860 and the Terrorist and Disruptive Activities (Prevention) Act offences for sentencing purpose

62. In Writ Petition No. 34 of 2013, the accused were mulcted with TADA charges which ultimately ended in death sentence. Mr Ram Jethmalani, learned Senior Counsel for the petitioners in that writ petition argued against the ratio laid down in *Devender Pal Singh Bhullar*v. *State (NCT of Delhi)* [*Devender Pal Singh Bhullar* v. *State (NCT of Delhi)*, (2013) 6 SCC 195 : (2013) 4 SCC (Cri) 455] which holds that when the accused are convicted under TADA, there is no question of showing any sympathy or considering supervening circumstances for commutation of sentence, and emphasised the need for reconsideration of the verdict. According to Mr Ram Jethmalani, *Devender Pal Singh Bhullar* [*Devender Pal Singh Bhullar* v.*State (NCT of Delhi)*, (2013) 6 SCC 195 : (2013) 4 SCC (Cri) 455] is per incuriam and is not a binding decision for other cases. He also prayed that inasmuch as the ratio laid down in *Devender Pal Singh Bhullar* [*Devender Pal Singh Bhullar* v. *State (NCT of Delhi)*, (2013) 6 SCC 195 : (2013) 4 SCC (Cri) 455] is erroneous, this Court, being a larger Bench, must overrule the same.

63. Mr Ram Jethmalani, learned Senior Counsel pointed out that delay in execution of sentence of death after it has become final at the end of the judicial process is wholly unconstitutional inasmuch as it constitutes torture, deprivation of liberty and detention in custody not authorised by law within the meaning of Article 21 of the Constitution. He further pointed out that this involuntary detention of the convict is an action not authorised by any penal provision including Section 302 IPC or any other law including TADA. On the other hand, Mr Luthra, learned ASG heavily relying on the reasonings in *Devender Pal Singh Bhullar* [*Devender Pal Singh Bhullar* v. *State (NCT of Delhi)*, (2013) 6 SCC 195 : (2013) 4 SCC (Cri) 455] submitted that inasmuch as the crime involved is serious and heinous and the accused were charged under TADA, there cannot be any sympathy or leniency even on the ground of delay in disposal of mercy petition. According to him, considering the gravity of the crime, death sentence is warranted and *Devender Pal Singh Bhullar* [*Devender Pal*

Singh Bhullar v. *State (NCT of Delhi)*, (2013) 6 SCC 195 : (2013) 4 SCC (Cri) 455] has correctly arrived at a conclusion and rejected the claim for commutation on the ground of delay.

…

65. As rightly pointed out by Mr Ram Jethmalani, it is open to the legislature in its wisdom to decide by enacting an appropriate law that a certain fixed period of imprisonment in addition to the sentence of death can be imposed in some well-defined cases but the result cannot be accomplished by a judicial decision alone. The unconstitutionality of this additional incarceration is itself inexorable and must not be treated as dispensable through a judicial decision.

…

67. The brief facts of that case were: Devender Pal Singh Bhullar, who was convicted by the Designated Court at Delhi for various offences under TADA, IPC and was found guilty and sentenced to death. The appeal as well as the review filed by him was dismissed by this Court. Soon after the dismissal of the review petition, Bhullar submitted a mercy petition dated 14-1-2003 to the President of India under Article 72 of the Constitution and prayed for commutation of his sentence. Various other associations including Delhi Sikh Gurdwara Management Committee sent letters in connection with commutation of the death sentence awarded to him. During the pendency of the petition filed under Article 72, he also filed Curative Petition (Criminal) No. 5 of 2013 which was also dismissed by this Court on 12-3-2013. After prolonged correspondence and based on the advice of the Home Minister, the President rejected his mercy petition which was informed vide letter dated 13-6-2011 sent by the Deputy Secretary (Home) to the Jail Authorities.

68. After rejection of his petition by the President, Bhullar filed a writ petition, under Article 32 of the Constitution, in this regard praying for quashing the communication dated 13-6-2011. While issuing notice in *Devender Pal Singh Bhullar* v. *State (NCT of Delhi)* [(2013) 6 SCC 195, Footnote 18] , this Court directed the respondents to clarify as to why the petitions made by the petitioner had not been disposed of for the last 8 years. In compliance with the Court's direction, the Deputy Secretary (Home) filed an affidavit giving reasons for the delay. This Court, after adverting to all the earlier decisions, instructions regarding procedure to be observed for dealing with the petitions for mercy, accepted that there was a delay of 8 years. Even

after accepting that long delay may be one of the grounds for commutation of sentence of death into life imprisonment, this Court dismissed his writ petition on the ground that the same cannot be invoked in cases where a person is convicted for an offence under TADA or similar statutes. This Court also held that such cases stand on an altogether different footing and cannot be compared with murders committed due to personal animosity or over property and personal disputes. It is also relevant to point out that while arriving at such conclusion, the Bench heavily relied on opinion expressed by Shetty, J. in *Triveniben* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] . Though the Bench adverted to paras 73, 74, 75 and 76 of*Triveniben* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] , the Court very much emphasised on para 76 which reads as under: (SCC p. 714)

> *"76. … The court while examining the matter, for the reasons already stated, cannot take into account the time utilised in the judicial proceedings up to the final verdict. The court also cannot take into consideration the time taken for disposal of any petition filed by or on behalf of the accused either under Article 226 or under Article 32 of the Constitution after the final judgment affirming the conviction and sentence. The court may only consider whether there was undue long delay in disposing of mercy petition; whether the State was guilty of dilatory conduct and whether the delay was for no reason at all. The inordinate delay, may be a significant factor, but that by itself cannot render the execution unconstitutional. Nor can it be divorced from the dastardly and diabolical circumstances of the crime itself."*

69. On going through the judgment of Oza, J. on his behalf and for M.M. Dutt, K.N. Singh and L.M. Sharma, JJ., we are of the view that the above quoted statement of Shetty, J. is not a majority view and at the most this is a view expressed by him alone. In this regard, at the cost of repetition it is relevant to refer once again to the operative portion of the order dated 11.10.1988 in *Triveniben* [*Triveniben* v. *State of Gujarat*, (1988) 4 SCC 574: 1989 SCC (Cri) 25] which is as under: (SCC p. 576, para 2)

> "*2*. We are of the opinion that:

> Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances that ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to reopen the conclusions reached by the court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in *Vatheeswaran case* [*T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342] cannot be said to lay down the correct law and therefore to that extent stands overruled."

70. The same view was once again reiterated by all the Judges and the very same reasonings have been reiterated in para 23 of the order dated 7.2.1989 [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248]. In such circumstances and also in view of the categorical opinion of Oza, J. in para 22 of the judgment in *Triveniben* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] that: (SCC p. 697)

> "*22. … it will not be open to this Court in exercise of jurisdiction under Article 32 to go behind or to examine the final verdict …. The nature of the offence, circumstances in which the offence was committed will have to be taken as found by the competent court*…."

It cannot be held, as urged, on behalf of the Union of India that the majority opinion in *Triveniben* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] is to the effect that delay is only one of the circumstances that may be considered along with "other circumstances of the case" to determine as to whether the death sentence should be commuted to one of life imprisonment. We are, therefore, of the view that the opinion rendered by Shetty, J. as quoted in para 76 of the judgment in *Triveniben* [*Triveniben* v.*State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC

(Cri) 248] is a minority view and not a view consistent with what has been contended to be the majority opinion. We reiterate that as per the majority view, if there is undue long delay in execution of sentence of death, the condemned prisoner is entitled to approach this Court under Article 32 and the Court is bound to examine the nature of delay caused and circumstances that ensued after the sentence was finally confirmed by the judicial process and to take a decision whether execution of sentence should be carried out or should be altered into imprisonment for life. It is, however, true that the majority of the Judges have not approved the fixed period of two years enunciated in *Vatheeswaran* [*T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342] and only to that extent overruled the same.

71. Incidentally, it is relevant to point out *Mahendra Nath Das* v. *Union of India* [(2013) 6 SCC 253 : (2014) 1 SCC (Cri) 271] , wherein the very same Bench, taking note of the fact that there was a delay of 12 years in the disposal of the mercy petition and also considering the fact that the appellants therein were prosecuted and convicted under Section 302 IPC held the rejection of the appellants' mercy petition as illegal and consequently, the sentence of death awarded to them by the trial court which was confirmed by the High Court, commuted into life imprisonment.

72. In the light of the same, we are of the view that the ratio laid down in *Devender Pal Singh Bhullar* [*Devender Pal Singh Bhullar* v. *State (NCT of Delhi)*, (2013) 6 SCC 195 : (2013) 4 SCC (Cri) 455] is per incuriam. There is no dispute that in the same decision this Court has accepted the ratio enunciated in *Triveniben* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] (Constitution Bench) and also noted some other judgments following the ratio laid down in those cases that unexplained long delay may be one of the grounds for commutation of sentence of death into life imprisonment. There is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence. Each case requires consideration on its own facts.

…

78. Taking guidance from the above principles and in the light of the ratio enunciated in *Triveniben* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248] , we are of the view that unexplained delay is one of the grounds for commutation of sentence of death into life imprisonment and the said supervening circumstance is applicable to all types of cases including the offences under TADA. The only aspect the courts have to satisfy is that the delay must be unreasonable and unexplained or inordinate at the hands of the executive. The argument of

Mr Luthra, learned ASG that a distinction can be drawn between IPC and non-IPC offences since the nature of the offence is a relevant factor is liable to be rejected at the outset. In view of our conclusion, we are unable to share the views expressed in *Devender Pal Singh Bhullar* [*Devender Pal Singh Bhullar* v. *State (NCT of Delhi)*, (2013) 6 SCC 195 : (2013) 4 SCC (Cri) 455] .

…

244. It is well established that exercising of power under Articles 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. Considering the high status of office, the Constitution Framers did not stipulate any outer time-limit for disposing of the mercy petitions under the said Articles, which means it should be decided within reasonable time. However, when the delay caused in disposing of the mercy petitions is seen to be unreasonable, unexplained and exorbitant, it is the duty of this Court to step in and consider this aspect. Right to seek for mercy under Articles 72/161 of the Constitution is a constitutional right and not at the discretion or whims of the executive. Every constitutional duty must be fulfilled with due care and diligence, otherwise judicial interference is the command of the Constitution for upholding its values."

IN THE SUPREME COURT OF INDIA

Union of India. v. V. Sriharan

2015 SCC Online SC 1267

H. L, Dattu, C. J., Fakkir Mohamed Ibrahim Kalifulla, Pinaki Chandra Ghose, Abhay Manohar Sapre & Uday Umesh Lalit, JJ.

A writ petition was filed in the Supreme Court challenging the decision of the Tamil Nadu Government to remit the sentence of those convicted in the Rajiv Gandhi Assassination case. In deciding this case, the Court examined whether and when remission applies to cases of life imprisonment; whether the Courts can direct the executive to not remit the sentence of a convict for a specified time period; and the distribution of powers between the Centre and States in deciding upon questions of remission.

Fakkir Mohamed Ibrahim Kalifulla, J.: "1. The Petitioner has challenged the letter dated 19.02.2014 issued by the Chief Secretary, Government of Tamil Nadu to the Secretary, Government of India wherein the State of Tamil Nadu proposed to remit the sentence of life imprisonment and to release the respondent Nos. 1 to 7 in the Writ Petition who were convicted in the Rajiv Gandhi assassination case. As far as respondent Nos. 1 to 3 are concerned, originally they were imposed with the sentence of death. In the judgment reported as *V. Sriharan alias Murugan* v. *Union of India* - (2014) 4 SCC 242, the sentence of death was commuted by this Court. Immediately thereafter, the impugned letter came to be issued by the State of Tamil Nadu which gave rise for the filing of the present Writ Petition. While dealing with the said Writ Petition, the learned Judges thought it fit to refer seven questions for consideration by the Constitution Bench in the judgment reported as *Union of India* v. *V. Sriharan @ Murugan* - (2014) 11 SCC 1 and that is how this Writ Petition has now been placed before us. In paragraph 52, the questions have been framed for consideration by this Bench. The said paragraph reads as under:

> "52.1 Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal

Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of Swamy Shraddananda(2), a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

Whether the "Appropriate Government" is permitted to exercise the power of remission under Section 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its Constitutional power under Article 32 as in this case?

Whether Section 432(7) of the Code clearly gives primacy to the Executive Power of the Union and excludes the Executive Power of the State where the power of the Union is co-extensive?

Whether the Union or the State has primacy over the subject matter enlisted in List III of the Seventh Schedule to the Constitution of India for exercise of power of remission?

Whether there can be two Appropriate Governments in a given case under Section 432(7) of the Code?

Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in sub-clause (2) of the same Section is mandatory or not?

Whether the term "'Consultation'" stipulated in Section 435(1) of the Code implies "'Concurrence'"?"

2. It was felt that the questions raised were of utmost critical concern for the whole of the country, as the decision on the questions would determine the procedure for awarding sentence in criminal justice system. When we refer to the questions as mentioned in paragraph 52 and when we heard the learned Solicitor General for the petitioner and the counsel who appeared for the State of Tamil Nadu as well as respondent Nos. 1 to 7, we find that the following issues arise for our consideration:

(a) Maintainability of this Writ Petition under Article 32 of the Constitution by the Union of India.

(b)(i) Whether imprisonment for life means for the rest of one's life with any right to claim remission?

(ii) Whether as held in Shraddananda case a special category of sentence; instead of death; for a term exceeding 14 years and put that category beyond application of remission can be imposed?

(c) Whether the Appropriate Government is permitted to grant remission under Sections 432/433 Code of Criminal Procedure after the parallel power was exercised under Article 72 by the President and under Article 161 by the Governor of the State or by the Supreme Court under its Constitutional power(s) under Article 32?

(d) Whether Union or the State has primacy for the exercise of power under Section 432(7) over the subject matter enlisted in List III of the Seventh Schedule for grant of remission?

(e) Whether there can be two Appropriate Governments under Section 432(7) of the Code?

(f) Whether the power under Section 432(1) can be exercised suo motu, if yes, whether

the procedure prescribed under Section 432(2) is mandatory or not?

(g) Whether the expression "'Consultation'" stipulated in Section 435(1) of the Code implies "Concurrence"?

3. On the question of maintainability of the Writ Petition by the Union of India, according to learned Solicitor General, the same cannot be permitted to be raised in this Reference since the said question was not raised and considered in the order of Reference reported as *Union of India* v. *V. Sriharan alias Murugan* (supra), and that when notice was issued in the Writ Petition to all the States on 09.07.2014 then also this question was not considered, that the scheme of Code of Criminal Procedure was to protect the interest of victims at the hands of accused which onerous responsibility is cast on the agency of the Central Government, namely, the CBI which took over the investigation on the very next day of the crime and, therefore, the Union of India has every locus to file the writ petition, that since the issue raised in the Writ Petition cannot be worked out by way of suit under Article 131 of the Constitution since the accused are private parties, Writ Petition is the only remedy available, that after the questions of general importance are answered, the individual cases will go before the Regular Benches and, therefore, the Union of India is only concerned about the questions of general importance and lastly if Union of India is held to be the Appropriate Government in a case of this nature, then the State will be denuded of all powers under Sections 432/433 Code of Criminal Procedure and consequently any attempted exercise will fall to the ground.

4. Mr. Rakesh Dwivedi, learned Senior Counsel who appeared for the State of Tamil Nadu would, however, contend that the Writ Petition does not reflect any violation of fundamental right for invoking Article 32, that the maintainability question was raised as could be seen from the additional grounds raised by the Union of India in the Writ Petition itself though the question was not considered in the order of Reference. Mr. Ram Jethmalani, learned Senior Counsel who appeared for the private respondent(s) by referring to Articles 143 and 145(3) read along with the proviso to the said sub-Article submitted that when no question of law was likely to arise, the referral itself need not have been made and, therefore, there is nothing to be answered. By referring to each of the sub-paragraphs in paragraph 52 of the Reference order, the learned Senior Counsel submitted that

none of them would fall under the category of Constitutional question and, therefore, the Writ Petition was not maintainable. The learned Senior Counsel by referring to the correspondence exchanged between the State and the Union of India and the judgment reported as *V. Sriharan alias Murugan* v. *Union of India* (supra) by which the sentence was commuted by this Court as stated in particular paragraph 32 of the said judgment, contended that in that judgment itself while it was held that commutation was made subject to the procedural checks mentioned in Section 432 and further substantive check in Section 433-A of the Code there is nothing more to be considered in this Writ Petition.

5. Having considered the objections raised on the ground of maintainability, having heard the respective counsel on the said question and having regard to the nature of issues which have been referred for consideration by this Constitution Bench, as rightly contended by the learned Solicitor General, we are also convinced that answer to those questions would involve substantial questions of law as to the interpretation of Articles 72, 73, 161 and 162, various Entries in the Seventh Schedule consisting of Lists I to III as well as the corresponding provisions of Indian Penal Code and Code of Criminal Procedure and thereby serious public interest would arise for consideration and, therefore, we do not find it appropriate to reject the Reference on the narrow technical ground of maintainability. We, therefore, proceed to find an answer to the questions referred for consideration by this Constitution Bench.

6. Having thus steered clear of the preliminary objections raised by the respondents on the ground of maintainability even before entering into the discussion on the various questions referred, it will have to be stated that though in the Writ Petition the challenge is to the letter of State of Tamil Nadu dated 19.02.2014, by which, before granting remission of the sentences imposed on the private respondent Nos. 1 to 7, the State Government approached the Union of India by way of 'Consultation' as has been stipulated in Section 435(1) of Cr.P.C, the questions which have been referred for the consideration of the Constitution Bench have nothing to do with the challenge raised in the Writ Petition as against the letter dated 19.02.2014. Therefore, at this juncture we do not propose to examine the correctness or validity or the power of the State of Tamil Nadu in having issued the letter dated 19.02.2014. It may be, that depending upon the ultimate answers rendered to the various questions referred for our consideration, we ourselves may deal with the challenge raised as against the letter of the State Government dated 19.02.2014 or may leave

it open for consideration by the appropriate Bench which may deal with the Writ Petition on merits.

7. In fact in this context, the submission of Learned Solicitor General that the answers to the various questions referred for consideration by the Constitution Bench may throw light on individual cases which are pending or which may arise in future for being disposed of in tune with the answers that may be rendered needs to be appreciated.

8. Keeping the above factors in mind, precisely the nature of questions culminates as follows:

(i) As to whether the imprisonment for life means till the end of convict's life with or without any scope for remission?

(ii) Whether a special category of sentence instead of death for a term exceeding 14 years can be made by putting that category beyond grant of remission?

(iii) Whether the power under Sections 432 and 433 Code of Criminal Procedure by Appropriate Government would be available even after the Constitutional power under Articles 72 and 161 by the President and the Governor is exercised as well as the power exercised by this Court under Article 32?

(iv) Whether State or the Central Government have the primacy under Section 432(7) of Code of Criminal Procedure?

(v) Whether there can be two Appropriate Governments under Section 432(7)?

(vi) Whether power under Section 432(1) can be exercised suo motu without following the procedure prescribed under section 432(2)?

(vii) Whether the expression "Consultation" stipulated in 435(1) really means "Concurrence"?

9. In order to appreciate the various contentions raised on the above questions by the respective parties and also to arrive at a just conclusion and render an appropriate answer, it is necessary to note the relevant provisions in the Constitution, the Indian Penal Code and the Code of Criminal Procedure The relevant provisions of the Constitution which require to be noted are Articles 72, 73, 161, 162, 246(4), 245(2), 249, 250

as well as some of the Entries in List I, II and III of the Seventh Schedule. In the Indian Penal Code the relevant provisions required to be stated are Sections 6, 7, 17, 45, 46, 53, 54, 55, 55A, 57, 65, 222, 392, 457, 458, 370, 376A 376B and 376E. In the Code of Criminal Procedure, the provisions relevant for our purpose are Sections 2(y), 4, 432, 433, 434, 433A and 435. The said provisions can be noted as and when we examine those provisions and make an analysis of its application in the context in which we have to deal with those provisions in the case on hand.

10. Keeping in mind the above perception, we proceed to examine the provisions contained in the Constitution. Articles 72, 73, 161 and 162 of the Constitution read as under:

> "Article 72.- Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.- (1) the President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence-
>
> In all cases where the punishment or sentence is by the Court Martial;
>
> In all cases where the punishment or sentence is for an offence against any law relating to a matter to which the Executive Power of the Union extends;
>
> In all cases where the sentence is a sentence of death.
>
> Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by the Court martial.
>
> Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force."

Article 73. Extent of executive power of the Union Subject to the provisions of this Constitution, the executive power of the Union shall extend-

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

Article 161.- Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases

The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

Article 162.- Extent of executive power of State

Subject to the provisions of this Constitution, the executive power of a State shall extend to the

> matters with respect to which the Legislature of the State has power to make laws:
>
> Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

17. Under Article 72, there is all pervasive power with the President as the Executive Head of the Union as stated under Article 53, to grant pardons, reprieves, respite and remission of punishments apart from the power to suspend, remit or commute the sentence of any person convicted of any offence. Therefore, the substantive part of sub-Article (1), when read, shows the enormous Constitutional power vested with the President to do away with the conviction imposed on any person of any offence apart from granting the lesser relief of reprieve, respite or remission of punishment. The power also includes power to suspend, remit or commute the sentence of any person convicted of any offence. Sub-Article (1), therefore, discloses that the power of the President can go to the extent of wiping of the conviction of the person of any offence by granting a pardon apart from the power to remit the punishment or to suspend or commute the sentence.

18. For the present purpose, we do not find any need to deal with Article 72(1)(a). However, we are very much concerned with Article 72(1)(b) which has to be read along with Article 73 of the Constitution. Reading Article 72(1)(b) in isolation, it prescribes the power of the President for the grant of pardon, reprieve, remission, commutation etc. in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the Executive Power of the Union extends. In this context when we refer to sub-Article (1)(a) of Article 73 which has set out the extent of Executive Power of the Union, it discloses that the said power is controlled only by the proviso contained therein. Therefore, reading Article 72(1)(b) along with Article 73(1)(a) in respect of a matter in which the absolute power of the President for grant of pardon etc. will remain in the event of express provisions in the Constitution or in any law made by the Parliament specifying the Executive Power of the Centre so prescribed. When we refer to Article 72(1)(c) the power of the President extends to all cases where the sentence is a sentence of death.

19. When we examine the above all pervasive power vested with the President, a small area is carved out under Article 72(3), wherein, in respect of cases where the sentence is a sentence of death, it is provided that irrespective of such enormous power vested with the President relating to cases where sentence of death is the punishment, the power to suspend, remit or commute a sentence of death by the Governor would still be available under any law for the time being in force which fall within the Executive Power exercisable by the Governor of the State. Article 72(1)(c) read along with Article 72(3) is also referable to the proviso to Article 73(1) as well as Articles 161 and 162.

20. When we read the proviso, while making reference to the availability of the Executive Power of the Union under Article 73(1)(a), we find a restriction imposed in the exercise of such power in any State with reference to a matter with respect to which the Legislature of the State has also power to make laws, save as expressly provided in the Constitution or any law made by the Parliament conferment of Executive Power with the Centre. Therefore, the exercise of the Executive Power of the union under Article 73(1)(a) would be subject to the provisions of the said saving clause vis-a-vis any State. Therefore, reading Article 72(1)(a) and (3) along with the proviso to Article 73(1)(a) it emerges that wherever the Constitution expressly provides as such or a law is made by the Parliament that empowers all pervasive Executive Power of the Union as provided under Article 73(1)(a), the same could be extended in any State even if the dual power to make laws are available to the States as well.

21. When we come to Article 161 which empowers the Governor to grant pardon etc. which is more or less identical to the power vested with the President under Article 72, though not to the full extent, the said Article empowers the Governor of a State to grant pardon, respite, reprieve or remission or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the Executive Power of the State extends. It will be necessary to keep in mind while reading Article 161, the nature and the extent to which the extended Executive Power of the Union is available under Article 73(1)(a), as controlled under the proviso to the said Article.

22. Before deliberating upon the extent of Executive power which can also be exercised by the State, reference should also be made to Article 162 which prescribes the extent of Executive Power of the State. The Executive Power of the State under the said Article extends to the matters

with respect to which the Legislature of the State has power to make laws. The proviso to Article 162 which is more or less identical to the words expressed in the proviso to Article 73(1)(a) when applied would result in a situation where the result of the consequences that would follow by applying the proviso to Article 73(1)(a) would be the resultant position.

23. Pithily stated under the proviso to Article 73(1)(a) where there is an express provision in the Constitution or any law is made by the Parliament, providing for specific Executive Power with the Centre, then the Executive Power referred to in sub-clause (a) of sub-article (1) of Article 73 would be available to the Union and would also extend in any State to matters with respect to which the Legislature of the State has also powers to make laws. In other words, it can be stated that, in the absence of any such express provision in the Constitution or any law made by the Parliament in that regard, the enormous Executive Power of the Union stipulated in Article 73(1)(a), would not be available for the Union to be extended to any State to matters with respect to which the Legislature of the State has also powers to make laws. To put it differently, in order to enable the Executive Power of the Union to extend to any State with respect to which the Legislature of a State has also got power to make laws, there must be an express provision providing for Executive Power in the Constitution or any law made by the Parliament. Therefore, the said prescription, namely, the saving clause provided in the proviso to Article 73(1)(a) will be of paramount consideration for the Union to exercise its Executive Power while examining the provision providing for the extent of Executive Power of the State as contained in Article 162.

24. Before examining the questions referred for consideration, it will be necessary to make a detailed analysis of the Constitutional and statutory provisions that would be required to be applied. When we refer to Article 161, that is the power of the Governor to grant pardon etc., as well as to suspend, remit etc., the last set of expressions contained in the said Article, namely, "to a matter to which the Executive Power of the State extends", makes it clear that the exercise of such power by the Governor of State is restricted to the sentence of any person convicted of any offence against any law relating to a matter to which the Executive Power of the State is extended. In other words, such power of the Governor is regulated by the Executive Power of the State as has been stipulated in Article 162. In turn, we have to analyze the extent, to which the Executive Power of the Union as provided under Article 73(1)(a) regulated by the proviso to the said sub-article (1), which stipulates that the overall Executive Power of the

Union is regulated to the extent to which the legislature of State has also got the power to make laws subject, however, to the express provisions in the Constitution or in any law made by Parliament. The proviso to Article 162 only re-emphasizes the said extent of coextensive legislative power of the State to make any laws at par with the Parliament which again will be subject to, as well as, limited by the express provision providing for Executive Power with the Centre in the Constitution or in any law made by Parliament upon the Union or its authorities. In respect of the punishments or convictions of any offence against any law relating to a matter to which the Executive Power of the State extends, the power of pardon etc. or power to suspend or remit or commute etc., available to the Governor of a State under Article 161 would be available as has been stipulated therein.

25. In this respect, when we examine the opening set of expressions in Article 73(1), namely:

> "subject to the provisions of this Constitution, the Executive Power of the Union extend……."

26. It will be appropriate to refer to Articles 246(4), 245(2), 249 and 250. Each of the said Articles will show the specific power conferred on the Union in certain extraordinary situations as well as, in respect of areas which remain untouched by any of the States. Such powers referred to in these Articles are de hors the specific power provided under Article 73(1)(a), namely, with respect to matters for which Parliament has power to make laws.

27. In this context, it will also be relevant to analyze the scope of Article 162 which prescribes the extent of Executive Power of the State. Proviso to Article 162 in a way slightly expands the Executive Power of the Union with respect to matters to which the State Legislature as well as the Parliament has power to make laws. In such matters the Executive Power of the State is limited and controlled to the extent to which the power of the Union as well as its authorities are expressly conferred by the Constitution or the laws made by Parliament.

28. If we apply the above Constitutional prescription of the Executive Power of the Union vis-à-vis the Executive Power of the State in the present context with which we are concerned, namely, the power of remission, commutation etc., it is well known that the powers relating to those actions are contained, governed and regulated by the provisions under the Criminal Procedure Code, which is the law made by Parliament covered

by Entry 1 in List III (viz.), Concurrent List of the Seventh Schedule of the Constitution. What is prescribed in the proviso to Article 73(1)(a) is in relation to "matters with respect to which the legislature of the State has also power to make laws" (Emphasis supplied). In other words, having regard to the fact that 'criminal law is one of the items prescribed in List III, under Article 246(2), the State Legislature has also got power to make laws in that subject. It is also to be borne in mind that The Indian Penal Code and The Code of Criminal Procedure are the laws made by the Parliament.

29. Therefore, the resultant position would be that, the Executive Power of the Union and its authorities in relation to grant of remission, commutation etc., are available and can be exercised by virtue of the implication of Article 73(1)(a) read along with its proviso and the exercise of such power by the State would be controlled and limited as stipulated in the proviso to Article 162 to the extent to which such control and limitations are prescribed in the Code of Criminal Procedure.

30. On an analysis of the above-referred Constitutional provisions, namely, 72, 73, 161 and 162 what emerges is:

The President is vested with the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the Executive Power of the Union extends as has been provided under Article 73(1)(a) subject, however, to the stipulations contained in the proviso therein.

31. Insofar as cases where the sentence is sentence of death such power to suspend, remit or commute the sentence provided under Article 72(1) would be available even to the Governor of a State wherever such sentence of death came to be made under any law for the time being in force.

32. The Executive Power of the Union as provided under Article 73(1)(a) will also extend to a State if such Executive Power is expressly provided in the Constitution or in any law made by the Parliament even with respect to matters with respect to which the Legislature of a State has also got the power to make laws.

33. The power of the Governor of any State to grant pardon etc., or to suspend, remit or commute sentence etc., would be available in respect of sentence of any person convicted of any offence against any law relating

to a matter to which the Executive Power of the State extends and not beyond. The extent of Executive Power of the State which extend to all matters with respect to which the legislature of the State has power to make laws is, however, subject to and limited by the Executive Power expressly conferred under the Constitution or by any law made by Parliament upon the Union or the authorities of the Union.

34. Keeping the above legal principles that emerge from a reading of Articles 72, 73, 161 and 162, further analysis will have to be made as to the extent to which any such restrictions have been made providing for exclusive power of the Union or co-extensive power of the State under the Constitution as well as the laws made by the Parliament with reference to which the Legislature of the State has also got the power to make laws.

35. The express provision contained in the Constitution prescribing the Executive Power of the Union as well as on its authorities can be found in Article 53. However, the nature of power stated therein has nothing to do with the one referred to either in Article 73(1)(a) or 162 of the Constitution. Under Articles 53 and 156 of the Constitution, the Executive Power of the Union and the State are to be exercised in the name of the President and the Governor of the State respectively. Though, under Articles 123, 213 and 239B of the Constitution, the power to issue Ordinance is vested with the President, the Governor and the Administrator of the Union, the State and the Union Territory of Puducherry respectively by way of an executive action, this Court has clarified that the exercise of such power would be on par with the Legislative action and not by way of an administrative action. Reference can be had to the decisions reported as *K. Nagaraj* v. *State of Andhra Pradesh* - (1985) 1 SCC 523 @ 548 paragraph 31 and *T. Venkata Reddy* v. *State of Andhra Pradesh* - (1985) 3 SCC 198 paragraph 14.

36. Under Article 246(2) of the Constitution, Parliament and the State have equal power to make laws with respect to any of the matters enumerated in List III of the Seventh Schedule. Under Article 246(4), the Parliament is vested with the power to make laws for any part of the territory of India which is not part of any State. Article 247 of the Constitution is referable to Entry 11A of List III of Seventh Schedule. The said Entry is for administration of justice, Constitution and organization of all Courts, except the Supreme Court and the High Courts. Under Article 247, Parliament is empowered to provide for establishment of certain additional Courts. Whereas under Articles 233, 234 and 237 falling under Chapter VI of the Constitution appointment of District Judges, recruitment of persons

other than District Judges, their service conditions and application of the provisions under the said Chapter are all by the Governor of the State as its Executive Head subject, however in 'Consultation' with the High Court exercising jurisdiction in relation to such State. Here and now it can be noted that having regard to the specific provisions contained in Article 247 of the Constitution, the Central Government may enact a law providing for establishment of additional Courts but unless the Executive Power of the Union to the specific extent is expressly provided in the said Article or in the Statute if any, enacted for making the appointments then the saving clause under the proviso to Article 73(1)(a) will have no application.

37. Under Articles 249 and 250 of the Constitution, Parliament is empowered to legislate with respect to a matter in the State List in the National Interest and if a Proclamation of Emergency is in operation. Therefore, in exercise of said superscriptive power any law is made, it must be stated that exercise of any action by way of executive action would again be covered by the proviso to Article 73(1)(a) of the Constitution. Similarly, under Article 251 of the Constitution where any inconsistency between the laws made by Parliament under Articles 249 and 250 and the laws made by State Legislature, the laws made by the Parliament whether made before or after the laws made by the State would to the extent of repugnancy prevail so long as the law made by the Parliament continues to have effect. Under Article 252 of the Constitution, de hors the powers prescribed under Articles 249 and 250, with the express resolution of two or more of State Legislatures, the Parliament is empowered to make laws applicable to such States. Further any such laws made can also be adopted by such other States whose Legislature passes necessary resolution to the said effect. Here again in the event of such situations governed by Articles 251 and 252 of Constitution emerge, the saving clause prescribed in the proviso to Article 73(1)(a) will have application.

38. Irrespective of special situations under which the laws made by the Parliament would prevail over any State to the extent of repugnancy, as stipulated in Articles 249, 250 and 251 of the Constitution, Article 254 provides for supervening power of the laws made by the Parliament by virtue of its competence, in respect of Entries found in the Concurrent List if any repugnancy conflicting with the such laws of Parliament by any of the laws of the State is found, to that extent such laws of the State would become inoperative and the laws of the Parliament would prevail, subject, however, to stipulations contained in sub-Article (2) of Article 254 and the proviso.

39. Article 256 of the Constitution is yet another superscriptus (Latin) Executive Power of the Union obligating the Executive Power of the State to be subordinate to such power. Under the head Administrative relations falling under Chapter II of Part XI of the Constitution, Articles 256, 257, 258 and 258A are placed. Article 257(1) prescribes the Executive Power of the State to ensure that it does not impede or prejudice the exercise of the Executive Power of the Union apart from the authority to give such directions to State as may appear to the Government of India to be necessary for that purpose. Under Article 258, the Executive Head of the Union, namely, the President is empowered to confer the Executive Power of the Union on the States in certain cases. A converse provision is contained in Article 258A of the Constitution by which, the Executive Head of the State, namely, the Governor can entrust the Executive Power of the State with the Centre. Here again, we find that all these Articles are closely referable to the saving clause provided under the proviso to Article 73(1)(a) of the Constitution.

40. The saving clause contained in Article 277 of the Constitution is yet another provision, whereunder, the authority of the Union in relation to levy of taxes can be allowed to be continued to be levied by the States and the local bodies, having regard to such levies being in vogue prior to the commencement of the Constitution. However, the Union is empowered to assert its authority by making a specific law to that effect by the Parliament under the very same Article.

41. Under the head 'Miscellaneous Financial Provisions' the Union or the State can make any grant for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislative of the State, as the case may be, can make laws.

42. Article 285 of the Constitution is yet another provision where the power of the Union to get its properties lying in a State to be exempted from payment of any tax. Similarly, under Article 286 restrictions on the State as to imposition of tax on the sale or purchase of goods outside the State is prescribed, which can be ascribed by a law of the Parliament.

43. Article 289 prescribes the extent of the executive and legislative power of the Union and the Parliament in relation to exemption of property and income of a State from Union taxation.

44. The Executive Power of the Union and of each State as regards carrying on of any trade or business as to the acquisition, holding and disposal of

property and the making of contracts for any purpose is prescribed under Article 298.

45. The above Articles 277, 282, 285, 286 and 289 fall under Part XII, Chapter I and Article 298 under Chapter III.

46. Articles 302, 303, 304 and 307 falling under Part XIII of the Constitution read along with Entry 42 of List I, Entry 26 of List II and Entry 33 of List III provides the relative and corresponding executive and legislative power of the Union and the States with reference to Trade, Commerce and intercourse within the territory of India.

47. Articles 352 and 353 of the Constitution falling under Part XVIII of the Constitution prescribe the power of the President to declare Proclamation of Emergency under certain contingencies and the effect of proclamation of emergency. Under Article 355 of the Constitution, the duty has been cast 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.

48. Article 369 of the Constitution falling under Part XXI empowers the Parliament to make laws with respect to certain matters in the State Lists for a limited period of five years and to cease after the said period by way of temporary and transitional measure.

49. Thus a close reading of the various Constitutional provisions on the Executive Power of the Centre and the State disclose the Constitutional scheme of the framers of the Constitution to prescribe different types of such Executive Powers to be exercised befitting different situations. However, the cardinal basic principle which weighed with the framers of the Constitution in a democratic federal set up is clear to the pointer that it should be based on "a series of agreements as well as series of compromises". In fact, the temporary Chairman of the Constituent Assembly, the Late Dr. Sachidananda Sinha, the oldest Parliamentarian in India, by virtue of his long experience, advised; "that reasonable agreements and judicious compromises are nowhere more called for than in framing a Constitution for a country like India". His ultimate request was that; "the Constitution that you are going to plan, may similarly be reared for 'immortality', if the rule of man may justly aspire to such a title, and it may be a structure of adamantine strength, which will outlast and overcome all present and future destructive forces". With those lofty ideas, the Constitution came to be framed.

50. We are, therefore, able to discern from a reading of the various provisions of the Constitution referred to above, to be read in conjunction with Articles 72, 73, 161 and 162, which disclose the dichotomy of powers providing for segregation, combination, specific exclusion (temporary or permanent), interrelation, voluntary surrender, one time or transitional or temporary measures, validating, superscriptus, etc. We are also able to clearly note that while the Executive Power of the State is by and large susceptible to being controlled by the Executive Power of the Union under very many circumstances specifically warranting for such control, the reverse is not the case. It is quite apparent that while the federal fabric of the set up is kept intact, when it comes to the question of National Interest or any other emergent or unforeseen situations warranting control in the nature of a super-terrestrial order (celestial) the Executive Power of the Union can be exercised like a bull in the China shop.

51. At the risk of repetition we can even quote some of such provisions in the Constitution which by themselves expressly provide for such supreme control, as well as, some other provisions which enable the Parliament to prescribe such provisions by way of an enactment as and when it warrants. For instance, under Article 247 of the Constitution, by virtue of Entry 11A of List III of the Seventh Schedule, the Parliament is empowered to provide for establishment of certain additional Courts at times of need. In fact, it can be validly stated that the establishment of Fast Track Courts in the various States and appointment of ad hoc Judges at the level of Entry level District Judges though not in the cadre strength, came to be made taking into account the enormous number of undertrial prisoners facing Sessions cases of grievous offences in different States. This is one such provision which expressly provided for remedying the situation in the Constitution itself specifically covered by the proviso to Article 73(1)(a) and the proviso to Article 162 of the Constitution. Similar such provisions in the Constitution containing express powers can be noted in Articles 256, 257, 258, 285 and 286 of the Constitution. We can quote any number such Articles specifically and expressly providing for higher Executive Power of the Union governed by Article 73(1)(a) of the Constitution.

52. Quite apart, we can also cite some of the Articles under which the Parliament is enabled to promulgate laws which can specifically provide for specific Executive Power vesting with the Union to be exercisable in supersession of the Executive Power of the State. Such provisions are contained in Articles 246(2), 249, 250, 277, 286 and 369 of the Constitution.

53. Having thus made an elaborate analysis of the Constitutional provisions relating to the relative Executive Power of the Union and the State as it exists and exercisable by the respective authorities in the given situations, we wish to examine the provisions specifically available in the Indian Penal Code, Criminal Procedure Code, as well as the Special enactment, namely, the Delhi Special Police Establishment Act under which the CBI operates, to understand the extent of powers exercisable by the State and the Centre in order to find an answer to the various questions referred for our consideration.

54. In the Indian Penal Code, the provisions for our purpose can be segregated into two categories, namely, those by which various terms occurring in the Penal Code are defined or explained and those which specifically provide for particular nature of punishments that can be imposed for the nature of offence involved. Sections 17, 45, 46, 53, 54, 55, 55A are some of the provisions by which the expressions occurring in the other provisions of the Code are defined or explained. Under Section 17, the word 'Government' would mean the 'Central Government' or the 'State Government'. Under Section 45, the expression 'life' would denote the life of a human being, unless the contrary appears from the context. Similarly, the expression 'death' would mean death of a human being unless the contrary appears from the context. Section 53 prescribes five kinds of punishments that can be imposed for different offences provided for in the Penal Code which ranges from the imposition of 'fine' to the capital punishment of 'death'. Section 54 empowers the Appropriate Government to commute the punishment of death imposed on an offender for any other punishment even without the consent of the offender. Similar such power in the case of life imprisonment is prescribed under Section 55 to be exercised by the Appropriate Government, but in any case for a term not exceeding fourteen years. Section 55A defines the term "Appropriate Government" with particular reference to Sections 54 and 55 of the Penal Code.

55. Having thus noted those provisions which highlight the various expressions used in the Penal Code to be understood while dealing with the nature of offences committed and the punishments to be imposed, the other provisions which specify the extent of punishment to be imposed are also required to be noted. For many of the offences, the prescribed punishments have been specified to be imposed upto a certain limit, namely, number of years or fine or with both. There are certain offences for which it is specifically provided that such punishment of imprisonment to be either life or a specific term, namely, seven years or ten years or

fourteen years and so on. To quote a few, under Section 370(5), (6) and (7) for the offence of trafficking in person, such punishments shall not be less than fourteen years, imprisonment for life to mean imprisonment for the remainder of that person's natural life apart from fine. Similar such punishments are provided under Sections 376(2), 376A, 376D and 376E.

56. At this juncture, without going into much detail, we only wish to note that the Penal Code prescribes five different punishments starting from fine to the imposition of capital punishment of Death depending upon the nature of offence committed. As far as the punishment of life imprisonment and death is concerned, it is specifically explained that it would mean the life of a human being or the death of a human being, with a rider, unless the contrary appears from the context, which means something written or spoken that immediately precede or follow or that the circumstances relevant to something under consideration to be seen in the context. For instance, when we refer to the punishment provided for the offence under Section 376A or 376D while prescribing life imprisonment as the maximum punishment that can be imposed, it is specifically stipulated that such life imprisonment would mean for the remainder of that person's natural life. We also wish to note that under Sections 54 and 55 of the Penal Code, the power of the Appropriate Government to commute the Death sentence and life sentence is provided which exercise of power is more elaborately specified in the Code of Criminal Procedure. While dealing with the provisions of Criminal Procedure Code on this aspect we will make reference to such of those provisions in the Penal Code which are required to be noted and considered. In this context, it is also relevant to note the provisions in the Penal Code wherein the punishment of death is provided apart from other punishments. Such provisions are Sections 120B(1), 121, 132, 194, 195A, 302, 305, 307, 376A, 376E, 396 and 364A. The said provisions are required to be read along with Sections 366 to 371 and 392 of Code of Criminal Procedure. We will make a detailed reference to the above provisions of Penal Code and Code of Criminal Procedure while considering the second part of the first question referred for our consideration.

57. When we come to the provisions of Criminal Procedure Code, for our present purpose, we may refer to Sections 2(y), 432, 433, 433A, 434 and 435. Section 2(y) of the Code specifies that words and expressions used in the Code and not defined but defined in the Indian Penal Code (45 of 1860) will have the same meaning respectively assigned to them in that Code. Section 432 prescribes the power of the Appropriate

Government to suspend or remit sentences. Section 432(7) defines the expression 'Appropriate Government' for the purpose of Sections 432 and 433. Section 433 enumerates the power of the Appropriate Government for commutation of sentences, namely, fine, simple imprisonment, rigorous imprisonment, life imprisonment as well as the punishment of death. Section 433A which came to be inserted by Act 45 of 1978 w.e.f. 18.12.1978, imposes a restriction on the power of Appropriate Government for remissions or suspensions or commutation of punishments provided under Sections 432 and 433 by specifying that exercise of such power in relation to the punishment of death or life imprisonment to ensure at least fourteen years of imprisonment. Under Section 434 in regard to sentences of death, concurrent powers of Central Government are prescribed which is provided for in Sections 432 and 433 upon the State Government. Section 435 of the Code imposes a restriction upon the State Government to consult the Central Government while exercising its powers under Sections 432 and 433 of the Code under certain contingencies.

58. In the case on hand, we are also obliged to refer to the provisions of the Delhi Special Police Establishment Act of 1946 (hereinafter referred to as the "Special Act") as the Reference which arose from the Writ Petition was dealt with under the said Act. The Special Act came to be enacted to make provision for the Constitution of special force in Delhi for the investigation of certain offences in the Union Territory. Under Section 3 of the Special Act, the Central Government can, by Notification in the official Gazette, specify the offences or classes of offences which are to be investigated by the Delhi Special Police Establishment. Under Section 4, the superintendence of the Delhi Special Police Establishment vests with the Central Government. Section 5 of the Special Act, however, empowers the Central Government to extend the application of the said Act to any area of any State other than Union Territories, the powers and jurisdiction of the members of the Special Police Establishment for the investigation of any offences or classes of offences specified in a Notification under Section 3. However, such empowerment on the Central Government is always subject to the consent of the concerned State Government over whose area the Special Police Establishment can be allowed to operate.

59. Having noted the scope and ambit of the said Special Act, it is also necessary for our present purpose to refer to the communication of the Principal Secretary (Home) to Government of Tamil Nadu addressed to the Joint Secretary to Government of India, Department of Personal and Training dated 22.05.1991 forwarding the order of Government of Tamil

Nadu, conveying its consent under Section 6 of the Special Act for the extension of the powers and jurisdiction of members of Special Police Establishment to investigate the case in Crime No. 329/91 under Sections 302, 307, 326 IPC and under Sections 3 and 5 of The Indian Explosive Substances Act, 1908 registered in Sriperumbudur P.S., Changai Anna (West) District, Tamil Nadu relating to the death of Late Rajiv Gandhi, former Prime Minister of India on 21.05.1991. Pursuant to the said communication and order of State of Tamil Nadu dated 22.05.1991, the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training issued the Notification dated 23rd May, 1991 extending the powers and jurisdiction of the members of the Delhi Special Police Establishment to the whole of the State of Tamil Nadu for investigation of the offences registered in Crime No. 329/91 in Sriperumbudur Police Station of Changai Anna (West) District of Tamil Nadu. Relevant part of the said Notification reads as under:-

> "a) Offences punishable under Section 302, 307, 326 of the Indian Penal Code, 1860 (Act No. 45 of 1860) and under Section 5 and 6 of the Indian Explosive Substances Act 1908 (Act No. 6 of 1903) relating to case in Crime No. 329/91 registered in Sriperumbudur Police Station Changai-Anna (West) District, Tamil Nadu;
>
> b) Attempts, abetments and conspiracies in relation to or in connection with the offences mentioned above and any other offence or offences committed in the course of the same transaction arising out of the same facts." Having thus noted the relevant provisions in the Constitution, the Penal Code, Code of Criminal Procedure and the Special Act, we wish to deal with the question referred for our consideration in seriatim. The first question framed for the consideration of the Constitution Bench reads as under:
>
> > 'Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life

> imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of Swamy Shraddananda (supra), a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission'.

60. This question contains two parts. The first part poses a question as to whether life imprisonment as a punishment provided for under Section 53 of the Penal Code and as defined under Section 45 of the said Code means imprisonment for the rest of one's life or a convict has a right to claim remission. The second part is based on the ruling of *Swamy Shraddananda (2) alias Murali Manohar Mishra* v. *State of Karnataka* reported in (2008) 13 SCC 767.

61. Before answering the first part of this question, it will be worthwhile to refer to at least two earlier Constitution Bench decisions which cover this very question. The first one is reported as *Gopal Vinayak Godse* v. *The State of Maharashtra* - (1961) 3 SCR 440. The first question that was considered in that decision was:

> "whether, under the relevant statutory provisions, an accused who was sentenced to transportation for life could legally be imprisoned in one of the jails in India; and if so what was the term for which he could be so imprisoned".

62. We are concerned with the second part of the said question, namely, as to what was the term for which a life convict could be imprisoned. This Court answered the said question in the following words:

> "A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life".

63. The learned Judges also took note of the various punishments provided for in Section 53 of the Penal Code before rendering the said answer. However, we do not find any reference to Section 45 of the Penal Code

which defines 'life' to denote the life of a human being unless the contrary appears from the context.

64. Having noted the ratio of the above said decision in this question, we can also profitably refer to a subsequent Constitution Bench decision reported as *Maru Ram*v. *Union of India* - 1981 (1) SCR 1196. At pages 1222-1223, this Court while endorsing the earlier ratio laid down in *Godse* (supra) held as under:

> "A possible confusion creeps into this discussion by equating life imprisonment with 20 years imprisonment. Reliance is placed for this purpose on Section 55 IPC and on definitions in various Remission Schemes. All that we need say, as clearly pointed out in Godse, is that these equivalents are meant for the limited objective of computation to help the State exercise its wide powers of total remissions. Even if the remissions earned have totaled upto 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 prisoners cannot claim his liberty. The reason is that life sentence is nothing less than life-long 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. No greater punishment is inflicted by Section 433A than the law annexed originally to the crime. Nor is any vested right to remission cancelled by compulsory 14 years jail life once we realize the truism that a life sentence is a sentence for a whole life. See *Sambha Ji Krishan Ji.* v.*State of Maharashtra*, AIR 1974 SC 147 and *State of Madhya Pradesh* v. *Ratan Singh* [1976] Supp. SCR 552" (Emphasis added)

65. Again at page 1248 it is held as under:

> "We follow *Godse's case* (supra) to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned,

> the prisoner can claim release only if the remaining sentence is remitted by Government".

66. In an earlier decision of this Court reported as *Sambha Ji Krishan Ji* v. *State of Maharashtra* - AIR 1974 SC 147, in paragraph 4 it is held as under:

> "4……..As regards the third contention, the legal position is that a person sentenced to transportation for life may be detained in prison for life. Accordingly, this Court cannot interfere on the mere ground that if the period of remission claimed by him is taken into account, he is entitled to be released. It is for the Government to decide whether he should be given any remissions and whether he should be released earlier."

67. Again in another judgment reported as *State of Madhya Pradesh* v. *Ratan Singh* - (1976) 3 SCC 470, it was held as under in paragraph 9:

> "9. From a review of the authorities and the statutory provisions of the Code of Criminal Procedure the following proposition emerge:
>
> 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 the 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;"
>
> (Emphasis added)

68. It will have to be stated that Section 401 referred to therein is the corresponding present Section 432.

69. We also wish to make reference to the statement of law made by the Constitution Bench in *Maru Ram* (supra) at pages 1221 and 1222. At page 1221, it was held:

> "Here, again, if the sentence is to run until life lasts, remissions, quantified in time cannot reach a point of zero. This is the ratio of Godse."

70. In the decision reported as *Ranjit Singh alias Roda* v. *Union Territory of Chandigarh* - (1984) 1 SCC 31 while commuting the death to life imprisonment, it was held that:

> "the two life sentences should run consecutively, to ensure that even if any remission is granted for the first life sentence, the second one can commence thereafter".

71. It is quite apparent that this Court by stating as above has affirmed the legal position that the life imprisonment only means the entirety of the life unless it is curtailed by remissions validly granted under the Code of Criminal Procedure by the Appropriate Government or under Articles 72 and 161 of the Constitution by the Executive Head viz., the President or the Governor of the State, respectively.

72. In the decision reported as *Ashok Kumar alias Golu* v. *Union of India* - (1991) 3 SCC 498, it was specifically ruled that the decision in *Bhagirath* (supra) does not run counter to *Godse* (supra) and *Maru Ram* (supra), paragraph 15 is relevant for our purpose, which reads as under:

> "15. It will thus be seen from the ratio laid down in the aforesaid two cases that where a person has been sentenced to imprisonment for life the remissions earned by him during his internment in prison under the relevant remission rules have a limited scope and must be confined to the scope and ambit of the said rules and do not acquire significance until the sentence is remitted under Section 432, in which case the remission would be subject to limitation of Section 433-A of the Code, or Constitutional power has been exercised under Article 72/161 of the Constitution. In *Bhagirath case* the question which the Constitution Bench was required to consider was whether a person sentenced to imprisonment for life can claim

> the benefit of Section 428 of the Code which, inter alia, provides for setting off the period of detention undergone by the accused as an undertrial against the sentence of imprisonment ultimately awarded to him. Referring to Section 57, IPC, the Constitution Bench reiterated the legal position as under:
>
> "The provision contained in Section 57 that imprisonment for life has to be reckoned as equivalent to imprisonment for 20 years is for the purpose of calculating fractions of terms of punishment. We cannot press that provision into service for a wider purpose."

73. These observations are consistent with the ratio laid down in *Godse and Maru Ram cases*. Coming next to the question of set off under Section 428 of the Code, this Court held:

> "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 authority under Section 432 or Section 433 of 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."
>
> We fail to see any departure from the ratio of *Godse case*; on the contrary the aforequoted passage clearly shows approval of that ratio and this becomes further clear from the final order passed by the court while allowing the appeal/writ petition. The court directed that the period of detention undergone by the two accused as undertrial prisoners would be set off against the sentence of life imprisonment imposed upon them, subject to the provisions contained in Section 433-A and, 'provided that

> orders have been passed by the appropriate authority under Section 433 of the Code of Criminal Procedure'. These directions make it clear beyond any manner of doubt that just as in the case of remissions so also in the case of set off the period of detention as undertrial would enure to the benefit of the convict provided the Appropriate Government has chosen to pass an order under Sections 432/433 of the Code. The ratio of *Bhagirath case*, therefore, does not run counter to the ratio of this Court in the case of *Godse* or *Maru Ram*." (underlining is ours)

74. In *Subash Chander* v. *Krishan Lal* - (2001) 4 SCC 458, this Court followed *Godse* (supra) and *Ratan Singh* (supra) and held that a sentence for life means a sentence for entire life of the prisoner unless the Appropriate Government chooses to exercise its discretion to remit either the whole or part of the sentence under Section 401 of Code of Criminal Procedure.

75. Paragraphs 20 and 21 can be usefully referred to which read as under:

> "20. Section 57 of the Indian Penal Code provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. It does not say that the transportation for life shall be deemed to be for 20 years. The position at law is that unless the life imprisonment is commuted or remitted by appropriate authority under the relevant provisions of law applicable in the case, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison. In Gopal Vinayak Godse v. State of Maharashtra the petitioner convict contended that as the term of imprisonment actually served by him exceeded 20 years, his further detention in jail was illegal and prayed for being set at liberty. Repelling such a contention and referring to the judgment of the Privy Council in Pandit Kishori Lal v. King Emperor this Court held: (SCR pp. 444- 45)

"If so, the next question is whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by Appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Indian Penal Code, Code of Criminal Procedure or the Prisons Act. Though the Government of India stated before the Judicial Committee in the case cited supra that, having regard to Section 57 of the Indian Penal Code, 20 years' imprisonment was equivalent to a sentence of transportation for life, the Judicial Committee did not express its final opinion on that question. The Judicial Committee observed in that case thus at p. 10:

'Assuming that the sentence is to be regarded as one of twenty years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application, and it was therefore rightly dismissed, but in saying this, their Lordships are not to be taken as meaning that a life sentence must and in all cases be treated as one of not more than twenty years, or that the convict is necessarily entitled to remission.'

Section 57 of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words 'imprisonment for life' for 'transportation for life' enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole

> of the remaining period of the convicted person's natural life."

76. In State of M.P. v. Ratan Singh this Court held that a sentence of imprisonment for life does not automatically expire at the end of 20 years, including the remissions. "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", observed the Court (at SCC p. 477, para 9). To the same effect are the judgments in Sohan Lal v. Asha Ram, Bhagirath v. Delhi Admn. and the latest judgment in Zahid Hussein v. State of W.B. (Emphasis added)

77. Having noted the above referred to two Constitution Bench decisions in *Godse* (supra) and *Maru Ram* (supra) which were consistently followed in the subsequent decisions in *Sambha Ji Krishan Ji* (supra), *Ratan Singh* (supra), *Ranjit Singh* (supra), *Ashok Kumar* (supra) and *Subash Chander* (supra). The first part of the first question can be conveniently answered to the effect that imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of the life of the prisoner subject, however, to the right to claim remission, etc. as provided under Articles 72 and 161 of the Constitution to be exercisable by the President and the Governor of the State and also as provided under Section 432 of the Code of Criminal Procedure.

78. As far as remissions are concerned, it consists of two types. One type of remission is what is earned by a prisoner under the Prison Rules or other relevant Rules based on his/her good behavior or such other stipulations prescribed therein. The other remission is the grant of it by the Appropriate Government in exercise of its power under Section 432 Code of Criminal Procedure Therefore, in the latter case when a remission of the substantive sentence is granted under Section 432, then and then only giving credit to the earned remission can take place and not otherwise. Similarly, in the case of a life imprisonment, meaning thereby the entirety of one's life, unless there is a commutation of such sentence for any specific period, there would be no scope to count the earned remission. In either case, it will again depend upon an answer to the second part of the first question based on the principles laid down in *Swamy Shraddananda* (supra).

79. With that when we come to the second part of the first question which pertains to the special category of sentence to be considered in substitute

of Death Penalty by imposing a life sentence i.e., the entirety of the life or a term of imprisonment which can be less than full life term but more than 14 years and put that category beyond application of remission which has been propounded in paragraphs 91 and 92 of *Swamy Shraddananda* (supra) and has come to stay as on this date.

80. To understand and appreciate the principle set down in the said decision, it will be necessary to note the special features analysed by this Court in the said judgment. At the very outset, it must be stated that the said decision was a well thought out one. This Court before laying down the principles therein noted the manner in which the appellant in that case comprehended a scheme with a view to grab the wealth of the victim, who was a married woman and who was seduced by the appellant solely with a view to make an unholy accumulation of the wealth at the cost of the victim, who went all out to get separated from her first husband by getting a divorce, married the appellant whole heartedly reposing very high amount of faith, trust and confidence and went to the extent of executing a Power of Attorney in favour of the appellant for dealing with all her valuable properties. This Court has stated that when the victim at some point of time realized the evil designs of the appellant and found total mistrust in him, the appellant set the clock for her elimination. It will be more appropriate to note the observation made in the said judgment after noting the manner in which the process of elimination was schemed by the appellant. Paragraphs 28, 29 and 30 of the *Swamy Shraddananda (2)* (supra) judgment gives graphic description of the 'witchcrafted' scheme formulated and executed with all perfection by the appellant and the said paragraphs can be extracted herein which are as under:

> "28. These are, in brief, the facts of the case. On these facts, Mr. Sanjay Hegde, learned counsel for the State of Karnataka, supported the view taken by Katju, J. (as indeed by the High Court and the trial court) and submitted that the appellant deserved nothing less than death. In order to bring out the full horror of the crime Mr. Hegde reconstructed it before the Court. He said that after five years of marriage Shakereh's infatuation for the appellant had worn thin. She could see through his fraud and see him for what he was, a lowly charlatan. The appellant could sense that his game was up but

he was not willing to let go of all the wealth and the lavish lifestyle that he had gotten used to. He decided to kill Shakereh and take over all her wealth directly.

29. In furtherance of his aim he conceived a terrible plan and executed it to perfection. He got a large pit dug up at a "safe" place just outside their bedroom. The person who was to lie into it was told that it was intended for the construction of a soak pit for the toilet. He got the bottom of one of the walls of the bedroom knocked off making a clearing to push the wooden box through; God only knows saying what to the person who was to pass through it. He got a large wooden box (7×2× 2 ft) made and brought to 81, Richmond Road where it was kept in the guest house, mercifully out of sight of the person for whom it was meant. Having thus completed all his preparations he administered a very heavy dose of sleeping drugs to her on 28-5-1991 when the servant couple, on receiving information in the morning regarding a death in their family in a village in Andhra Pradesh asked permission for leave and some money in advance. However, before giving them the money asked for and letting them go, the appellant got the large wooden box brought from the guest house to the bedroom by Raju (with the help of three or four other persons called for the purpose) where, according to Raju, he saw Shakereh (for the last time) lying on the bed, deep in sleep. After the servants had gone away and the field was clear the appellant transferred Shakereh along with the mattress, the pillow and the bed sheet from the bed to the box, in all probability while she was still alive. He then shut the lid of the box and pushed it through the opening made in the wall into the pit, dug just outside the room, got the pit filled up with earth and the surface cemented and covered with stone slabs.

> 30. What the appellant did after committing murder of Shakereh was, according to Mr. Hegde even more shocking. He continued to live, like a ghoul, in the same house and in the same room and started a massive game of deception. To Sabah, who desperately wanted to meet her mother or at least to talk to her, he constantly fed lies and represented to the world at large that Shakereh was alive and well but was simply avoiding any social contacts. Behind the facade of deception he went on selling Shakereh's properties as quickly as possible to convert those into cash for easy appropriation. In conclusion, Mr. Hegde submitted that it was truly a murder most foul and Katju, J. was perfectly right in holding that this case came under the first, second and the fifth of the five categories, held by this Court as calling for the death sentence in Machhi Singh v. State of Punjab."

81. After noting the beastly character of the appellant, this Court made a detailed reference to those decisions in which the "rarest of rare case" principle was formulated and followed subsequently, namely, *Machhi Singh* v. *State of Punjab* reported in (1983) 3 SCC 470, *Bachan Singh* v. *State of Punjab* reported in (1980) 2 SCC 684, *Jag Mohan Singh* v. *State of U.P.* reported in (1973) 1 SCC 20. While making reference to the said decisions and considering the submissions made at the Bar that for the sake of saving the Constitutional validity of the provision providing for "Death Penalty" this Court must step in to clearly define its scope by unmistakably making the types of grave murders and other capital offence that would attract death penalty rather than the alternative punishment of imprisonment for life. His Lordship Justice Aftab Alam, the author of the judgment has expressed the impermissibility of this Court in agreeing to the said submission in his own inimitable style in paragraphs 34, 36, 43, 45 and 47 in the following words:

> "34. As on the earlier occasion, in Bachan Singh too the Court rejected the submission. The Court did not accept the contention that asking the Court to state special reasons for awarding death sentence amounted to leaving the Court to do something

that was essentially a legislative function. The Court held that the exercise of judicial discretion on well-established principles and on the facts of each case was not the same as to legislate. On the contrary, the Court observed, any attempt to standardise or to identify the types of cases for the purpose of death sentence would amount to taking up the legislative function. The Court said that a "standardisation or sentencing discretion is a policy matter which belongs to the sphere of legislation" and "the Court would not by overleaping its bounds rush to do what Parliament, in its wisdom, warily did not do".

> 36. Arguing against standardisation of cases for the purpose of death sentence the Court observed that even within a single category offence there are infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. The Court further observed that standardisation of the sentencing process tends to sacrifice justice at the altar of blind uniformity.

43. In Machhi Singh the Court crafted the categories of murder in which "the community" should demand death sentence for the offender with great care and thoughtfulness. But the judgment in *Machhi Singh* was rendered on 20-7-1983, nearly twenty-five years ago, that is to say a full generation earlier. A careful reading of the Machhi Singh categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for ransom and gang rape and murders committed in the course of those offences were yet to become a menace for the society compelling the legislature to create special slots for those offences in the Penal

Code. At the time of Machhi Singh, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and "whistle-blowers". There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in Bachan Singh, therefore, we respectfully wish to say that even though the categories framed in Machhi Singh provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in Bachan Singh itself.

45. But the relative category may also be viewed from the numerical angle, that is to say, by comparing the case before the Court with other cases of murder of the same or similar kind, or even of a graver nature and then to see what punishment, if any was awarded to the culprits in those other cases. What we mean to say is this, if in similar cases or in cases of murder of a far more revolting nature the culprits escaped the death sentence or in some cases were even able to escape the criminal justice system altogether, it would be highly unreasonable and unjust to pick on the condemned person and confirm the death penalty awarded to him/her by the courts below simply because he/she happens to be before the Court. But to look at a case in this perspective this Court has hardly any field of comparison. The Court is in a position to judge "the rarest of rare cases" or an "exceptional

> case" or an "extreme case" only among those cases that come to it with the sentence of death awarded by the trial court and confirmed by the High Court. All those cases that may qualify as the rarest of rare cases and which may warrant death sentence but in which death penalty is actually not given due to an error of judgment by the trial court or the High Court automatically fall out of the field of comparison.
>
> 47. We are not unconscious of the simple logic that in case five crimes go undetected and unpunished that is no reason not to apply the law to culprits committing the other five crimes. But this logic does not seem to hold good in case of death penalty. On this logic a convict of murder may be punished with imprisonment for as long as you please. But death penalty is something entirely different. No one can undo an executed death sentence."
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> (underlining is ours)

82. After noting the above principles, particularly culled out from the decision in which the very principle namely "the rarest of rare cases", or an "exceptional case" or an "extreme case", it was noted that even thereafter, in reality in later decisions neither the rarest of rare case principle nor *Machhi Singh* (supra) categories were followed uniformly and consistently. In this context, the learned Judges also noted some of the decisions, namely, *Aloke Nath Dutta* v. *State of West Bengal* reported in(2007) 12 SCC 230. This Court in *Swamy Shraddananda* (supra) also made a reference to a report called "Lethal Lottery, the Death Penalty in India" compiled jointly by Amnesty International India and People's Union for Civil Liberties, Tamil Nadu, and Puduchery wherein a study of the Supreme Court judgments in death penalty cases from 1950 to 2006 was referred and one of the main facets made in the report (Chapters 2 to 4) was about the Court's lack of uniformity and consistency in awarding death sentence. This Court also noticed the ill effects it caused by reason of such inconsistencies and lamented over the same in the following words in paragraph 52:

> "52. The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by

> the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system. Thus the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied."

83. We fully endorse the above anguish expressed by this Court and as rightly put, the situation is a matter of serious concern for this Court and wish to examine whether the approach made thereafter by this Court does call for any interference or change or addition or mere confirmation. After having expressed its anguish in so many words this Court proceeded to examine the detailed facts of the appellant's role in that case and noted the criminal magnanimity shown by him in killing the victim by stating that he devised a plan so that the victim could not know till the end and even for a moment that she was betrayed by the one she trusted most and that the way of killing appears quite ghastly it may be said that it did not cause any mental or physical pain to the victim and that at least before the High Court he confessed his guilt. It must be stated that the manner in which the victim was sedated and buried while she was alive in the chamber no one would knew whether at all she regained her senses and if so what amount of torments and trauma she would have undergone before her breath came to a halt. Nevertheless, nobody had the opportunity ever to remotely imagine the amount of such ghastly, horrendous gruesome feeling the victim would have undergone in her last moments. In these circumstances, it was further expressed by this Court that this Court must not be understood to mean that the crime committed by the appellant in that case was not grave or the motive behind the crime was not highly depressed. With these expressions, it was held that this Court was hesitant in endorsing the death penalty awarded to him by the trial court and confirmed by the High Court. The hangman's noose was thus taken off the appellant's neck.

84. If one were to judge the case of the said appellant in the above background of details from the standpoint of the victim's side, it can be said without any hesitation that one would have unhesitatingly imposed the death sentence. That may be called as the human reaction of anyone who is affected by the conduct of the convict of such a ghastly crime. That may even be called as the reaction or reflection in the common man's point of view. But in an organized society where the Rule of Law prevails, for every conduct of a human being, right or wrong, there is a well set methodology followed based on time tested, well thought out principles of law either to reward or punish anyone which was crystallized from time immemorial by taking into account very many factors, such as the person concerned, his or her past conduct, the background in which one was brought up, the educational and knowledge base, the surroundings in which one was brought up, the societal background, the wherewithal, the circumstances that prevailed at the time when any act was committed or carried out whether there was any preplan prevalent, whether it was an individual action or personal action or happened at the instance of anybody else or such action happened to occur unknowingly, so on so forth. It is for this reason, we find that the criminal law jurisprudence was developed by setting forth very many ingredients while describing the various crimes, and by providing different kinds of punishment and even relating to such punishment different degrees, in order to ensure that the crimes alleged are befitting the nature and extent of commission of such crimes and the punishments to be imposed meets with the requirement or the gravity of the crime committed.

85. Keeping the above perception of the Rule of Law and the settled principle of Criminal Law Jurisprudence, this Court expressed its concern as to in what manner even while let loose of the said appellant of the capital punishment of death also felt that any scope of the appellant being let out after 14 years of imprisonment by applying the concept of remission being granted would not meet the ends of justice. With that view, this Court expressed its well thought out reasoning for adopting a course whereby such heartless, hardened, money minded, lecherous, paid assassins though are not meted out with the death penalty are in any case allowed to live their life but at the same time the common man and the vulnerable lot are protected from their evil designs and treacherous behavior. Paragraph 56 can be usefully referred to understand the lucidity with which the whole issue was understood and a standard laid down for others to follows:

> "56. But this leads to a more important question about the punishment commensurate to the appellant's

crime. The sentence of imprisonment for a term of 14 years, that goes under the euphemism of life imprisonment is equally, if not more, unacceptable. As a matter of fact, Mr. Hegde informed us that the appellant was taken in custody on 28-3-1994 and submitted that by virtue of the provisions relating to remission, the sentence of life imprisonment, without any qualification or further direction would, in all likelihood, lead to his release from jail in the first quarter of 2009 since he has already completed more than 14 years of incarceration. This eventuality is simply not acceptable to this Court. What then is the answer? The answer lies in breaking this standardisation that, in practice, renders the sentence of life imprisonment equal to imprisonment for a period of no more than 14 years; in making it clear that the sentence of life imprisonment when awarded as a substitute for death penalty would be carried out strictly as directed by the Court. This Court, therefore, must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed, in appropriate cases as a uniform policy not only by this Court but also by the High Courts, being the superior courts in their respective States. A suggestion to this effect was made by this Court nearly thirty years ago in *Dalbir Singh* v. *State of Punjab*. In para 14 of the judgment this Court held and observed as follows: (SCC p. 753)

"14. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in *Rajendra Prasad case*. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the men's life but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court,

> be subject to the condition that the sentence of imprisonment shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder."
>
> We think that it is time that the course suggested in Dalbir Singh should receive a formal recognition by the Court." (underlining is ours)

86. Even after stating its grounds for the above conclusion, this Court also noticed the earlier decisions of this Court wherein such course was adopted, namely, in *Dalbir Singh* v. *State of Punjab* - (1979) 3 SCC 745, *Subash Chander* (supra), *Shri Bhagavan* v. *State of Rajasthan* - (2001) 6 SCC 296, *Ratan Singh* (supra), *Bhagirath* v. *Delhi Administration* - (1985) 2 SCC 580, *Prakash Dhawal Khairnar (Patil)* v. *State of Maharashtra* - (2002) 2 SCC 35, *Ram Anup Singh* v. *State of Bihar* - (2002) 6 SCC 686, *Mohd. Munna* v. *Union of India* - (2005) 7 SCC 417, *Jayawant Dattatraya Suryarao* v. *State of Maharashtra* - (2001) 10 SCC 109, *Nazir Khan* v. *State of Delhi* - (2003) 8 SCC 461,*Ashok Kumar* (supra) and *Satpal alias Sadhu* v. *State of Haryana*-(1992) 4 SCC 172.

87. Having thus noted the need for carrying out a special term of imprisonment to be imposed, based on sound legal principles, this Court also considered some of the decisions of this Court wherein the mandate of Section 433 Code of Criminal Procedure was considered at length wherein it was held that exercise of power under Section 433 was an executive discretion and the High Court in its review jurisdiction had no power to commute the sentence imposed where a minimum sentence was provided. It was a converse situation which this Court held has no application and the submissions were rejected as wholly misconceived. Thereafter, a detailed reference was made to Sections 45, 53, 54, 55, 55A, 57 and other related provisions in the Indian Penal Code to understand the sentencing procedure prevalent in the Code and after making reference to the provisions relating to grant of remission in Sections 432, 433, 433A, 434 and 435 of Code of Criminal Procedure concluded as under in paragraphs 91 and 92:

> "91. The legal position as enunciated in Pandit Kishori Lal, Gopal Vinayak Godse, Maru Ram,

Ratan Singh and Shri Bhagwan and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.

92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all."

(Emphasis added)

88. Thus on a detailed reference to *Swamy Shraddananda* (supra) judgment, it can be straight away held in our view, that no more need be stated. But we wish to make reference to certain paragraphs from the concurring judgment of Justice Fazal Ali in *Maru Ram* (supra), pages 1251, 1252 and 1256 are relevant which are as under:

> "The dominant purpose and the avowed object of the legislature in introducing Section 433-A in the Code of Criminal Procedure unmistakably seems to be to secure a deterrent punishment for heinous offences committed in a dastardly, brutal or cruel fashion or offences committed against the defence or security of the country. It is true that there appears to be a modern trend of giving punishment a colour of reformation so that stress may be laid on the reformation of the criminal rather than his confinement in jail which is an ideal objective. At the same time, it cannot be gainsaid that such an objective cannot be achieved without mustering the necessary facilities, the requisite education and the appropriate climate which must be created to foster a sense of repentance and penitence in a criminal so that he may undergo such a mental or psychological revolution that he realizes the consequences of playing with human lives. In the world of today and particularly in our country, this ideal is yet to be achieved and, in fact, with all our efforts it will take us a long time to reach this sacred goal.
>
> xxx xxx xxx
>
> The question, therefore, is - should the country take the risk of innocent lives being lost at the hands of criminals committing heinous crimes in the holy hope or wishful thinking that one day or the other, a criminal, however dangerous or callous he may be, will reform himself. Valmikis are not born everyday and to expect that our present generation, with the prevailing social and economic environment, would produce Valmikis day after day is to hope for the impossible.
>
> xxx xxx xxx

xxx xxx xxx

Taking into account the modern trends in penology there are very rare cases where the courts impose a sentence of death and even if in some cases where such sentences are given, by the time the case reaches this Court, a bare minimum of the cases are left where death sentences are upheld. Such cases are only those in which imposition of a death sentence becomes an imperative necessity having regard to the nature and character of the offences, the antecedents of the offender and other factors referred to in the Constitution Bench judgment of this Court in Bachan Singh v. State of Punjab. In these circumstances, I am of the opinion that the Parliament in its wisdom chose to act in order to prevent criminals committing heinous crimes from being released through easy remissions or substituted form of punishments without undergoing at least a minimum period of imprisonment of fourteen years which may in fact act as a sufficient deterrent which may prevent criminals from committing offences. In most parts of our country, particularly in the north, cases are not uncommon where even a person sentenced to imprisonment for life and having come back after earning a number of remissions has committed repeated offences. The mere fact that a long-term sentence or for that matter a sentence of death has not produced useful results cannot support the argument either for abolition of death sentence or for reducing the sentence of life imprisonment from 14 years to something less. The question is not what has happened because of the provisions of the Penal Code but what would have happened if deterrent punishments were not given. In the present distressed and disturbed atmosphere we feel that if deterrent punishment is not resorted to, there will be complete chaos in the entire country and criminals will be let loose endangering the lives of thousands of innocent people of our country. In spite of all the resources at its hands, it will be

> difficult for the State to protect or guarantee the life and liberty of all the citizens, if criminals are let loose and deterrent punishment is either abolished or mitigated. Secondly, while reformation of the criminal is only one side of the picture, rehabilitation of the victims and granting relief from the tortures and sufferings which are caused to them as a result of the offences committed by the criminals is a factor which seems to have been completely overlooked while defending the cause of the criminals for abolishing deterrent sentences. Where one person commits three murders it is illogical to plead for the criminal and to argue that his life should be spared, without at all considering what has happened to the victims and their family. A person who has deprived another person completely of his liberty forever and has endangered the liberty of his family has no right to ask the court to uphold his liberty. Liberty is not a one-sided concept, nor does Article 21 of the Constitution contemplate such a concept. If a person commits a criminal offence and punishment has been given to him by a procedure established by law which is free and fair and where the accused has been fully heard, no question of violation of Article 21 arises when the question of punishment is being considered. Even so, the provisions of the Code of Criminal Procedure of 1973 do provide an opportunity to the offender, after his guilt is proved, to show circumstances under which an appropriate sentence could be imposed on him. These guarantees sufficiently comply with the provisions of Article 21. Thus, it seems to me that while considering the problem of penology we should not overlook the plight of victimology and the sufferings of the people who die, suffer or are maimed at the hands of criminals." (Emphasis added)

89. The above chiseled words of the learned Judge throw much light on the sentencing aspect of different criminals depending upon the nature of crimes committed by them. Having noted the above observations of the

learned Judge which came to be made about three and a half decades ago, we find that what was anticipated by the learned Judge has now come true and today we find that criminals are let loose endangering the lives of several thousand innocent people in our country. Such hardened criminals are in the good books of several powerful men of ill-gotten wealth and power mongers for whom they act as paid assassins and Goondas. Lawlessness is the order of the day. Having got the experience of dealing with cases involving major crimes, we can also authoritatively say that in most of the cases, even the kith and kin, close relatives, friends, neighbours and passersby who happen to witness the occurrence are threatened and though they initially give statements to the police, invariably turn hostile, apparently because of the threat meted out to them by the hardened and professional criminals and gangsters. As was anticipated by the learned Judge, it is the hard reality that the State machinery is not able to protect or guarantee the life and liberty of common man. In this scenario, if any further lenience is shown in the matter of imposition of sentence, at least in respect of capital punishment or life imprisonment, it can only be said that that will only lead to further chaos and there will be no Rule of Law, but only anarchy will rule the country enabling the criminals and their gangs to dictate terms. Therefore, any sympathy shown will only amount to a misplaced one which the courts cannot afford to take. Applying these well thought out principles, it can be said that the conclusions drawn by this Court in *Swamy Shraddananda* (supra) is well founded and can be applied without anything more, at least until as lamented by Justice Fazal Ali the necessary facilities, the requisite education and the appropriate climate created to foster a sense of repentance and penitence in a criminal is inducted so that he may undergo such a mental or psychological revolution that he realizes the consequence of playing with human lives. It is also appropriate where His Lordship observed that in the world of today and particularly in our country, this ideal is yet to be achieved and that it will take a long time to reach that goal.

90. Therefore, in the present juncture, when we take judicial notice of the crime rate in our country, we find that criminals of all types of crimes are on the increase. Be it white collar crimes, vindictive crimes, crimes against children and women, hapless widow, old aged parents, sexual offences, retaliation murder, planned and calculated murder, through paid assassins, gangsters operating in the developed cities indulging in killing for a price, kidnapping and killing for ransom, killing by terrorists and militants, organized crime syndicates, etc., are the order of the day. While on the one side peace loving citizens who are in the majority are

solely concerned with their peaceful existence by following the Rule of Law and aspire to thrive in the society anticipating every protection and support from the governance of the State and its administration, it is common knowledge, as days pass on it is a big question mark whether one will be able to lead a normal peaceful life without being hindered at the hands of such unlawful elements, who enjoy in many cases the support of very many highly placed persons. In this context, it will be relevant to note the PRECEPTS OF L AW which are: to live honourably, to injure no other man and to render everyone his due. There are murders and other serious offences orchestrated for political rivalry, business rivalry, family rivalry, etc., which in the recent times have increased manifold and in this process, the casualty are the common men whose day to day functioning is greatly prejudiced and people in the helm of affairs have no concern for them. Even those who propagate for lessening the gravity of imposition of severe punishment are unmindful of such consequences and are only keen to indulge in propagation of rescuing the convicts from being meted out with appropriate punishments. We are at a loss to understand as to for what reason or purpose such propagation is carried on and what benefit the society at large is going to derive.

91. Faced with the above situation prevailing in the Society, it is also common knowledge that the disposal of cases by Courts is getting delayed for variety of reasons. Major among them are the disproportionate Judges: population ratio and lack of proper infrastructure for the institution of judiciary. Sometime in 2009 when the statistics was taken it was found that the Judges: Population ratio was 8 Judges for 1 million population in India, whereas it was 50 Judges per million population in western countries. The above factors also added to the large pendency of criminal and civil cases in the Courts which results in abnormal delay in the guilty getting punished then and there. In the normal course, it takes a minimum of a year for a murder case being tried and concluded, while the appeal arising out of such concluded trial at the High Court level takes not less than 5 to 10 years and when it reaches this Court, it takes a minimum of another 5 years for the ultimate conclusion. Such enormous delay in the disposal of cases also comes in handy for the criminals to indulge in more and more of such heinous crimes and in that process, the interest of the common man is sacrificed.

92. Keeping the above hard reality in mind, when we examine the issue, the question is 'whether as held in *Shraddananda* (supra), a special category of sentence; instead of death; for a term exceeding 14 years and putting

that category beyond application of remission is good in law? When we analyze the issue in the light of the principles laid down in very many judgments starting from *Godse* (supra), *Maru Ram* (supra), *Sambha Ji Krishan Ji* (supra), *Ratan Singh* (supra), it has now come to stay that when in exceptional cases, death penalty is altered as life sentence, that would only mean rest of one's life span.

93. In this context, the principles which weighed with this Court in *Machhi Singh* (supra) to inflict the capital punishment of death were the manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime and the targeted personality of victim of murder. The said five categories cannot be held to be exhaustive. It cannot also be said even if a convict falls under one or the other of the categories, yet, this Court has in numerable causes by giving adequate justification to alter the punishment from 'Death' to 'Life'. Therefore, the law makers entrusted the task of analyzing and appreciating the gravity of the offence committed in such cases with the institution of judiciary reposing very high amount of confidence and trust. Therefore, when in a case where the judicial mind after weighing the pros and cons of the crime committed, in a golden scale and keeping in mind the paramount interest of the society and to safeguard it from the unmindful conduct of such offenders, takes a decision to ensure that such offenders don't deserve to be let loose in the society for a certain period, can it be said that such a decision is impermissible in law. In the first instance, as noted earlier, life sentence in a given case only means the entirety of the life of a person unless the context otherwise stipulates. Therefore, where the life sentence means, a person's life span in incarnation, the Court cannot be held to have in anyway violated the law in doing so. Only other question is how far the Court will be justified in stipulating a condition that such life imprisonment will have to be served by an offender in jail without providing scope for grant of any remission by way of statutory executive action. As has been stated by this Court in *Maru Ram* (supra) by the Constitution Bench, that the Constitutional power of remission provided under Articles 72 and 161 of the Constitution will always remain untouched, inasmuch as, though the statutory power of remission, etc., as compared to Constitution power under Articles 72 and 161 looks similar, they are not the same. Therefore, we confine ourselves to the implication of statutory power of remission, etc., provided under the Criminal Procedure Code entrusted with the Executive of the State as against the well thought out judicial decisions in the imposition of sentence for the related grievous crimes for which either capital punishment or a life sentence is provided for. When the

said distinction can be clearly ascertained, it must be held that there is a vast difference between an executive action for the grant of commutation, remission etc., as against a judicial decision. Time and again, it is held that judicial action forms part of the basic structure of the Constitution. We can state with certain amount of confidence and certainty, that there will be no match for a judicial decision by any of the authority other than Constitutional Authority, though in the form of an executive action, having regard to the higher pedestal in which such Constitutional Heads are placed whose action will remain unquestionable except for lack of certain basic features which has also been noted in the various decisions of this Court including *Maru Ram* (supra).

94. Though we are not attempting to belittle the scope and ambit of executive action of the State in exercise of its power of statutory remission, when it comes to the question of equation with a judicial pronouncement, it must be held that such executive action should give due weight and respect to the latter in order to achieve the goals set in the Constitution. It is not to be said that such distinctive role to be played by the Executive of the State would be in the nature of a subordinate role to the judiciary. In this context, it can be said without any scope of controversy that when by way of a judicial decision, after a detailed analysis, having regard to the proportionality of the crime committed, it is decided that the offender deserves to be punished with the sentence of life imprisonment (i.e.) for the end of his life or for a specific period of 20 years, or 30 years or 40 years, such a conclusion should survive without any interruption. Therefore, in order to ensure that such punishment imposed, which is legally provided for in the Indian Penal Code read along with Criminal Procedure Code to operate without any interruption, the inherent power of the Court concerned should empower the Court in public interest as well as in the interest of the society at large to make it certain that such punishment imposed will operate as imposed by stating that no remission or other such liberal approach should not come into effect to nullify such imposition.

95. In this context, the submission of the learned Solicitor General on the interpretation of Section 433-A assumes significance. His contention was that under Section 433-A what is prescribed is only the minimum and, therefore, there is no restriction to fix it at any period beyond 14 years and upto the end of one's life span. We find substance in the said submission. When we refer to Section 433-A, we find that the expression used in the said Section for the purpose of grant of remission relating to a person convicted and directed to undergo life imprisonment, it stipulates that "such person

shall not be released from prison unless he had served at least fourteen years of imprisonment." Therefore, when the minimum imprisonment is prescribed under the Statute, there will be every justification for the Court which considers the nature of offence for which conviction is imposed on the offender for which offence the extent of punishment either death or life imprisonment is provided for, it should be held that there will be every justification and authority for the Court to ensure in the interest of the public at large and the society, that such person should undergo imprisonment for a specified period even beyond 14 years without any scope for remission. In fact, going by the caption of the said Section 433-A, it imposes a restriction on powers of remission or commutation in certain cases. For a statutory authority competent to consider a case for remission after the imposition of punishment by Court of law it can be held so, then a judicial forum which has got a wider scope for considering the nature of offence and the conduct of the offender including his mens rea to bestow its judicial sense and direct that such offender does not deserve to be released early and required to be kept in confinement for a longer period, it should be held that there will be no dearth in the Authority for exercising such power in the matter of imposition of the appropriate sentence befitting the criminal act committed by the convict. In this context, the concurring judgment of Justice Fazal Ali in *Maru Ram* (supra), as stated in pages 1251, 1251 and 1258 on the sentencing aspect noted in earlier paragraphs requires to be kept in view. There is one other valid ground for our above conclusion. In paragraph 46 of this judgment, we have noted the provision in the Penal Code which provides for imposing the punishment of death. There are also several dimensions to this view to be borne in mind. In this context, it will be worthwhile to refer to the fundamental principles which weighed with our Constitution makers while entrusting the highest power with the head of the State, namely, the President in Article 72 of the Constitution. In the leading judgment of the Constitution Bench in *Kehar Singh* v. *Union of India* - (1989) 1 SCC 204, this Court prefaced its judgment in paragraph 7 highlighting the said principle in the following words:

> "7. The Constitution of India, in keeping with modern constitutional practice, is a constitutive document, fundamental to the governance of the country, whereby, according to accepted political theory, the people of India have provided a constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution. All power belongs to the people,

and it is entrusted by them to specified institutions and functionaries with the intention of working out, maintaining and operating a constitutional order. The Preambular statement of the Constitution begins with the significant recital:

"We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic … do hereby adopt, enact and give to ourselves this Constitution."

To any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State. In England, the power is regarded as the royal prerogative of pardon exercised by the Sovereign, generally through the Home Secretary. It is a power which is capable of exercise on a variety of grounds, for

> reasons of State as well as the desire to safeguard against judicial error. It is an act of grace issuing from the Sovereign. In the United States, however, after the founding of the Republic, a pardon by the President has been regarded not as a private act of grace but as a part of the constitutional scheme. In an opinion, remarkable for its erudition and clarity, Mr. Justice Holmes, speaking for the Court in W.I. Biddle v. Vuco Perovich enunciated this view, and it has since been affirmed in other decisions. The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. It is not denied, and indeed it has been repeatedly affirmed in the course of argument by learned counsel, Shri Ram Jethmalani and Shri Shanti Bhushan, appearing for the petitioners that the power to pardon rests on the advice tendered by the Executive to the President, who subject to the provisions of Article 74(1) of the Constitution, must act in accordance with such advice. We may point out that the Constitution Bench of this Court held in Maru Ram v. Union of India, that the power under Article 72 is to be exercised on the advice of the Central Government and not by the President on his own, and that the advice of the Government binds the Head of the State." (Underlining is ours)

96. Again in paragraphs 8 and 10, this Court made a detailed analysis of the effect of the grant of pardon or remission vis-à-vis the judicial pronouncement and explained the distinguishing features in their respective fields in uncontroverted terms. Paragraphs 8 and 10 can also be usefully extracted which are as under:

> 8. To what areas does the power to scrutinise extend? In Ex parte William Wells the United States Supreme Court pointed out that it was to be used

> "particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice". And in Ex parte Garland decided shortly after the Civil War, Mr. Justice Field observed:
>
> "The inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence … if granted after conviction, it removes the penalties and disabilities and restores him to all his civil rights…."

97. The classic exposition of the law is to be found in Ex parte Philip Grossman where Chief Justice Taft explained:

> "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments."

98. We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different

plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him. In *U.S.* v. *Benz Sutherland*, J., observed:

99. The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua a judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance.

100. The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. It is the nature of the power which is determinative. In *Sarat Chandra Rabha* v. *Khagendranath Nath*, Wanchoo, J., speaking for the Court addressed himself to the question whether the order of remission by the Governor of Assam had the effect of reducing the sentence imposed on the appellant in the same way in which an order of an appellate or revisional criminal court has the effect of reducing the sentence passed by a trial court, and after discussing the law relating to the power to grant pardon, he said:

> "Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched. In this view of the matter the order of remission passed in this case though it had the effect that the appellant was released from jail before he had served the full sentence of three years' imprisonment and had actually served only about sixteen months' imprisonment, did not in any

> way affect the order of conviction and sentence passed by the court which remained as it was.
>
> and again:
>
> Now where the sentence imposed by a trial court is varied by way of reduction by the appellate or revisional court, the final sentence is again imposed by the Court; but where a sentence imposed by the Court is remitted in part under Section 401 of the Code of Criminal Procedure that has not the effect in law of reducing the sentence imposed by the court, though in effect the result may be that the convicted person suffers less imprisonment than that imposed by the court. The order of remission affects the execution of the sentence imposed by the court but does not affect the sentence as such, which remains what it was in spite of the order of remission."

101. It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court. (Underlining is ours)

102. Having thus noted the well thought out principles underlying the exercise of judicial power and the higher Executive power of the State without affecting the core of the judicial pronouncements, we wish to refer to some statistics noted in that very judgment in paragraph 17 as to the number of convicts hanged as compared to the number of murders that had taken place during the relevant period, namely, between 1974 to 1978. It was found that there were 29 persons hanged during that period while the number of murders was noted as 85,000. It reveals that in a period of almost four years as against the huge number of victims, the execution of death penalty was restricted to the minimal i.e. it was 0.034%. We only point out that great care and caution weighed with the Courts and the Executive to ensure that under no circumstance an innocent is subjected to the capital punishment even if the real culprit may in that

process be benefited. After all in a civilized society, the rule of law should prevail and the right of a human being should not be snatched away even in the process of decision making which again is entrusted with another set of human beings as they are claimed to be experts and well informed legally as well as are men in the know of things.

103. Keeping the above principles in mind, when we make a study of the vexed question, we find that the law makers have restricted the power to impose death sentence to only 12 Sections in the Penal Code, namely, Sections 120B(1), 121, 132, 194, 195A, 302, 305, 307(2nd para), 376A, 376E, 396 and 364A. Apart from the Penal Code such punishments of death are provided in certain other draconian laws like TADA, MCOCA etc. Therefore, it was held by this Court in umpteen numbers of judgments that death sentence is an exception rather than a rule. That apart, even after applying such great precautionary prescription when the trial Courts reach a conclusion to impose the maximum punishment of death, further safe guards are provided under the Criminal Procedure Code and the Special Acts to make a still more concretized effort by the higher Courts to ensure that no stone is left unturned for the imposition of such capital punishments.

104. In this context, we can make specific reference to the provisions contained in Chapter XXVIII of Code of Criminal Procedure wherein Sections 366 to 371, are placed for the relevant consideration to be mandatorily made when a death penalty is imposed by the trial Court. Under Section 366, whenever a Sessions Court passes a sentence of death, the proceedings should be mandatorily submitted to the High Court and the sentence of death is automatically suspended until the same is confirmed by the High Court. Under Chapter XXVIII of the Code, even while exercising the process of confirmation by the High Court, very many other safe guards such as, further enquiries, letting in additional evidence, ordering a new trial on the same or amended charge or amend the conviction or convict the accused of any other offence of lesser degree is provided for. Further in order to ensure meticulous and high amount of precaution to be undertaken, the consideration of such confirmation process is to be carried out by a minimum of two Judges of the High Court. In the event of difference of opinion amongst them, the case is to be placed before a third Judge as provided under Section 392 of the Code. Statutory prescriptions apart, by way of judicial pronouncements, it has been repeatedly held that imposition of death penalty should be restricted to in the rarest of rare cases again to ensure that the Courts

adopt a precautionary principle of very high order when it comes to the question of imposition of death penalty.

105. Again keeping in mind the above statutory prescriptions relating to imposition of capital punishment or the alternate punishment of life imprisonment, meaning thereby till the end of the convict's life, we wish to analyze the scope and extent to which such alternate punishment can be directed to be imposed. In the first place, it must be noted that the law makers themselves have bestowed great care and caution when they decided to prescribe the capital punishment of death and its alternate to life imprisonment, restricted the scope for such imposition to the least minimum of 12 instances alone. As has been noted by us earlier, by way of interpretation process, this Court has laid down that such imposition of capital punishment can only be in the rarest of rare cases. In the later decisions, as the law developed, this court laid down and quoted very many circumstances which can be said to be coming within the four corners of the said rarest of rare principle, though such instances are not exhaustive. The above legal principle come to be introduced in the first instance in the decision reported as *Bachan Singh* v. *State of Punjab* - AIR 1980 SC 898. It was held as under:

> "151……. A sentence of death is the extreme penalty of law and it is but fair that when the Court awards that sentence in a case where the alternative sentence of imprisonment for life is also available, it should give special reasons in support of the sentence…..
>
> 207: There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished

> by the Union of India, show that in the past Courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

106. Subsequently, it was elaborated in the decision reported as *Machhi Singh* v. *State of Punjab* - AIR 1983 SC 957 it was held as under:

> "32: The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by 'Killing' a member of the

community which protects the murderer himself from being killed, or when the community feels that for the sake of self preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so (in rarest of rare cases) when its collective conscience 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. The community may entrain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. Manner of Commission of Murder

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. For instance,

(i) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or

in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

(a) 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. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of "bride burning" and what are known as "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.

IV. Magnitude of crime

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 of a particular caste, community, or locality, are committed.

V. Personality of victim of murder

When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

33: In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from Bachan Singh's case:

(i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

34: In order to apply these guidelines inter-alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed here in above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so." (Emphasis added)

107. These revered principles were subsequently adopted or explained or upheld in following cases reported as *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra* - 2009 (6) SC 498, *Aloke Nath Dutta* (supra), *Prajeet Kumar Singh* v. *State of Bihar* - (2008) 4 SCC 434, *B.A. Umesh* v. *Registrar General, High Court of Karnataka* - (2011) 3 SCC 85, *State of Rajasthan* v. *Kashi Ram* - (2006) 12 SCC 254 and *Atbir* v. *Government of NCT of Delhi* - (2010) 9 SCC 1 and also in a peculiar case of*D.K. Basu* v. *State of West Bengal* - AIR 1997 SC 610 where this Court took the view that custodial torture and consequential death in custody was an offence which fell in the category of the rarest of rare cases. While specifying the reasons in support of such decision, the Court awarded death penalty in that case.

108. In a recent decision of this Court reported as *Vikram Singh alias Vicky* v. *Union of India* - AIR 2015 SC 3577 this Court had occasion to examine the sentencing aspect. That case arose out of an order passed by the High Court in a writ petition moved before the High Court of Punjab and Haryana praying for a Mandamus to strike down Section 364A of IPC and for an order restraining the execution of death sentence awarded to the appellant therein. A Division Bench of the High Court of Punjab and Haryana while dismissing the writ petition took the view that the question whether Section 364A of IPC was attracted to the case at hand and whether a person found guilty of an offence punishable under the provision could be sentenced to death was not only raised by the appellant therein as an argument before the High Court in an appeal filed by them against their conviction and sentence imposed which was noticed and found against them. The High Court dismissed the writ petition by noting the regular appeal filed earlier by the appellant therein against the conviction

and sentence which was also upheld by this Court while dismissing the subsequent writ petition. While upholding the said judgment of the High Court on the sentencing aspect, this Court has noticed as under in paragraph 49:

> "49. To sum up:
>
> Punishments must be proportionate to the nature and gravity of the offences for which the same are prescribed.
>
> Prescribing punishments is the function of the legislature and not the Courts.
>
> The legislature is presumed to be supremely wise and aware of the needs of the people and the measures that are necessary to meet those needs.
>
> Courts show deference to the legislative will and wisdom and are slow in upsetting the enacted provisions dealing with the quantum of punishment prescribed for different offences.
>
> Courts, however, have the jurisdiction to interfere when the punishment prescribed is so outrageously disproportionate to the offence or so inhuman or brutal that the same cannot be accepted by any standard of decency.
>
> Absence of objective standards for determining the legality of the prescribed sentence makes the job of the Court reviewing the punishment difficult.
>
> Courts cannot interfere with the prescribed punishment only because the punishment is perceived to be excessive.
>
> In dealing with questions of proportionality of sentences, capital punishment is considered to be different in kind and degree from sentence of imprisonment. The result is that while there are several instances when capital punishment has been considered to be disproportionate to the offence committed, there are very few and rare

> cases of sentences of imprisonment being held disproportionate."

109. When we are on the question of sentencing aspect we feel it appropriate to make a reference to the principles culled out in the said judgment.

110. Having thus noted the serious analysis made by this Court in the imposition of Death sentence and the principle of rarest of rare cases formulated in the case of *Bachan Singh* (supra) which was subsequently elaborated in *Machhi Singh* (supra), followed in the later decisions and is being applied and developed, we also wish to note some of the submissions of the counsel for the respondents by relying upon the report of Justice Malimath Committee on Reform in Criminal Justice System submitted in 2003 and the report of Justice Verma's Committee on Amendment to Criminal Law and the introduction of some of the punishments in the Penal Code, namely, Sections 370(6), 376A, 376D and 376E which prescribe the punishment of imprisonment for life which shall mean imprisonment for the remainder of that persons' natural life. It was further contended that some special Acts like TADA specifically prescribe that the imposition of such punishment shall remain and no remission can be considered. The submission was made to suggest that in law when a punishment is prescribed it is only that punishment that can be inflicted and nothing more. In other words, when the penal provision prescribes the punishment of Death or Life, the Court should at the conclusion of the trial or at its confirmation, should merely impose the punishment of Death or Life and nothing more. Though the submission looks attractive, on a deeper scrutiny, we find that the said submission has no force. As has been noted by us in the earlier paragraphs where we have discussed the first part of this question, namely, what is meant by life imprisonment, we have found an answer based on earlier Constitution Bench decisions of this Court that life imprisonment means rest of one's life who is imposed with the said punishment. In the report relied upon and the practices followed in various other countries were also highlighted to support the above submission. Having thus considered the submissions, with utmost care, we find that it is nowhere prescribed in the Penal Code or for that matter any of the provisions where Death Penalty or Life Imprisonment is provided for, any prohibition that the imprisonment cannot be imposed for any specific period within the said life span. When life imprisonment means the whole life span of the person convicted, can it be said, that the Court which is empowered to impose the said punishment cannot specify

the period upto which the said sentence of life should remain befitting the nature of the crime committed, while at the same time apply the rarest of rare principle, the Court's conscience does not persuade it to confirm the death penalty. In such context when we consider the views expressed in *Shraddananda* (supra) in paragraphs 91 and 92, the same is fully justified and needs to be upheld. By stating so, we do not find any violation of the statutory provisions prescribing the extent of punishment provided in the Penal Code. It cannot also be said that by stating so, the Court has carved out a new punishment. What all it seeks to declare by stating so was that within the prescribed limit of the punishment of life imprisonment, having regard to the nature of offence committed by imposing the life imprisonment for a specified period would be proportionate to the crime as well as the interest of the victim, whose interest is also to be taken care of by the Court, when considering the nature of punishment to be imposed. We also note that when the report of Justice Malimath Committee was submitted in 2003, the learned Judge and the members did not have the benefit of the law laid down in *Swamy Shraddananda* (supra). Insofar as Justice Verma Committee report of 2013 was concerned, the amendments introduced after the said report in Sections 370(6), 376A, 376D and 376E, such prescription stating that life imprisonment means the entirety of the convict's life does not in any way conflict with the well thought out principles stated in *Swamy Shraddananda* (supra). In fact, Justice Verma Committee report only reiterated the proposition that a life imprisonment means the whole of the remaining period of the convict's natural life by referring to *Mohd. Munna* (supra), *Rameshbhai Chandubhai Rathod* v. *State of Gujarat* - (2011) 2 SCC 764 and *State of Uttar Pradesh* v. *Sanjay Kumar* - (2012) 8 SCC 537 and nothing more. Further, the said Amendment can only be construed to establish that there should not be any reduction in the life sentence and it should remain till the end of the convict's life span. As far as the reference to prescription of different type of punishments in certain other countries need not dissuade us to declare the legal position based on the punishment prescribed in the Penal Code and the enormity of the crimes that are being committed in this country. For the very same reasons, we are not able to subscribe to the submissions of Mr. Dwivedi and Shri Andhyarujina that by awarding such punishment of specified period of life imprisonment, the Court would be entering the domain of the Executive or violative of the principle of separation of powers. By so specifying, it must be held that, the Courts even while ordering the punishment prescribed in the Penal Code only seek to ensure that such imposition of punishment is commensurate to the nature of crime committed and in that process no injustice is caused

either to the victim or the accused who having committed the crime is bound to undergo the required punishment. It must be noted that the highest executive power prescribed under the Constitution in Articles 72 and 161 remains untouched for grant of pardon, suspend, remit, reprieve or commute any sentence awarded. As far as the apprehension that by declaring such a sentencing process, in regard to the offences falling under Section 302 and other offences for which capital punishment or in the alternate life imprisonment is prescribed, such powers would also be available to the trial Court, namely, the Sessions Court is concerned, the said apprehension can be sufficiently safeguarded by making a detailed reference to the provisions contained in Chapter XXVIII of Code of Criminal Procedure which we shall make in the subsequent paragraphs of this judgment. As far as the other apprehension that by prohibiting the consideration of any remission the executive power under Sections 432 and 433 are concerned, it will have to be held that such prohibition will lose its force the moment, the specified period is undergone and the Appropriate Government's power to consider grant of remission will automatically get revived. Here again, it can be stated at the risk of repetition that the higher executive power provided under the Constitution will always remain and can be exercised without any restriction.

111. As far as the argument based on ray of hope is concerned, it must be stated that however much forceful, the contention may be, as was argued by Mr. Dwivedi, the learned Senior Counsel appearing for the State, it must be stated that such ray of hope was much more for the victims who were done to death and whose dependents were to suffer the aftermath with no solace left. Therefore, when the dreams of such victims in whatever manner and extent it was planned, with reference to oneself, his or her dependents and everyone surrounding him was demolished in an unmindful and in some cases in a diabolic manner in total violation of the Rule of Law which is prevailing in an organized society, they cannot be heard to say only their rays of hope should prevail and kept intact. For instance, in the case relating to the murder of the former Prime Minister, in whom the people of this country reposed great faith and confidence when he was entrusted with such great responsible office in the fond hope that he will do his best to develop this country in all trusts, all the hope of the entire people of this country was shattered by a planned murder which has been mentioned in detail in the judgment of this Court which we have extracted in paragraph No. 147. Therefore, we find no scope to apply the concept of ray of hope to come for the rescue of such hardened, heartless offenders, which if considered in their favour will only result in misplaced

sympathy and again will be not in the interest of the society. Therefore, we reject the said argument outright.

112. Having thus noted the various submissions on this question, we have highlighted the various prescriptions in the cited judgments to demonstrate as to how the highest Court of this land is conscious of the onerous responsibility reposed on this institution by the Constitution makers in order to ensure that even if there is a Penal provision for the imposition of capital punishment of death provided for in the statute, before deciding to impose the said sentence, there would be no scope for anyone to even remotely suggest that there was any dearth or deficiency or lack of consideration on any aspect in carrying out the said onerous duty and responsibility. When the highest Court of this land has thus laid down the law and the principles to be applied in the matter of such graver punishments and such principles are dutifully followed by the High Courts, when the cases are placed before it by virtue of the provisions contained in Chapter XXVIII of Code of Criminal Procedure, it must be held that it will also be permissible for this Court to go one step further and stipulate as to what extent such great precautionary principle can be further emphasized.

113. Before doing so, we also wish to note each one of the 12 crimes for which, the penalty of death and life is prescribed. Under Section 120B, when prescribing the penalty for criminal conspiracy in respect of offence for which death penalty or life imprisonment is provided for in the Penal Code, every one of the accused who was a party to such criminal conspiracy in the commission of the offence is to be treated as having abetted the crime and thereby liable to be punished and imposed with the same punishment as was to be imposed on the actual offender. Under Section 121 the provision for capital punishment is for the offence of waging or attempting to wage a war or abetting the waging of war against the Government of India. In other words, in the event of such offence found proved, such a convict can be held to have indulged in a crime against the whole of the NATION meaning thereby against every other Indian citizen and the whole territory of this country. Under Section 132, the punishment of death is provided for an offender who abets the committing of MUTINY by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Government of India and in the event of such MUTINY been committed as a sequel to such abetment. MUTINY in its ordinary dictionary meaning is an open revolt against Constitutional authority, especially by soldiers or sailors against their officers. It can be, therefore, clearly visualized that in the event of such MUTINY taking place by the Army personnel what would

be plight of this country and the safety and interest of more than 120 million people living in this country. Under the later part of Section 194 whoever tenders or fabricates false evidence clearly intending thereby that such act would cause any innocent person be convicted of capital punishment and any such innocent person is convicted of and executed of such capital punishment, the person who tendered such fake and fabricated evidence be punished with punishment of death. Under the Second Part of Section 195A if any person threatens any other person to give false evidence and as a consequence of such Act any other person is though innocent, but convicted and sentenced to death in consequence of such false evidence, the person at whose threat the false evidence came to be tendered is held to be liable to be meted out with the same punishment of death.

114. Under Section 302, whoever commits murder of another person is liable to be punished with death or life imprisonment. Under Section 305, whoever abets the commission of suicide of a person under 18 years of age i.e. a minor or juvenile, any insane person, any idiot or any person in a state of intoxication is liable to be punished with death or life imprisonment. It is relevant to note that the categories of persons whose suicide is abetted by the offender would be persons who in the description of law are supposedly unaware of committing such act which they actually perform but for the abetment of the offender. Under the Second Part of Section 307, if attempt to murder is found proved against an offender who has already been convicted and sentenced to undergo life imprisonment, then he is also liable to be inflicted with the sentence of death. Under Section 376A whoever committed the offence of rape and in the course of commission of such offence, also responsible for committing the death of the victim or such injury caused by the offence is such that the victim is in a persistent vegetative state, then the minimum punishment provided for is 20 years or life imprisonment or death.

115. Under Section 376E whoever who was once convicted for the offence under Sections 376, 376A or 376D is subsequently convicted of an offence under any of the said Sections would be punishable for life imprisonment meaning thereby imprisonment for the remainder of his life span or with death. Under Section 376D for the offence of gang rape, the punishment provided for is imprisonment for a minimum period of 20 years and can extend upto life imprisonment meaning thereby the remainder of that person's life.

116. Under Section 364A kidnapping for ransom, etc. in order to compel the Government or any foreign State or international, intergovernmental

organization or another person to do or abstain from doing any act to pay a ransom shall be punishable with death or life imprisonment.

117. Under Section 396, if any one of five or more persons conjointly committed decoity, everyone of those persons are liable to be punished with death or life imprisonment.

118. Thus, each one of the offences above noted, for which the penalty of death or life imprisonment or specified minimum period of imprisonment is provided for, are of such magnitude for which the imposition of anyone of the said punishment provided for cannot be held to be excessive or not warranted. In each individual case, the manner of commission or the modus operandi adopted or the situations in which the act was committed or the situation in which the victim was situated or the status of the person who suffered the onslaught or the consequences that ensued by virtue of the commission of the offence committed and so on and so forth may vary in very many degrees. It was for this reason, the law makers, while prescribing different punishments for different crimes, thought it fit to prescribe extreme punishments for such crimes of grotesque (monstrous) nature.

119. While that be so it cannot also be lost sight of that it will be next to impossible for even the law makers to think of or prescribe in exactitude all kinds of such criminal conduct to fit into any appropriate pigeon hole for structured punishments to run in between the minimum and maximum period of imprisonment. Therefore, the law makers thought it fit to prescribe the minimum and the maximum sentence to be imposed for such diabolic nature of crimes and leave it for the adjudication authorities, namely, the Institution of Judiciary who is fully and appropriately equipped with the necessary knowledge of law, experience, talent and infrastructure to study the detailed parts of each such case based on the legally acceptable material evidence, apply the legal principles and the law on the subject, apart from the guidance it gets from the jurists and judicial pronouncements revealed earlier, to determine from the nature of such grave offences found proved and depending upon the facts noted what kind of punishment within the prescribed limits under the relevant provision would appropriately fit in. In other words, while the maximum extent of punishment of either death or life imprisonment is provided for under the relevant provisions noted above, it will be for the Courts to decide if in its conclusion, the imposition of death may not be warranted, what should be the number of years of imprisonment that would be judiciously and judicially more appropriate to

keep the person under incarceration, by taking into account, apart from the crime itself, from the angle of the commission of such crime or crimes, the interest of the society at large or all other relevant factors which cannot be put in any straitjacket formulae.

120. The said process of determination must be held to be available with the Courts by virtue of the extent of punishments provided for such specified nature of crimes and such power is to be derived from those penal provisions themselves. We must also state, by that approach, we do not find any violation of law or conflict with any other provision of Penal Code, but the same would be in compliance of those relevant provisions themselves which provide for imposition of such punishments.

121. That apart, as has been noted by us earlier, while the description of the offences and the prescription of punishments are provided for in the Penal Code which can be imposed only through the Courts of law, under Chapter XXVIII of Code of Criminal Procedure, at least in regard to the confirmation of the capital punishment of death penalty, the whole procedure has been mandatorily prescribed to ensure that such punishment gets the consideration by a Division Bench consisting of two Hon'ble Judges of the High Court for its approval. As noted earlier, the said Chapter XXVIII can be said to be a separate Code by itself providing for a detailed consideration to be made by the Division Bench of the High Court, which can do and undo with the whole trial held or even order for retrial on the same set of charges or of different charges and also impose appropriate punishment befitting the nature of offence found proved.

122. Such prescription contained in the Code of Criminal Procedure, though procedural, the substantive part rests in the Penal Code for the ultimate Confirmation or modification or alteration or amendment or amendment of the punishment. Therefore, what is apparent is that the imposition of death penalty or life imprisonment is substantively provided for in the Penal Code, procedural part of it is prescribed in the Code of Criminal Procedure and significantly one does not conflict with the other. Having regard to such a dichotomy being set out in the Penal Code and the Code of Criminal Procedure, which in many respects to be operated upon in the adjudication of a criminal case, the result of such thoroughly defined distinctive features have to be clearly understood while operating the definite provisions, in particular, the provisions in the Penal Code providing for capital punishment and in the alternate the life imprisonment.

123. Once we steer clear of such distinctive features in the two enactments, one substantive and the other procedural, one will have no hurdle or difficulty in working out the different provisions in the two different enactments without doing any violence to one or the other. Having thus noted the above aspects on the punishment prescription in the Penal Code and the procedural prescription in the Code of Criminal Procedure, we can authoritatively state that the power derived by the Courts of law in the various specified provisions providing for imposition of capital punishments in the Penal Code such power can be appropriately exercised by the adjudicating Courts in the matter of ultimate imposition of punishments in such a way to ensure that the other procedural provisions contained in the Code of Criminal Procedure relating to grant of remission, commutation, suspension etc. on the prescribed authority, not speaking of similar powers under Articles 72 and 162 of the Constitution which are untouchable, cannot be held to be or can in any manner overlap the power already exercised by the Courts of justice.

124. In fact, while saying so we must also point out that such exercise of power in the imposition of death penalty or life imprisonment by the Sessions Judge will get the scrutiny by the Division Bench of the High Court mandatorily when the penalty is death and invariably even in respect of life imprisonment gets scrutinized by the Division Bench by virtue of the appeal remedy provided in the Code of Criminal Procedure. Therefore, our conclusion as stated above can be reinforced by stating that the punishment part of such specified offences are always examined at least once after the Sessions Court's verdict by the High Court and that too by a Division Bench consisting of two Hon'ble Judges.

125. That apart, in most of such cases where death penalty or life imprisonment is the punishment imposed by the trial Court and confirmed by the Division Bench of the High Court, the concerned convict will get an opportunity to get such verdict tested by filing further appeal by way of Special Leave to this Court. By way of abundant caution and as per the prescribed law of the Code and the criminal jurisprudence, we can assert that after the initial finding of guilt of such specified grave offences and the imposition of penalty either death or life imprisonment when comes under the scrutiny of the Division Bench of the High Court, it is only the High Court which derives the power under the Penal Code, which prescribes the capital and alternate punishment, to alter the said punishment with one either for the entirety of the convict's life or for any specific period of more than 14 years, say 20, 30 or so on depending upon the gravity of the crime

committed and the exercise of judicial conscience befitting such offence found proved to have been committed.

126. We, therefore, reiterate that, the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other Court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior Court.

127. Viewed in that respect, we state that the ratio laid down in *Swamy Shraddananda* (supra) that a special category of sentence; instead of Death; for a term exceeding 14 years and put that category beyond application of remission is well founded and we answer the said question in the affirmative. We are, therefore, not in agreement with the opinion expressed by this Court in *Sangeet* v. *State of Haryana* - (2013) 2 SCC 452 that the deprival of remission power of the Appropriate Government by awarding sentences of 20 or 25 years or without any remission as not permissible is not in consonance with the law and we specifically overrule the same.

128. With that we come to the next important question, namely:

> "Whether the Appropriate Government is permitted to grant remission under Section 432/433 of Code of Criminal Procedure after the pardon power is exercised under Article 72 by the President and under Article 161 by the Governor of the State or by the Supreme Court of its Constitutional Power under Article 32."

129. For the above discussion the relevant provisions of Code of Criminal Procedure, 1973 are extracted as under:

> "Section 432.- Power to suspend or remit sentences- (1) 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.

(2) whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and,-

Where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

Where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in Section 433, the expression "appropriate Government" means,-

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government:

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed. Section 433.-Power to commute sentence-The appropriate Government may, without the consent of the person sentenced commute-

A sentence of death, for any other punishment provided by the Indian Penal Code

A sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

A sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

A sentence of simple imprisonment, or fine."

130. Last part of the second question refers to the exercise of power by this Court under Article 32 of the Constitution pertaining to a case of

remission. To understand the background in which the said part of the question was framed, we can look into paragraphs 29 to 31 of the Order of Reference. On behalf of the Union of India, it was contended that once the power of commutation/remission has been exercised in a particular case of a convict by a Constitutional forum particularly this Court, then there cannot be a further exercise of the Executive Power for the purpose of commuting/remitting the sentence of the said convict in the same case by invoking Sections 432 and 433 of Code of Criminal Procedure.

131. While stoutly resisting the said submission made on behalf of the Union of India, Mr. Dwivedi, learned Senior Counsel, who appeared for the State of Tamil Nadu contended that in the case on hand, this Court while commuting the death sentence of some of the convicts did not exercise the Executive Power of the State, and that it only exercised its judicial power in the context of breach of Article 21 of the Constitution. It was further contended that if the stand of Union of India is accepted then in every case where this Court thought it fit to commute sentence for breach of Article 21 of the Constitution, that would foreclose even the right of a convict to seek for further commutation or remission before the Appropriate Government irrespective of any precarious situation of the convict, i.e., even if the physical condition of the convict may be such that he may be vegetable by virtue of his old age or terminal illness. It was also pointed out that in *V. Sriharan alias Murugan* v. *Union of India* -(2014) 4 SCC 242 dated 18.02.2014, this Court while commuting the sentence of death into one of life also specifically observed that such commutation was independent of the power of remission under the Constitution, as well as, the Statute. In this context, when we refer the power of commutation/remission as provided under Code of Criminal Procedure, namely, Sections 432, 433, 433A, 434 and 435, it is quite apparent that the exercise of power under Article 32 of the Constitution by this Court is independent of the Executive Power of the State under the Statue. As rightly pointed out by Mr. Dwivedi, learned Senior Counsel in his submissions made earlier, such exercise of power was in the context of breach of Article 21 of the Constitution. In the present case, it was so exercised to commute the sentence of death into one of life imprisonment. It may also arise while considering wrongful exercise or perverted exercise of power of remission by the Statutory or Constitutional authority. Certainly there would have been no scope for this Court to consider a case of claim for remission to be ordered under Article 32 of the Constitution. In other words, it has been consistently held by this Court that when it comes to the question of reviewing order of remission passed which is patently illegal or fraught with stark illegality on Constitutional

violation or rejection of a claim for remission, without any justification or colourful exercise of power, in either case by the Executive Authority of the State, there may be scope for reviewing such orders passed by adducing adequate reasons. Barring such exceptional circumstances, this Court has noted in numerous occasions, the power of remission always vests with the State Executive and this Court at best can only give a direction to consider any claim for remission and cannot grant any remission and provide for premature release. It was time and again reiterated that the power of commutation exclusively rest with the Appropriate Government. To quote a few, reference can be had to the decisions reported as *State of Punjab* v. *Kesar Singh* - (1996) 5 SCC 495, *Delhi Administration (now NCT of Delhi)*v. *Manohar Lal* - (2002) 7 SCC 222 which were followed in *State (Government of NCT of Delhi)* v. *Prem Raj* - (2003) 7 SCC 121. Paragraph 13 of the last of the decision can be quoted for its lucid expression on this issue which reads as under:

> "13. An identical question regarding exercise of power in terms of Section 433 of the Code was considered in *Delhi Admn. (now NCT of Delhi)* v. *Manohar Lal*. The Bench speaking through one of us (Doraiswamy Raju, J.) was of the view that exercise of power under Section 433 was an executive discretion. The High Court in exercise of its revisional jurisdiction had no power conferred on it to commute the sentence imposed where a minimum sentence was provided for the offence. In*State of Punjab* v. *Kesar Singh* this Court observed as follows [though it was in the context of Section 433(b)]: (SCC pp. 495-96, para 3)
>
> "The mandate of Section 433 Code of Criminal Procedure enables the Government in an appropriate case to commute the sentence of a convict and to prematurely order his release before expiry of the sentence as imposed by the courts…… That apart, even if the High Court could give such a direction, it could only direct consideration of the case of premature release by the Government and could not have ordered the premature release of the respondent itself. The right to exercise the power under Section 433 CrPC vests in the Government and has to be exercised by the Government in

> accordance with the rules and established principles. The impugned order of the High Court cannot, therefore, be sustained and is hereby set aside."
>
> (Underlining is ours)

132. The first part of the said question pertains to the power of the Appropriate Government to grant remission after the parallel power is exercised under Articles 72 and 161 of the Constitution by the President and the Governor of the State respectively. In this context, a reference to Articles 72 and 161 of the Constitution on the one hand and Sections 432 and 433 of Code of Criminal Procedure on the other needs to be noted. When we refer to Article 72, necessarily a reference will have to be made to Articles 53 and 74 as well. Under Article 53 of the Constitution the Executive Power of the Union vests in the President and such power should be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Under Article 74, the exercise of the functions of the President should always be based on the aid and advise of the Council of Ministers headed by the Prime Minister. Under the proviso to the said Article, the President can at best seek for reconsideration of any such advice and should act based on such reconsidered advice. Article 74(2) in fact, has insulated any such advice being enquired into by any Court. Identical provisions are contained in Articles 154, 161 and 163 of the Constitution relating to the Governor of the State. Reading the above provisions, it is clear that the president of the Union and the Governor of the State while functioning as the Executive Head of the respective bodies, only have to act based on the advice of the Council of Ministers of the Union or the State. While so, when we look into the statutory prescription contained in Sections 432 and 433 of the Code of Criminal Procedure though the exercise of the power under both the provisions vests with the Appropriate Government either State or the Centre, it can only be exercised by the Executive Authorities headed by the President or the Governor as the case may be. In the first blush though it may appear that exercise of such power under Sections 432 and 433 is nothing but the one exercisable by the same authority as the Executive Head, it must be noted that the real position is different. For instance, when we refer to Section 432, the power is restricted to either suspend the execution of sentence or remit the whole or any part of the punishment. Further under sub-section (2) of Section 432, it is stipulated that exercise of power of suspension or remission may require the opinion of the presiding Judge of the Court before or by which the conviction was held or confirmed. There is also provision for imposing conditions while deciding to suspend or

remit any sentence or punishment. There are other stipulations contained in Section 432. Likewise, when we refer to Section 433 it is provided therein that the Appropriate Government may without the consent of the persons sentenced commute any of the sentence to any other sentence which ranges from Death sentence to fine. One significant feature in the Constitutional power which is apparent is that the President is empowered under Article 72 of the Constitution to grant pardons, reprieves, respites or remission, suspend or commute the sentence. Similar such power is also vested with the Governor of the State. Whereas under Sections 432 and 433 of the Code of Criminal Procedure the power is restricted to suspension, remission and commutation. It can also be noted that there is no specific provision prohibiting the execution of the power under Sections 432 and 433 of Code of Criminal Procedure when once similar such power was exercised by the Constitutional Authorities under Articles 72 and 161 of the Constitution. There is also no such implied prohibition to that effect.

133. In this context, learned Solicitor General submitted that while the power under Articles 72 and 161 of the Constitution can be exercised more than once, the same is not the position with Sections 432 and 433 of Code of Criminal Procedure. The learned Solicitor General contended that since the exercise of power under Articles 72 and 161 is with the aid of the Council of Ministers, it must be held that Sections 432 and 433 of Code of Criminal Procedure are only enabling provisions for exercise of power under Articles 72 and 161 of the Constitution. In support of the said submission, the learned Solicitor General, sought to rely upon the passage in *Maru Ram*(supra) to the effect that:

> "since Sections 432 and 433(a) are statutory expression and modus operandi of the Constitutional power ……..".

134. Though the submission looks attractive, we are not convinced. We find that the said set of expression cannot be strictly stated to be the conclusion of the Court. In fact, if we read the entire sentence, we find that it was part of the submission made which the Court declined. On the other hand, in the ultimate analysis, the Majority view was summarized wherein it was held at page 1248 as under:

> "4. We hold that Sections 432 and 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar, power, and Section 433A, by nullifying wholly or partially

> these prior provisions does not violate or detract from the full operation of the Constitutional power to pardon, commute and the like."

135. Therefore, it must be held that there is every scope and ambit for the Appropriate Government to consider and grant remission under Sections 432 and 433 of the Code of Criminal Procedure even if such consideration was earlier made and exercised under Article 72 by the President and under Article 161 by the Governor. As far as the implication of Article 32 of the Constitution by this Court is concerned, we have already held that the power under Sections 432 and 433 is to be exercised by the Appropriate Government statutorily, it is not for this Court to exercise the said power and it is always left to be decided by the Appropriate Government, even if someone approaches this Court under Article 32 of the Constitution. We answer the said question on the above terms.

136. The next questions for consideration are:

> "Whether Section 432(7) of the Code clearly gives primacy to the Executive Power of the Union and excludes the Executive Power of the State where the power of the Union is coextensive?
>
> Whether the Union or the State has primacy over the subject-matter enlisted in List III of the Seventh Schedule to the Constitution of India for exercise of power of remission?
>
> Whether there can be two Appropriate Governments in a given case under Section 432(7) of the Code?"

137. According to the respondents, it is the State Government which is the Appropriate Government in a case of this nature, unless it is specifically taken over by way of a Statute from the State Government. Reference was made to proviso to Article 162 of the Constitution as well as Section 432(7) of Code of Criminal Procedure where the expression used is "subject to and limited by" which has got greater significance. It was also contended on behalf of the respondents that Penal Code is a compilations of offences, in different situations for which different consequence will follow. By way of an analysis it was pointed out that Penal Code is under the concurrent list and when the conviction is one under Section 302 simpliciter, then, the jurisdiction for consideration of remission would be

with the State Government and that if the said Section also attracted the provisions of TADA, then the Centre would get exclusive jurisdiction. By making reference to Section 55A(a) of the Penal Code and Section 434 of Code of Criminal Procedure it was contended that when the conviction and sentence is under Section 302 I.P.C., without the aid of TADA or any other Central Act, State Government gets jurisdiction which will be the Appropriate Government. In this context, our attention was drawn to the fact that in the Rajiv Gandhi murder case, respondents Santhan, Murugan, Nalini and Arivu @ Perarivalan were awarded death sentence, while 3 other accused, namely, Ravichandran, Robert Payas and Jayakumar were given life imprisonment and that Nalini's death sentence was commuted by the Governor of the State in the year 2000, while the claim of 3 others was rejected.

138. Later, by the judgment dated 18.02.2014, the death sentence of three others was also commuted to life by this Court. In support of the submission reliance was placed upon the decisions of this Court in *Ratan Singh* (supra), *State of Madhya Pradesh* v. *Ajit Singh* - (1976) 3 SCC 616, *Hanumant Dass* v. *Vinay Kumar* - (1982) 2 SCC 177and *Govt. of A.P.* v. *M.T. Khan* - (2004) 1 SCC 616.

139**.** Reference was also made to the Constituent Assembly debates on Article 59 which corresponds to Article 72 in the present form and Article 60 which correspondents to Article 73(1)(a) of the present form. In the course of the debates, an amendment was sought to be introduced to Article 59(3) and in this context, the member who moved the amendment stated thus:

> "Sir, in my opinion, the President only should have power to suspend, remit or commute a sentence of death. He is the supreme Head of the State. It follows therefore that he should have the supreme powers also. I am of opinion that rulers of States or Provincial Government should not be vested with this supreme power……"

140. Dr. Ambedkar while making his comment on the amendment proposed stated thus:

> "Yes: Sir: It might be desirable that I explain in a few words in its general outline the scheme embodied in article 59. It is this: the power of commutation of

> sentence for offences enacted by the Federal Law is vested in the President of the Union. The power to commute sentences for offences enacted by the State Legislatures is vested in the Governors of the State. In the case of sentences of death, whether it is inflicted under any law passed by Parliament or by the law of the States, the power is vested in both, the President as well as the State concerned. This is the scheme." (Underlining is ours)

141. After the above discussions on the proposed amendments, when it was put to vote, the amendment was negatived.

142. Similarly the amendment to the proviso to Article 60 was preferred by a member who in his address stated thus:

> "The object of my amendment is to preserve the Executive Power of the States or provinces at least in so far as the subjects which are included in the concurrent list. It has been pointed out during the general discussions that the scheme of the Draft Constitution is to whittle down the powers of the States considerably and, though the plan is said to be a federal one, in actual fact it is a unitary form of Government that is sought to be imposed in the Country by the Draft Constitution……"
>
> (Emphasis added)

143. After an elaborate discussion, when the opinion of Dr. Ambedkar was sought, he addressed the Assembly and stated thus:

> "The Hon'ble Dr. B.R. Ambedkar (Bombay:General): Mr. Vice-President, Sir, I am sorry that I cannot accept either of the two amendments which have been moved to this proviso, but I shall state to the House very briefly the reasons why I am not in a position to accept these amendments. Before I do so, I think it is desirable that the House should know what exactly is the difference between the position as stated in the proviso and the two amendments which are moved to that proviso. Taking the proviso as it stands, it lays down two propositions. The first proposition is that

> generally the authority to executive laws which relate to what is called the concurrent field, whether the law is passed by the Central Legislature or whether it is passed by the provincial or State Legislature, shall ordinarily apply to the province or the State. That is the first proposition which this proviso lays down. The second proposition which the proviso lays down is that if in any particular case Parliament thinks that in passing the law which relates to the concurrent field the execution ought to be retained by the Central Government, Parliament shall have the power to do so. Therefore, the position is this; that in all cases, ordinarily, the executive authority so far as the concurrent list is concerned will rest with the union, the provinces as well as the States. It is only in exceptional cases that the Centre may prescribe that the execution of the concurrent law shall be with the Centre." (Emphasis added)

144. Thereafter further discussions were held and ultimately when the amendment was put to vote, the same was negatived.

145. It was, therefore, contended that in the absence of a specific law pertaining to the exercise of power under Sections 432 and 433, the States will continue to exercise their power of remission and commutation and that cannot be prevented. As against the above submissions, learned Solicitor General contended that a reference to the relevant provision of the Penal Code and the Code of Criminal Procedure read along with the Constitutional provisions disclose that Entry I of List III of the Seventh Schedule makes a clear specification of the jurisdiction of the Centre and the State and any overlapping is taken care of in the respective entries themselves. The learned Solicitor General also brought to our notice the incorporation of Section 432(7) in the Code of Criminal Procedure providing for a comprehensive definition of 'Appropriate Government' based on the recommendations of the Law Commission in its Forty First Report. By the said report, the law Commission indicated that the definition of 'Appropriate Government' as made in Sections 54, 55 and 55A needs to be omitted in the Indian Penal Code as redundant while making a comprehensive provision in Section 402 (now the corresponding present Section 433). Paragraphs 29.10, 29.11 and 29.12 of the said report can be noted for the purpose for which the amendment was suggested and its implications:

"29.10. Power to commute sentences.- Sub-section (1) of section 402 enables the Appropriate Government to commute sentences without the consent of the person sentenced. This general provision has, however, to be read with sections 54 and 55 of the Indian Penal Code which contain special provisions in regard to commutation of sentences of death and of imprisonment for life. The definition of "Appropriate Government" contained in sub-section (3) of section 402 is substantially the same as that contained in section 55A of the Indian Penal Code. It would obviously be desirable to remove this duplication and to state the law in one place. In the present definition of "Appropriate Government" in section 402(3), the reference to the State Government is somewhat ambiguous. It will be noticed that clause (b) of section 55A of the Indian Penal Code specifies the particulars State Government which is competent to order commutation as "the Government of the State within which the offender is sentenced".

29.11. Section 402 revised: sections 54, 55 and 55A of I.P.C. to be omitted.- We, therefore, propose that sections 54, 55 and 55A may be omitted from the Indian Penal Code and their substance incorporated in section 402 of the Criminal Procedure Code. This section may be revised as follows:-

"402. Power to commute sentence.-(1) The Appropriate Government may, without the consent of the person sentenced,-

commute a sentence of death, for any other punishment provided by the Indian Penal Code;

commute a sentence of imprisonment for life, for imprisonment of either description for a term, not exceeding fourteen years or for fine;

commute a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced or for fine;

commute a sentence of simple imprisonment, for fine.

(2) In this section and in section 401, the expression "Appropriate Government" means-

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (4A) of section 401 is passed under, any law relating to a matter to which the Executive Power of the Union extends, the Central Government; and

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed."

29.12. The power to suspend or remit sentences under section 401 and the power to commute sentences under section 402 are thus divided between the Central Government and the State Government on the Constitutional lines indicated in Articles 72 and 161. If, for instance, a person is convicted at the same trial for an offence punishable under the Arms Act or the Explosives Act and for an offence punishable under the Indian Penal Code and sentenced to different terms of imprisonment but running concurrently, both Governments will have to pass orders before the sentences are effectively suspended, remitted or commuted. Cases may occur where the State Government's order simply mentions the nature of the sentence remitted or commuted and is treated as sufficient warrant by the prison authorities though strictly under the law, a corresponding order of the Central Government is required in regard to the sentence for the offence falling within the Union List. The legal provisions are, however, clear on the point and we do not consider that any clarification is required."

146. The learned Solicitor General also relied upon the judgment of this Court in *G.V. Ramanaiah* v. *The Superintendent of Central Jail, Rajahmundry* - AIR 1974 SC 31 and contended that where the offence

is dealt with by the prosecuting agency of the Central Government, by virtue of the proviso to Article 73 of the Constitution, the Executive Power of the Central Government is saved and, therefore, in such cases, it is the Central Government which is the Appropriate Government.

147. Having noted the respective submissions of the parties, the sum and substance of the submission of the respondent State as well as other respondents is that a conspectus consideration of the definition of the "Appropriate Government" under the Penal Code read along with Section 432(7) of Code of Criminal Procedure, where the conviction was under the penal provision of IPC and was not under any Central Act, the whole authority for consideration of suspension of sentence or remission of sentence or commutation rests solely with the State Government within whose jurisdiction, the conviction came to be imposed. It was, however, submitted that if the conviction was also under any of the Central Act, then and then alone the Central Government becomes the 'Appropriate Government' and not otherwise. It was in support of the said submission, reliance was placed upon the decisions of this Court in *Ratan Singh* (supra), *Ajit Singh* (supra), *Hanumant Dass* (supra) and *M.T. Khan*(supra). The Constituent Assembly debates on the corresponding Articles viz., Articles 72 and 73 were also highlighted to show the intention of the Constituent Assembly while inserting the above said Articles to show the primacy of the State Government under certain circumstances and that of the Central Government under certain other circumstances which the Members of the Assembly wanted to emphasis.

148. The question posed for our consideration is whether there can be two Appropriate Governments under Section 432(7) of the Code of Criminal Procedure and whether Union or the State has primacy for the exercise of the power under Section 432(7) over the subject matter enlisted in List III of the Seventh Schedule for grant of remission as a co-extensive power. To find an answer to the combined questions, we can make reference to Section 55A of the Penal Code which defines "Appropriate Government" referred to in Sections 54 and 55 of the Penal Code. Sections 54 and 55 of the Penal Code pertain to commutation of sentence of death and imprisonment for life respectively by the Appropriate Government. In that context, in Section 55A, the expressions "Appropriate Government" has been defined to mean in cases where the sentence is a sentence of death or is for an offence against any law relating to a matter to which the Executive Power of the Union extends, the Central Government. The definition, therefore, makes it clear that insofar as it relates to commutation of death

sentence, the Appropriate Government is the Central Government. That apart, if the sentence of death or life is for an offence against any law relating to a matter to which the Executive Power of the Union extends, then again, the 'Appropriate Government' is the Central Government. We have dealt with in extenso while examining Section 73(1)(a) with particular reference to the proviso as to under what circumstance the Executive Power of the Central Government will continue to remain as provided under Article 73(1)(a). We can make a reference to that part of our discussion, where we have explained the implication of the proviso to Article 73(1)(a) in order to note the extent of the Executive Power of the Central Government under the said Article. Therefore, in those cases, where by virtue of any law passed by the Parliament or any of the provisions of the Constitution empowering the Central Government to act by specifically conferring Executive Authority, then in all those situations, the Executive Power of the Central Government will remain even if the State Government is also empowered to pass legislations under the Constitution. By virtue of the said Constitutional provision contained in the proviso to Article 73(1)(a), if the Executive Power of the Central Government remains, applying Section 55A (a) of the Penal Code, it can be stated without any scope of controversy that the Central Government would be the Appropriate Government in those cases, where the sentence is of death or is for an offence relating to a matter wherein the Executive Power of the Union gets extended. This is one test to be applied for ascertaining as who will be the Appropriate Government for passing order of commutation of sentence of death as well as life imprisonment in the context of Sections 54 and 55 of Penal Code.

149. Keeping it aside for a while, when we refer to Section 55A (b), it is provided therein that in cases where the sentence, whether of death or not, is for an offence against any law relating to a matter to which the Executive Power of the State extends, the Government of the State within which the offender is sentenced will be the Appropriate Government. Sub-clause (b) of Section 55A postulates different circumstances viz., the sentence whether of death or not is for an offence relating to a matter to which the Executive Power of the State extends, then if the imposition of such sentence was within the four corners of the State concerned, then the Appropriate Government would be the State Government. In fact in this context, the submission made on behalf of the respondents needs to be appreciated that if there was a conviction for an offence under Section 302 IPC simpliciter, even if the prosecuting agency was the Central Government, the State Government would be the Appropriate

Government within whose jurisdiction the imposition of sentence came to be made either of death or not. While analyzing Section 55A, vis-à-vis Sections 54 and 55 of the Penal Code, wherever the Executive Power of the Union extends, the Appropriate Government would be the Central Government and in all other cases, the Appropriate Government would be the concerned State within whose jurisdiction the sentence came to be imposed.

150. With that analysis made with reference to Section 55 of the Penal Code, when we refer to Section 432(7) of Code of Criminal Procedure, here again, we find the definition "Appropriate Government" is made with particular reference to and in the context of Sections 432 and 433 of Code of Criminal Procedure. Under Section 432(1) to (6) the prescription is relating to the power to suspend or remit sentences, the procedure to be followed, the conditions to be imposed and the consequences in the event of breach of any conditions imposed. Similarly, Section 433 pertains to the power of the Appropriate Government to commute the sentence of death, imprisonment for life, sentence of rigorous imprisonment and sentence of simple imprisonment to some other lesser punishment up to imposition of fine. The power under Section 433 can be exercised only by the Appropriate Government. It is in the above context of the prescription contained in Sections 432(1) to (6) and 433(a) to (d), the definition of 'Appropriate Government' under Section 432(7) has to be analysed. Section 432(7) defines the 'Appropriate Government' to mean; in cases where the sentence is for an offence against or the order referred to in sub-section (6) of Section 432 is passed under any law relating to a matter to which the Executive Power of the Union extends, it is the Central Government. Therefore, what is to be seen is whether the sentence passed is for an offence against any law relating to a matter to which the Executive Power of the Union extends. Here again, our elaborate discussion on Article 73(1)(a) and its proviso need to be read together. It is imperative and necessary to refer to the discussions on Articles 72, 73, 161 and 162 of the Constitution, inasmuch as how to ascertain the Executive Power of the Centre and the State has been basically set out only in those Constitutional provisions. In other words, only by applying the said Constitutional provisions, the Executive Power of the Centre and the State can be precisely ascertained. To put it differently, Section 432(7) does not prescribe or explain as to how to ascertain the Executive Power of the Centre and the State, which can be ascertained only by analyzing the above said Articles 72, 73, 161 and 162 of the Constitution. If the offence falls under any such law which the Parliament is empowered to enact as

such law has been enacted, on which subject law can also be enacted by any of the States, then the Executive Power of the Centre by virtue of such enactment passed by the Parliament providing for enforcement of such Executive Power, would result in the Central Government becoming the Appropriate Government in respect of any sentence passed against such law. At the risk of repetition, we can refer to Article 73(1)(a) with its proviso to understand the Constitutional prescription vis-à-vis its application for the purpose of ascertaining the Appropriate Government under Section 432(7) of the Code. When we read the proviso to Article 73(1)(a) closely, we note that the emphasis is on the 'Executive Power' which should have been expressly provided in the Constitution or in any law made by the Parliament in order to apply the saving Clause under the proviso. Once the said prescription is clearly understood, what is to be examined in a situation where any question arises as to who is the 'Appropriate Government' in any particular case, then if either under the law in which the prosecution came to be launched is exclusively under a Central enactment, then the Centre would be the 'Appropriate Government' even if the situs is in any particular State. Therefore, if the order passed by a Criminal Court covered by sub-section (6) of Section 432 was under any law relating to a matter where the Executive Power of the Union extends by virtue of enactment of such Executive Power under a law made by the Parliament or expressly provided in the Constitution, then, the Central Government would be the Appropriate Government. Therefore, what is to be noted is, whether the sentence passed under a law relating to a matter to which the Executive Power of the Union extends, as has been stipulated in the proviso to Article 73(1)(a). In this context, it will be worthwhile to make reference to what Dr. Ambedkar explained, when some of the Members of the Assembly moved certain amendments to enhance the powers of the State with particular reference to Article 60 of the Draft Constitution which corresponds to Article 73 as was ultimately passed. In the words of Dr. Ambedkar himself it was said:

> "The second proposition which the proviso lays down is that if in any particular case Parliament thinks that in passing the law which relates to the concurrent field the execution ought to be retained by the Central Government, Parliament shall have the power to do so…..It is only in exceptional cases that the Centre may prescribe that the execution of the concurrent law shall be with the Centre.

151. If the said prescription is satisfied than it would be the Central Government who will be the Appropriate Government.

152. For the purpose of ascertaining which Government would be the Appropriate Government as defined under Section 432(7), what is to be seen is the sentence imposed by the criminal court under the Code of Criminal Procedure or any other law which restricts the liberty of any person or imposes any liability upon him or his property. If such sentence imposed is under any of the Sections of the Penal Code, for which the Executive Power of the Central Government is specifically provided for under a Parliament enactment or prescribed in the Constitution itself then the 'Appropriate Government' would be the Central Government. To understand this position more explicitly, we can make reference to Article 72(1)(a) of the Constitution which while specifying the power of the Executive head of the country, namely, the President it is specifically provided that the power to grant pardons, etc. or grant of remissions etc. or commutation of sentence of any person convicted of any offence in all cases where the punishment or sentence is by the Court Martial, then it is clear to the effect that under the Constitution itself the Executive Power is specifically conferred on the Centre. While referring to various Constitutional provisions, we have also noted such express Executive Power conferred on the Centre in respect of matters with reference to which the State is also empowered to make laws. If under the provisions of the Code the sentence is imposed, within the territorial jurisdiction of the State concerned, then the 'Appropriate Government' would be the State Government. Therefore, to ascertain who will be Appropriate Government whether the Centre or the State, the first test should be under what provision of the Code of Criminal Procedure the criminal Court passed the order of sentence. If the order of sentence is passed under any other law which restricts the liberty of a person, then which is that law under which the sentence was passed to be ascertained. If the order of sentence imposed any liability upon any person or his property, then again it is to be verified under which provision of the Code of Criminal Procedure or any other law under which it was passed will have to be ascertained. In the ascertainment of the above questions, if it transpires that the implication to the proviso to Article 73(1)(a) gets attracted, namely, specific conferment of Executive Power with the Centre, then the Central Government will get power to act and consequently, the case will be covered by Section 432(7)(a) of the Code and as a sequel to it, Central Government will be the 'Appropriate Government' to pass orders under Sections 432 and 433 of the Code of Criminal Procedure.

153. In order to understand this proposition of law, we can make a reference to the decision relied upon by the learned Solicitor General in *G.V. Ramanaiah* (supra). That was a case where the offence was dealt with and the conviction was imposed under Sections 489A to 489D of the Penal Code. The convicts were sentenced to rigorous imprisonment for a period of ten years. The conviction came to be made by the criminal Court of the State of A.P. The question that came up for consideration was as to who would be the 'Appropriate Government' for grant of remission as was provided under Section 401 of the Code of Criminal Procedure which is the corresponding Section for 432 of Code of Criminal Procedure. In that context, this Court noted that the four sections, viz., Sections 489(A) to 489(D) were added to the Penal Code under the caption "of currency notes and Bank notes" by the Currency Notes Forgery Act, 1899. This Court noted that the bunch of those Sections were the law by itself and that the same would be covered by the expression "currency coinage and legal tender" which are expressly included in Entry 36 of the Union List in the Seventh Schedule of the Constitution. Entry No. 93 of the Union List in the same Schedule conferred on the Parliament the power to legislate with regard to offences against laws with respect to any of the matter in the Union List. It was, therefore, held that the offenses for which those persons were convicted were offences relating to a matter to which the Executive Power of the Union extended and the Appropriate Government competent to remit the sentence would be the Central Government and not the State Government. The said decision throws added light on this aspect.

154. Therefore, whether under any of the provisions of the Criminal Procedure Code or under any Special enactment enacted by the Central Government by virtue of its enabling power to bring forth such enactment even though the State Government is also empowered to make any law on that subject, having regard to the proviso to Article 73(1)(a), if the conviction is for any of the offences against such provision contained in the Code of Criminal Procedure or under such special enactments of the Centre if the Executive Power is specified in the enactment with the Central Government then the Appropriate Government would be the Central Government. Under Section 432(7)(b) barring cases falling under 432(7)(a) in all other cases, where the offender is sentenced or the sentence order is passed within the territorial jurisdiction of the concerned State, then alone the Appropriate Government would be the State.

155. Therefore, keeping the above prescription in mind contained in Section 432(7) and Section 55A of the IPC, it will have to be ascertained

whether in the facts and circumstances of a case, where the Criminal Court imposes the sentence and if such sentence pertains to any Section of the Penal Code or under any other law for which the Executive Power of the center extends, then in those cases the Central Government would be the 'Appropriate Government'. Again in respect of cases, where the sentence is imposed by the Criminal Court under any law which falls within the proviso to Article 73(1)(a) of the Constitution and thereby the Executive Power of the Centre is conferred and gets attracted, then again, the Appropriate Government would be the Centre Government. In all other cases, if the sentence order is passed by the Court within the territorial jurisdiction of the concerned State, the concerned State Government would be the Appropriate Government for exercising its power of remission, suspension as well as commutation as provided under Sections 432 and 433 of the Code of Criminal Procedure. Keeping the above prescription in mind, every case will have to be tested to find out which is the Appropriate Government State or the Centre.

156. However, when it comes to the question of primacy to the Executive Power of the Union to the exclusion of the Executive Power of the State, where the power is co-extensive, in the first instance, it will have to be seen again whether, the sentence ordered by the Criminal Court is found under any law relating to which the Executive Power of the Union extends. In that respect, in our considered view, the first test should be whether the offence for which the sentence was imposed was under a law with respect to which the Executive Power of the Union extends. For instance, if the sentence was imposed under TADA Act, as the said law pertains to the Union Government, the Executive Power of the Union alone will apply to the exclusion of the State Executive Power, in which case, there will be no question of considering the application of the Executive Power of the State.

157. But in cases which are governed by the proviso to Article 73(1)(a) of the Constitution, different situations may arise. For instance, as was dealt with by this Court in *G.V. Ramanaiah* (supra), the offence was dealt with by the criminal Court under Section 489(A) to 489(D) of the Penal Code. While dealing with the said case, this Court noted that though the offences fell under the provisions of the Penal Code, which law was covered by Entry 1 of List III of the Seventh Schedule, namely, the Concurrent List which enabled both the Centre as well as the State Government to pass any law, having regard to the special feature in that case, wherein, currency notes and bank notes to which the offences related, were all

matters falling under Entries 36 and 93 of the Union List of the Seventh Schedule, it was held that the power of remission fell exclusively within the competence of the Union. Therefore, in such cases the Union Government will get exclusive jurisdiction to pass orders under Sections 432 and 433 Code of Criminal Procedure.

158. Secondly, in yet another situation where the law came to be enacted by the Union in exercise of its powers under Articles 248, 249, 250, 251 and 252 of the Constitution, though the legislative power of the States would remain, yet, the combined effect of these Articles read along with Article 73(1)(a) of the Constitution will give primacy to the Union Government in the event of any laws passed by the Centre prescribes the Executive Power to vest with it to the exclusion of the Executive Power of the State then such power will remain with the Centre. In other words, here again, the co-extensive power of the State to enact any law would be present, but having regard to the Constitutional prescription under Articles 248 to 252 of the Constitution by which if specific Executive Power is conferred then the Union Government will get primacy to the exclusion of State.

159. Thirdly, a situation may arise where the authority to bring about a law may be available both to the Union as well as the State, that the law made by the Parliament may invest the Executive Power with the Centre while, the State may also enjoy similar such Executive Power by virtue of a law which State Legislature was also competent to make. In these situations, the ratio laid down by this Court in the decision in *G.V. Ramanaiah* (supra) will have to be applied and ascertain which of the two, namely, either the State or the Union would gain primacy to pass any order of remission, etc. In this context, it will be relevant to note the proviso to Article 162 of the Constitution, which reads as under:

> "Article 162.- Extent of executive power of State
>
> xxx xxx xxx
>
> Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

160. If the proviso applies to a case, the Executive Power of the State should yield to the Executive Power of the Centre expressly conferred by the Constitution or by any law made by Parliament upon the Union or its authorities.

161. Therefore, the answer to the question should be to the effect that where the case falls under the first test noted herein, it will be governed by Section 432(7)(a) of the Code of Criminal Procedure in which event, the power will be exclusive to the Union. In cases which fall under the situation as was dealt with by this Court in *G.V. Ramanaiah* (supra), there again the power would exclusively remain with the Centre. Cases falling under second situation like the one covered by Articles 248 to 252 of the Constitution, wherein, the competence to legislate laws was with the State, and thereby if the Executive Power of the State will be available, having regard to the mandate of these Articles which empowers the Union also to make laws and thereby if the Executive Power of the Union also gets extended, though the power is co-extensive, it must be held that having regard to the special features set out in the Constitution in these situations, the Union will get the primacy to the exclusion of the State.

162. Therefore, we answer the question Nos. 52.3, 52.4 and 52.5 to the above extent leaving it open for the parties concerned, namely, the Centre or the State to apply the test and find out who will be the 'Appropriate Government' for exercising the power under Sections 432 and 433 of the Criminal Procedure Code.

163. Next, we take up the question:

> "Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the Section, if yes, whether the procedure prescribed in sub-section (2) of the same section is mandatory or not?"

164. Section 432(1) and (2) reads as under:

> "432. Power to suspend or remit sentences.-(1) 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.
>
> (2) Whenever an application is made to the Appropriate Government for the suspension or remission of a sentence, the Appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists."

165. Sub-section (1) of Section 432 empowers the Appropriate Government either to suspend the execution of a sentence or remit the whole or any part of the punishment to which he has been sentenced. While passing such orders, it can impose any conditions or without any condition. In the event of imposing any condition such condition must be acceptable to the person convicted. Such order can be passed at any time.

166. Sub-section (2) of Section 432 pertains to the opinion to be secured from the presiding Judge of the Court who convicted the person and imposed the sentence or the Court which ultimately confirmed such conviction. Whenever any application is made to the Appropriate Government for suspension or remission of sentence, such opinion to be rendered must say whether the prayer made in the application should be granted or refused. It should also contain reasons along with the opinion, certified copy of the record of the trial or such other record which exists should also be forwarded.

167. Before making an analysis on the question referred for our consideration, certain observations of the Constitution Bench of this Court in *Maru Ram* (supra) which was stated in the context of the power exercisable under Articles 72 and 161 of the Constitution needs to be noted. Such observations relating to the Constitutional power of the President and Governor, of course with the aid and advice of the Council of Ministers, is on a higher plane and are stated to be 'untouchable' and 'unapproachable'. It was also held that the Constitutional power, as compared to the power exercisable under Sections 432 and 433 looks similar but not the same, in the sense that the statutory power under

Sections 432 and 433 is different in source, substance and strength and it is not as that of the Constitutional power. Such statement of law was made by the Constitution Bench to hold that notwithstanding Sections 433A which provides for minimum of 14 years incarnation for a lifer to get the benefit of remission, etc., the President and the Governor can continue to exercise the power of Constitution and release without the requirement of the minimum period of imprisonment. But the significant aspect of the ruling is a word of caution even to such exercise of higher Constitutional power with high amount of circumspection and is always susceptible to be interfered with by judicial forum in the event of any such exercise being demonstrated to be fraught with arbitrariness or mala fide and should act in trust to our Great Master, the Rule of Law. In fact the Bench quoted certain examples like the Chief Minister of a State releasing everyone in the prison in his State on his birthday or because a son was born to him and went to the extent of stating that it would be an outrage on the Constitution to let such madness to survive.

168. We must state that such observations and legal principles stated in the context of Articles 72 and 161 of the Constitution will have greater force and application when we examine the scope and ambit of the power exercisable by the Appropriate Government under Section 432(1) and (2) of Code of Criminal Procedure.

169. Keeping the above principles in mind, when we analyze Section 432(1), it must be held that the power to suspend or remit any sentence will have to be considered and ordered with much more care and caution, in particular the interest of the public at large. In this background, when we analyze Section 432(1), we find that it only refers to the nature of power available to the Appropriate Government as regards the suspension of sentence or remission to be granted at any length. Extent of power is one thing and the procedure to be followed for the exercise of the power is different thing. There is no indication in Section 432(1) that such power can be exercised based on any application. What is not prescribed in the statute cannot be imagined or inferred. Therefore, when there is no reference to any application being made by the offender, cannot be taken to mean that such power can be exercised by the authority concerned on its own. More so, when a detailed procedure to be followed is clearly set out in Section 432(2). It is not as if by exercising such power under Section 432(1), the Appropriate Government will be involving itself in any great welfare measures to the public or the society at large. It can never be held that such power being exercised suo motu any great development

act would be the result. After all such exercise of power of suspension or remission is only going to grant some relief to the offender who has been found to have committed either a heinous crime or at least a crime affecting the society at large. Therefore, when in the course of exercise of larger Constitutional powers of similar kind under Articles 72 and 161 of the Constitution it has been opined by this Court to be exercised with great care and caution, the one exercisable under a statute, namely, under Section 432(1) which is lesser in degree should necessarily be held to be exercisable in tune with the adjunct provision contained in the same section. Viewed in that respect, we find that the procedure to be followed whenever any application for remission is moved, the safeguard provided under Section 432(2) should be the sine-quo-non for the ultimate power to be exercised under Section 432(1).

170. By following the said procedure prescribed under Section 432(2), the action of the Appropriate Government is bound to survive and stand the scrutiny of all concerned including judicial forum. It must be remembered, barring minor offences, in cases involving heinous crimes like, murder, kidnapping, rape robbery, dacoity, etc., and such other offences of such magnitude, the verdict of the trial Court is invariably dealt with and considered by the High Court and in many cases by the Supreme Court. Thus, having regard to the nature of opinion to be rendered by the presiding officer of the concerned Court will throw much light on the nature of crime committed, the record of the convict himself, his background and other relevant factors which will enable the Appropriate Government to take the right decision as to whether or not suspension or remission of sentence should be granted. It must also be borne in mind that while for the exercise of the Constitutional power under Articles 72 and 161, the Executive Head will have the benefit of act and advice of the Council of Ministers, for the exercise of power under Section 432(1), the Appropriate Government will get the valuable opinion of the judicial forum, which will definitely throw much light on the issue relating to grant of suspension or remission.

171. Therefore, it can safely be held that the exercise of power under Section 432(1) should always be based on an application of the person concerned as provided under Section 432(2) and after duly following the procedure prescribed under Section 432(2). We, therefore, fully approve the declaration of law made by this Court in *Sangeet* (supra) in paragraph 61 that the power of Appropriate Government under Section 432(1) Code of Criminal Procedure cannot be suo motu for the simple reason that this Section is only an enabling provision. We also hold that such a

procedure to be followed under Section 432(2) is mandatory. The manner in which the opinion is to be rendered by the Presiding Officer can always be regulated and settled by the concerned High Court and the Supreme Court by stipulating the required procedure to be followed as and when any such application is forwarded by the Appropriate Government. We, therefore, answer the said question to the effect that the suo motu power of remission cannot be exercised under Section 432(1), that it can only be initiated based on an application of the persons convicted as provided under Section 432(2) and that ultimate order of suspension or remission should be guided by the opinion to be rendered by the Presiding Officer of the concerned Court.

172. We are now left with the question namely:

> "Whether the term "'Consultation'" stipulated in Section 435(1) of the Code implies "'Concurrence'"?"

173. It is relevant to extract Section 435(1) of Code of Criminal Procedure, which reads as under:

> "Section 435. State Government to act after consultation with Central Government in certain cases.-(1) the powers conferred by sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence is for an offence.
>
> Which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, or
>
> Which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, of
>
> Which was committed by a person in the service of the Central Government, while acting or purporting to act in the discharge of his official duty, shall not be exercised by the State Government except after consultation with the Central Government."

174. Answer to this question depends wholly on the interpretation of Section 435 of Code of Criminal Procedure. After referring to the said Section, learned Solicitor General referred to the convictions imposed on the accused/respondents in the *Late Rajiv Gandhi Murder case*. Learned Solicitor General pointed out that though 26 accused were convicted by the Special Court, this Court confirmed the conviction only as against the 7 respondents in that Writ Petition and the rest of the accused were all acquitted, namely, 19 of them. He also pointed out that the conviction of the Special Court under TADA Act was set aside by this Court. While the conviction of the respondents under Sections 212 and 216 of I.P.C, Section 14 of Foreigners Act, Section 25(1-B) of Arms Act, Section 5 of Explosive Substances Act, Section 12 of the Passport Act and Section 6(1-A) of The Wireless Telegraph Act were all confirmed by this Court. That apart conviction under Section 120-B I.P.C. read with Section 302 I.P.C. against all the seven respondents was also confirmed by this Court. In the ultimate conclusion, this Court confirmed the death sentence against A-1 Nalini, A-2 Santhan, A-3 Murugan and A-18 Arivu and the sentence of Death against A-9 Robert Payas, A-10 Jayakumar and A-16 Ravichandran was altered as imprisonment for life. Subsequently in the judgment in *V. Sriharan* (supra) even the death sentence against A-2 Santhan, A-3 Murugan and A-18 Arivu was also commuted into imprisonment for life meaning thereby end of one's life, subject to remission granted by the Appropriate Government under Section 432 of the Code of Criminal Procedure, 1973, which in turn, subject to the procedural checks mentioned in the said provision and further substantive checks in Section 433 A of the Code.

175. As far as the remission provided under Section 432 is concerned, the same will consist of the remission of the sentence of a prisoner by virtue of good behavior, etc., under the Jail Manual, Prisoners' Act and Rules and other Regulations providing for earning of such remission and remission of the sentence itself by imposing conditions. Keeping the above factual matrix in the *Rajiv Gandhi Murder case*, vis-à-vis the 7 respondents therein as a sample situation, we proceed to analyze these questions arising under Section 435 Code of Criminal Procedure Learned Solicitor General in his submissions contended that since the punishments imposed on the respondents under the various Central Acts such as Foreigners Act, Passport Act, etc., have all been completed by the respondents, the requirement of Section 435(2) does not arise and, therefore, there will be no impediment for the State Government to exercise its power under Section 435(2) of the Code of Criminal Procedure According to the learned Solicitor General, since the period of imprisonment under various Central

Acts has already been suffered by the respondents, the requirement of passing order of suspension, remission or commutation by the Central Government does not arise and it is for the State Government to pass order of suspension, remission or commutation under Section 435(2) Code of Criminal Procedure The learned Solicitor General, however, contended that by virtue of the fact that whole investigation right from the beginning was entrusted with the C.B.I. under the Delhi Police Establishment Act and the ultimate conviction of the respondents under the provisions of Indian Penal Code came to be made by the Special Court and commutation of the same with certain modifications as regards the sentence part alone by this Court, by virtue of the proviso to Article 73(1)(a) of the Constitution, the Executive Authority of the Union gets the power to pass order either under Article 72 of the Constitution or under Sections 432 to 435 of Code of Criminal Procedure and to that extent the scope and ambit of the power of the State Government gets restricted and, therefore, in the event of the State Government, in its right as the Appropriate Government seeks to exercise its power under Section 435(1) Code of Criminal Procedure such exercise of power in the present context can be exercised only with the 'Concurrence' of the Central Government and the expression 'Consultation' made in Section 435(1) should be held as such. In support of his submissions the learned Solicitor General relied upon *Lalu Prasad Yadav* v. *State of Bihar* - (2010) 5 SCC 1,*Supreme Court Advocates on Record Association* v. *Union of India* - (1993) 4 SCC 441, *State of Gujarat* v. *Justice R.A. Mehta (Retired)* - (2013) 3 SCC 1 and *N. Kannadasan* v. *Ajoy Khose* - (2009) 7 SCC 1.

176. As against the above submissions, Mr. Dwivedi, learned Senior Counsel for the State of Tamil Nadu prefaced his submissions by contending that while proposing to grant remission to the respondents, the State Government did not undermine the nature of crime committed and the impact of the remission that may be caused on the society, as well as, the concern of the State Government in this case. The learned Senior Counsel also submitted that the State Government is not going to act in haste and is very much alive to the fact that the person murdered was a former Prime Minister of this country and the State cannot take things lightly while considering the remission to be granted to the Respondents. The learned Senior Counsel, therefore, contended that in the process of 'Consultation', the views of the Central Government will be duly considered before passing final orders on the proposed remission. According to learned Senior Counsel under Section 435(1), the act of 'Consultation' prescribed is a rider to the exercise of Executive Power

of the State to be exercised under Sections 432 and 433 in respect of cases falling under Sections 435(1)(a) to (c). By referring to Sections 435(2) the learned Senior Counsel contended that in the said sub-section cautiously the Parliament has used the expression 'Concurrence' while in Section 435(1) the expression used is 'Consultation'. It is, therefore, pointed out that the distinctive idea of 'Consultation' and 'Concurrence' has been clearly disclosed. The learned Senior Counsel then pointed out that while acting under Section 435(1), what is relevant is the Sentence and not the Conviction, which can be erased only by grant of pardon and grant of remission will have no implication on the conviction. By referring to Section 435(1)(b) & (c), the learned Senior Counsel pointed out that with reference to those offences where the investigation can be carried out entirely by the State Government and the offence would only relate to the property of the Central Government and the services of person concerned in the services of the Centre what is contemplated is only 'Consultation'. It was contended that when the 'Consultation' process is invoked by the State Government, Union of India can suggest whatever safeguards to be made to ensure that even while granting remission, necessary safeguard is imposed. The learned Senior Counsel also submitted that paramount consideration should be the interest of the Nation which is the basic feature of the Constitution and, therefore, 'Consultation' means effective and meaningful 'Consultation' and that the State cannot act in an irresponsible manner keeping the Nation at peril. The learned Senior Counsel contended that though the CBI conducted the investigation and all the materials were gathered by the CBI, after the conviction, every material is open and, therefore, it cannot be said that the State Government had no material with it. The learned Senior Counsel also pointed out that the jail representation is with the State Government and it will be open to the State to consider the recorded materials by the Court and invoke its power under Sections 432 and 433 of Code of Criminal Procedure. The learned Senior Counsel further contended that in the process of 'Consultation', the Union Government will be able to consider any other material within its knowledge and make an effective report. If such valuable materials reflected in the 'Consultation' process are ignored by the State, then the Court's power of Review can always be invoked. The learned Senior Counsel relied upon the decisions reported in *State of U.P.* v. *Johri Mal* - (2004) 4 SCC 714, *Justice Chandrashekaraiah (Retired)* v. *Janekere C. Krishna* - (2013) 3 SCC 117 and *S.R. Bommai* v. *Union of India* - (1994) 3 SCC 1 in support of his submissions.

177. In order to appreciate the respective submissions, it will be necessary to refer to the relevant Government orders passed by the State of Tamil

Nadu and the consequential Notification issued by the Government of India after the gruesome murder of Late Rajiv Gandhi, the former Prime Minister of India on 21.05.1991 at 10.19 p.m. at Sriperumbudur in Tamil Nadu. It will be worthwhile to trace back the manner by which the accused targeted their killing as has been succinctly narrated in the judgment reported in *State through Superintendent of Police, CBI/SIT* v. *Nalini* - (1999) 5 SCC 253. Paragraphs 23 to 29 are relevant which read as under:

> "23. On 21-5-1991, Haribabu bought a garland made of sandalwood presumably for using it as a camouflage (for murdering Rajiv Gandhi). He also secured a camera. Nalini (A-1) wangled leave from her immediate boss (she was working in a company as PA to the Managing Director) under the pretext that she wanted to go to Kanchipuram for buying a saree. Instead she went to her mother's place. Padma (A-21) is her mother. Murugan (A-3) was waiting for her and on his instruction Nalini rushed to her house at Villiwakkam (Madras). Sivarasan reached the house of Jayakumar (A-10) and he got armed himself with a pistol and then he proceeded to the house of Vijayan (A-12).
>
> 24. Sivarasan directed Suba and Dhanu to get themselves ready for the final event. Suba and Dhanu entered into an inner room. Dhanu was fitted with a bomb on her person together with a battery and switch. The loosely stitched salwar-kameez which was purchased earlier was worn by Dhanu and it helped her to conceal the bomb and the other accessories thereto. Sivarasan asked Vijayan (A-12) to fetch an auto-rickshaw.
>
> 25. The auto-rickshaw which Vijayan (A-12) brought was not taken close to his house as Sivarasan had cautioned him in advance. He took Suba and Dhanu in the auto-rickshaw and dropped them at the house of Nalini (A-1). Suba expressed gratitude of herself and her colleagues to Nalini (A-1) for the wholehearted participation made by her in the mission they had undertaken. She then told

Nalini that Dhanu was going to create history by murdering Rajiv Gandhi. The three women went with Sivarasan to a nearby temple where Dhanu offered her last prayers. They then went to "Parry's Corner" (which is a starting place of many bus services at Madras). Haribabu was waiting there with the camera and garland.

26. All the 5 proceeded to Sriperumbudur by bus. After reaching there they waited for the arrival of Rajiv Gandhi. Sivarasan instructed Nalini (A-1) to provide necessary cover to Suba and Dhanu so that their identity as Sri Lankan girls would not be disclosed due to linguistic accent. Sivarasan further instructed her to be with Suba and to escort her after the assassination to the spot where Indira Gandhi's statue is situate and to wait there for 10 minutes for Sivarasan to reach.

27. Nalini (A-1), Suba and Dhanu first sat in the enclosure earmarked for ladies at the meeting place at Sriperumbudur. As the time of arrival of Rajiv Gandhi was nearing Sivarasan took Dhanu alone from that place. He collected the garland from Suba and escorted Dhanu to go near the rostrum. Dhanu could reach near the red carpet where a little girl (Kokila) and her mother (Latha Kannan) were waiting to present a poem written by Kokila on Rajiv Gandhi.

28. When Rajiv Gandhi arrived at the meeting place Nalini (A-1) and Suba got out of the enclosure and moved away. Rajiv Gandhi went near the little girl Kokila. He would have either received the poem or was about to receive the same, and at that moment the hideous battery switch was clawed by the assassin herself. Suddenly the pawn bomb got herself blown up as the incendiary device exploded with a deadening sound. All human lives within a certain radius were smashed to shreds. The head of a female, without its torso, was seen flinging up in the air and rolling down. In a twinkle, 18 human lives were turned into fragments of flesh among which

> was included the former Prime Minister of India Rajiv Gandhi and his personal security men, besides Dhanu and Haribabu. Many others who sustained injuries in the explosion, however, survived.
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> 29. Thus the conspirators perpetrated their prime target achievement at 10.19 p.m. on 21-5-1991 at Sriperumbudur in Tamil Nadu.

178. Closely followed, after the above occurrence, the Principal Secretary to the Government of Tamil Nadu addressed a D.O. letter dated 22.05.1991 to the Joint Secretary to the Government of India, conveying the order of the Government of Tamil Nadu expressing its consent under Section 6 of the Delhi Special Police Establishment Act 1946 to the extension of powers and jurisdiction of members of the Delhi Special Police Establishment to investigate the case in Crime No. 329/91 under Sections 302, 307 and 326 IPC and under Section 3 & 5 of The Explosive Substances Act, registered in Sriperumbudur police station, Changai Anna (West) District, Tamil Nadu, relating to the death of Late Rajiv Gandhi, former Prime Minister of India on 21.05.1991. The Notification of the Government of Tamil Nadu under Section 6 of the 1946 Act mentioned the State of Tamil Nadu's consent to the extension of powers to the members of Delhi Special Police Establishment in the WHOLE of the State of Tamil Nadu for the investigation of the crime in Crime No. 329/91. In turn, the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training passed its Notification dated 23.05.1991 extending power and jurisdiction of the members of the Delhi Special Police Establishment to the WHOLE of the State of Tamil Nadu for investigation in respect of crime No. 329/91. That is how the Central Government came into the picture in the investigation of the crime, the conviction by the Special Court of 26 persons and the ultimate confirmation insofar as it was against the present Respondents alone setting aside the conviction as against the 19 accused.

179. The above noted facts disclose that the case is covered by Section 435(1)(a) of Code of Criminal Procedure. Therefore, as per Section 435(1) the power of State Government to remit or commute the sentence under Sections 432 and 433 Code of Criminal Procedure should not be exercised except after due 'Consultation' with the Central Government. Since the expression 'shall' is used in the said sub-section, it is mandatory for the State Government to resort to the 'Consultation' process without

which, the power cannot be exercised. As rightly submitted by the learned Senior Counsel for the State of Tamil Nadu, such 'Consultation' cannot be an empty formality and it should be an effective one. While on the one hand the power to grant remission under Section 432 and commute the sentence under Section 433 conferred on the Appropriate Government is available, as we have noted, the exercise of such power insofar as it related to remission or suspension under Section 432 is not suo motu, but can be made only based on an application and also circumscribed by the other provisions, namely, Section 432(2), whereby the opinion of the Presiding Judge who imposed or confirmed the conviction should be given due consideration. Further, we have also explained how to ascertain as to who will be the Appropriate Government as has been stipulated under Section 432(7) of Code of Criminal Procedure which applied to the exercise of power both under Section 432 and as well as 433 Code of Criminal Procedure In this context, we have also analyzed as to how far the proviso to Article 73(1)(a) of the Constitution will ensure greater Executive Power on the Centre over the State wherever the State Legislature has also got power to make laws. Having analyzed the implication of the said proviso, vis-à-vis, Articles 161, 162 and Entry 1 and 2 of List III of the Seventh Schedule, by virtue of which, the Central Government gets primacy as an Appropriate Government in matter of this kind. Having regard to our above reasoning on the interpretation of the Constitutional provisions read along with the provisions of Code of Criminal Procedure, our conclusion as to who will be the Appropriate Government has to be ascertained in every such case. In the event of the Central Government becoming the Appropriate Government by applying the tests which we have laid based on Section 432(7) read along with the proviso to Article 73(1)(a) of the Constitution and the relevant entries of List III of the Seventh Schedule of the Constitution, then in those cases there would be no scope for the State Government to exercise its power at all under Section 432 Code of Criminal Procedure In the event of the State Government getting jurisdiction as the Appropriate Government and after complying with the requirement, namely, any application for remission being made by the person convicted and after obtaining the report of the concerned Presiding Officer as required under Section 432(2), if Section 435(1)(a) or (b) or (c) is attracted, then the question for consideration would be whether the expression "Consultation" is mere 'Consultation' or to be read as "Concurrence" of the Central Government.

180. In this context, it will be advantageous to refer to the Nine-Judge Constitution Bench decision of this Court reported in *Supreme Court*

Advocates on Record Association (supra). In the majority judgment authored by Justice J.S. Verma, the learned Judge while examining the question referred to the Bench on the interpretation of Articles 124(2) and 217(1) of the Constitution as it stood which related to appointment of Judges to the Supreme Court and High Courts quoted the precautionary statement made by Dr. Rajendra Prasad in his speech as President of the Constituent Assembly while moving for adoption of the Constitution of India. A portion of the said quote relevant for our purpose reads as under:

> "429…….There is a fissiparous tendency arising out of various elements in our life. We have communal differences, caste differences, language differences, provincial differences and so forth. It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups and areas and who will rise over the prejudices which are born of these differences. We can only hope that the country will throw up such men in abundance. … In India today I feel that the work that confronts us is even more difficult than the work which we had when we were engaged in the struggle. We did not have then any conflicting claims to reconcile, no loaves and fishes to distribute, no power to share. We have all these now, and the temptations are really great. Would to God that we shall have the wisdom and the strength to rise above them and to serve the country which we have succeeded in liberating".

181. Again in paragraph 432, the principle is stated as to how construction of a Constitutional Provision is to be analyzed which reads as under:

> "432. …….A fortiori any construction of the Constitutional provisions which conflicts with this Constitutional purpose or negates the avowed object has to be eschewed, being opposed to the true meaning and spirit of the Constitution and, therefore, an alien concept." (Emphasis added)

182. By thus laying down the broad principles to be applied, considered the construction of the expression "Consultation" to be made with the Chief Justice of India for the purpose of composition of higher judiciary as

used in Article 124(2) and 217(1) of the Constitution and held as under in paragraph 433:

> "433. It is with this perception that the nature of primacy, if any, of the Chief Justice of India, in the present context, has to be examined in the Constitutional scheme. The hue of the word "Consultation", when the 'Consultation' is with the Chief Justice of India as the head of the Indian Judiciary, for the purpose of composition of higher judiciary, has to be distinguished from the colour the same word "Consultation" may take in the context of the executive associated in that process to assist in the selection of the best available material."

183. Thereafter tracing the relevant provisions in the pre-Constitutional era, namely, the Government of India Act, 1919, and the Government of India Act, 1935, wherein the appointment of Judges of the Federal Court and the High Courts were in the absolute discretion of the Crown or in other words, of the Executive with no specific provision for 'Consultation' with the Chief Justice in the appointment process, further noted, the purpose for which the obligation of "Consultation" with the Chief Justice of India and the Chief Justice of the High Court in Articles 124(2) and 217(1) came to be incorporated was highlighted. Thereafter, the Bench expressed its reasoning as to why in the said context, the expression "Consultation" was used instead of "Concurrence". Paragraph 450 of the said judgment gives enough guidance to anyone dealing with such issue which reads as under:

> "450. It is obvious, that the provision for 'Consultation' with the Chief Justice of India and, in the case of the High Courts, with the Chief Justice of the High Court, was introduced because of the realisation that the Chief Justice is best equipped to know and assess the worth of the candidate, and his suitability for appointment as a superior Judge; and it was also necessary to eliminate political influence even at the stage of the initial appointment of a Judge, since the provisions for securing his independence after appointment were alone not sufficient for an independent judiciary. At the same time, the phraseology used indicated that giving absolute discretion or the power of veto to the

> Chief Justice of India as an individual in the matter of appointments was not considered desirable, so that there should remain some power with the executive to be exercised as a check, whenever necessary. The indication is, that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight; the selection should be made as a result of a participatory consultative process in which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the Constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. It was for this reason that the word "Consultation" instead of "Concurrence" was used, but that was done merely to indicate that absolute discretion was not given to anyone, not even to the Chief Justice of India as an individual, much less to the executive, which earlier had absolute discretion under the Government of India Acts." (Emphasis added)

184. We must state that in the first place, whatever stated by the said larger Constitution Bench while interpreting an expression in a Constitutional provision, having regard to its general application can be equally applied while interpreting a similar expression in any other statute. We find that the basic principles set out in the above quoted paragraphs of the said decision can be usefully referred to, relied upon and used as a test while examining a similar expression used, namely, in Section 435(1) of Code of Criminal Procedure. While quoting the statement of Dr. Rajendra Prasad, what was highlighted was the various differences that exist in our country including 'provincial differences', the necessity to ensure that men will not sacrifice the interests of the country at large for the sake of smaller groups and areas, the existence of conflicting claims to reconcile after our liberation, and the determination to save the country rather than yielding to the pressure of smaller groups. It was also stated in the context of Articles 124(2) and 217(1) as to how the independence of judiciary to be the paramount criteria and any construction that conflict with such said avowed object of the Constitution to be eschewed. Thereafter, while analyzing the primacy of the Chief Justice of India for the purpose of

appointment of Judges, analyzed as to how our Constitutional functionary qua the others who together participate in the performance of the function assumes significance only when they cannot reach an agreed conclusion. It was again stated as to see who would be best equipped and likely to be more correct for achieving the purpose and perform the task satisfactorily. It was stated that primacy should be in one who qualifies to be treated as the 'expert' in the field and comparatively greater weight to his opinion may then to be attached. We find that the above tests indicated in the larger Constitution Bench judgment can be applied in a situation like the one which we are facing at the present juncture.

185. Again in a recent decision of this Court reported in *R.A. Mehta (Retired)* (supra) to which one of us was a party (Fakkir Mohamed Ibrahim Kalifulla, J.) it was held as under in paragraph 32:

> "32. Thus, in view of the above, the meaning of "Consultation" varies from case to case, depending upon its fact situation and the context of the statute as well as the object it seeks to achieve. Thus, no straitjacket formula can be laid down in this regard. Ordinarily, 'Consultation' means a free and fair discussion on a particular subject, revealing all material that the parties possess in relation to each other and then arriving at a decision. However, in a situation where one of the consultees has primacy of opinion under the statute, either specifically contained in a statutory provision, or by way of implication, 'Consultation' may mean 'Concurrence'. The court must examine the fact situation in a given case to determine whether the process of 'Consultation' as required under the particular situation did in fact stand complete."
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> (Emphasis added)

186. The principles laid down in the larger Constitution Bench decision reported in *Supreme Court Advocates on Record Association* (supra) was also followed in *N. Kannadasan* (supra).

187. While noting the above principles laid down in the larger Constitution Bench decision and the subsequent decisions on the interpretation of the expression, we must also duly refer to the reliance placed upon the decision in *S.R. Bommai* (supra), *Johri Mal* (supra) and *Justice Chandrashekaraiah*

(Retired) (supra). The judgment in *S.R. Bommai* (supra) is again a larger Constitution Bench of Nine-Judges known as *Bommai case* (supra), in which our attention was drawn to paragraphs 274 to 276, wherein, Justice B.P. Jeevan Reddy pointed out that 'federation' or 'federal form of Government' has no fixed meaning, that it only broadly indicates a division of powers between the Centre and the States, and that no two federal Constitutions are alike. It was stated that, therefore, it will be futile to try to ascertain and fit our Constitution into any particular mould. It was also stated that in the light of our historical process and the Constitutional evolution, ours is not a case of independent States coming together to form a federation as in the case of U.S.A. The learned judge also explained that the founding fathers of our Constitution wished to establish a strong Centre and that in the light of the past history of this sub-continent such a decision was inevitably taken perforce. It was also stated that the establishment of a strong Centre was a necessity. It will be appropriate to extract paragraph 275 to appreciate the analysis of the scheme of the Constitution made by the learned Judge which reads as under:

> "275. A review of the provisions of the Constitution shows unmistakably that while creating a federation, the Founding Fathers wished to establish a strong Centre. In the light of the past history of this sub-continent, this was probably a natural and necessary decision. In a land as varied as India is, a strong Centre is perhaps a necessity. This bias towards Centre is reflected in the distribution of legislative heads between the Centre and States. All the more important heads of legislation are placed in List I. Even among the legislative heads mentioned in List II, several of them, e.g., Entries 2, 13, 17, 23, 24, 26, 27, 32, 33, 50, 57 and 63 are either limited by or made subject to certain entries in List I to some or the other extent. Even in the Concurrent List (List III), the parliamentary enactment is given the primacy, irrespective of the fact whether such enactment is earlier or later in point of time to a State enactment on the same subject-matter. Residuary powers are with the Centre. By the 42nd Amendment, quite a few of the entries in List II were omitted and/ or transferred to other lists. Above all, Article 3 empowers Parliament to form new States out of

existing States either by merger or division as also to increase, diminish or alter the boundaries of the States. In the process, existing States may disappear and new ones may come into existence. As a result of the Reorganisation of States Act, 1956, fourteen States and six Union Territories came into existence in the place of twenty-seven States and one area. Even the names of the States can be changed by Parliament unilaterally. The only requirement, in all this process, being the one prescribed in the proviso to Article 3, viz., ascertainment of the views of the legislatures of the affected States. There is single citizenship, unlike USA. The judicial organ, one of the three organs of the State, is one and single for the entire country - again unlike USA, where you have the federal judiciary and State judiciary separately. Articles 249 to 252 further demonstrate the primacy of Parliament. If the Rajya Sabha passes a resolution by 2/3rd majority that in the national interest, Parliament should make laws with respect to any matter in List II, Parliament can do so (Article 249), no doubt, for a limited period. During the operation of a Proclamation of emergency, Parliament can make laws with respect to any matter in List II (Article 250). Similarly, Parliament has power to make laws for giving effect to International Agreements (Article 253). So far as the finances are concerned, the States again appear to have been placed in a less favourable position, an aspect which has attracted a good amount of criticism at the hands of the States and the proponents of the States' autonomy. Several taxes are collected by the Centre and made over, either partly or fully, to the States. Suffice it to say that Centre has been made far more powerful vis-a-vis the States. Correspondingly, several obligations too are placed upon the Centre including the one in Article 355 - the duty to protect every State against external aggression and internal disturbance. Indeed, this very article confers greater power upon the Centre in the name of casting an obligation upon it, viz., "to ensure that the Government of every State is

> carried on in accordance with the provisions of this Constitution". It is both a responsibility and a power."

188. After making reference to the division of powers set out in the various Articles as well as the Lists I to III of Seventh Schedule and its purported insertion in the Constitutional provisions, highlighted the need for empowering the Centre on the higher side as compared with the States while also referring to the corresponding obligations of the Centre. While referring to Article 355 of the Constitution in that context, it was said "the duty to protect every State against external aggression and internal disturbance. Indeed this very Article confers greater power upon the Centre in the name of casting an obligation upon it (viz.) to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution". It is both a responsibility and a power. Simultaneously, in paragraph 276, the learned Judge also noted that while under the Constitution, greater power is conferred upon the Centre viz-a-viz the States, it does not mean that States are mere appendages of the Centre and that within the sphere allotted to them, States are supreme. It was, therefore, said that Courts should not adopt and approach, an interpretation which has the effect of or tend to have the effect of whittling down the powers reserved to the States. Ultimately, the learned Judge noted a word of caution to emphasize that Courts should be careful not to upset the delicately crafted Constitutional scheme by a process of interpretation.

189. In *Johri Mal* (supra), this Court considered the effect of the expression "Consultation" contained in The Legal Remembrancer's Manual, in the State of Uttar Pradesh which provides in Clause 7.03 the requirement of 'Consultation' by the District Officer with the District Judge before considering anyone for being appointed as District Government council. In the said judgment it was noticed that in Uttar Pradesh, the State government by way of amendment omitted sub-sections (1), (4) (5) and (6) of Section 24 which provided for "Consultation" with the High Court for appointment of Public Prosecutor for the High Court and with District Judge for appointment of such posts at the District level. Therefore, the only proviso akin to such prescription was made only in The Legal Remembrancer's Manual which is a compilation of executive order and not a 'Law' within the meaning of Article 13 of the Constitution. In the light of the said situation, this Court while referring to *Supreme Court Advocates on Record Association* (supra) made a distinction as to how the appointment of District Government counsel cannot be equated with

the appointment of High Court Judges and Supreme Court Judges in whose appointment this Court held that the expression "Consultation" would amount to "Concurrence". It was, however, held that even in the case of appointment of District Government counsel, the 'Consultation' by the District Magistrate with the District Judge should be an effective one. Similarly, in the judgment reported in *Justice Chandrasekaraiah (Retd.)* (supra) this Court considered the expression "Consultation" occurring in Section 3(2)(a)(b) of the Karnataka Lok Ayukta Act, 1984 relating to appointment of Lokayukta and Upa-Lokayukta, took the view that while 'Consultation' by the Chief Minister with the Chief Justice as one of the consultees is mandatory, since the appointment to those positions is not a judicial or Constitutional authority but is a sui generis quasi judicial authority, 'Consultation' will not amount to "Concurrence". Therefore, the said judgment is also clearly distinguishable.

190. Having considered the submissions of the respective counsel for the Union of India, State of Tamil Nadu and the other counsel and also the larger Constitution Bench decisions and the subsequent decisions of this Court as well as the specific prescription contained in Section 435(1)(a) read along with Articles 72, 73(i)(a), 161 and 162 of the Constitution, the following principles can be derived to note how and in what manner the expression "Consultation" occurring in Section 435(1)(a) can be construed:-

Section 435(1) mandatorily requires the State Government, if it is the 'Appropriate Government' to consult the Central Government if the consideration of grant of remission or commutation under Section 432 or 433 in a case which falls within any of the three sub-clauses (a)(b)(c) of Section 435(1).

191. The expression "Consultation" may mean differently in different situation depending on the nature and purpose of the statute.

192. When it came to the question of appointment of judges to the High Court and the Supreme Court, since it pertains to high Constitutional office, the status of Chief Justice of India assumed greater significance and primacy and, therefore, in that context, the expression "Consultation" would only mean "Concurrence".

193. While considering the appointment to the post of Chairman of State Consumer Forum, since the said post comes within four corners of judicial post having regard to the nature of functions to be performed,

'Consultation' with the Chief Justice of the High Court would give primacy to the Chief Justice.

194. The founding fathers of our Nation wished to establish a strong Centre taking into account the past history of this subcontinent which was under the grip of very many foreign forces by taking advantage of the communal differences, caste differences, language differences, provincial differences and so on which necessitated men of strong character, men of vision, men who will not sacrifice the interest of the Nation for the sake of smaller groups and areas and who will rise above the prejudices which are born of these differences, as visualized by the first President of this Nation Dr. Rajendra Prasad.

195. Again in the golden words of that great personality, in the pre-independence era while we were engaged in the struggle we did not have any conflicting claims to reconcile, no loaves and fishes to distribute, no power to share and we have all these now and the temptations are really great. Therefore, we should rise above all these, have the wisdom and strength and save the country which we got liberated after a great struggle.

196. The ratio and principles laid down by this Court as regards the interpretation and construction of Constitutional provisions which conflicts with the Constitutional goal to be achieved should be eschewed and interest of the Nation in such situation should be the paramount consideration. Such principles laid down in the said context should equally apply even while interpreting a statutory provision having application at the National, level in order to achieve the avowed object of National integration and larger public interest.

197. The nature of 'Consultation' contemplated in Section 435(1)(a) has to be examined in the touchstone of the above principles laid down by the larger Bench judgment in *Supreme Court Advocates on Record Association* (supra). In this context, the specific reference made therein to the statement of Dr. Rajendra Prasad, namely, where various differences that exist, in our country including provincial differences, the necessity to ensure that men will not sacrifice the interest of the country at large, for the sake of smaller groups and areas assumes significance.

198. To ascertain, in this context, when more than one authority or functionary participate together in the performance of a function, who assumes significance, keeping in mind the various above principles and objectives to be achieved, who would be best equipped and likely to be

more correct for achieving the purpose and perform the task satisfactorily in safeguarding the interest of the entire community of this Great Nation. Accordingly, primacy in one who qualifies to be treated as in know of things far better than any other, then comparatively greater weight to their opinion and decision to be attached.

199. To be alive to the real nature of Federal set up, we have in our country, which is not comparable with any other country and having extraordinarily different features in different States, say different religions, different castes, different languages, different cultures, vast difference between the poor and the rich, not a case of independent States coming together to form a Federation as in the case of United States of America. Therefore, the absolute necessity to establish a strong Centre to ensure that when it comes to the question of Unity of the Nation either from internal disturbance or any external aggression, the interest of the Nation is protected from any evil forces. The establishment of a strong Centre was therefore a necessity as felt by our founding fathers of the Nation. In this context Article 355 of the Constitution requires to be noted under which, the Centre is entrusted with the duty to protect every State against external aggression and internal disturbance and also to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution. However, within the spheres allotted to the respective States, they are supreme.

200. In the light of the above general principles, while interpreting Section 435(1)(a) which mandates that any State Government while acting as the 'Appropriate Government' for exercising its powers under Sections 432 and 433 of Code of Criminal Procedure and consider for remission or commutation to necessarily consult the Central Government. In this context the requirement of the implication of Section 432(7)(a) has to be kept in mind, more particularly in the light of the prescription contained in Article 73(1)(a) and Article 162 read along with its proviso, which asserts the status of the Central Government Authorities as possessing all pervasive right to hold the Executive Power by virtue of express conferment under the Constitution or under any law made by the Parliament though the State Legislature may also have the power to make laws on those subjects.

201. In a situation as the one arising in the above context, it must be stated, that by virtue of such status available with the Central Government possessing the Executive Power, having regard to the pronouncement of the larger Constitution Bench decision of this Court in *Supreme Court*

Advocates on Record Association (supra) and *S.R. Bommai* (supra), the Executive Power of the Center should prevail over the State as possessing higher Constitutional power specifically adorned on the Central Government under Article 73(1)(a).

202. Cases, wherein, the investigation is held by the agencies under the Delhi Special Police Establishment Act, 1946 or by any other agency engaged to make investigation into an offence under the Central Act other than the Code of Criminal Procedure, and where such offences investigated assumes significance having regard to the implication that it caused or likely to cause in the interest of the Nation or in respect of National figures of very high status by resorting to diabolic criminal conduct at the instance of any person whether such person belong to this country or of any foreign origin, either individually or representing anybody of personnel or an organization or a group, it must be stated that such situation should necessarily be taken as the one coming within the category of internal or external aggression or disturbance and thereby casting a duty on the Centre as prescribed under Article 355 of the Constitution to act in the interest of the Nation as a whole and also ensure that the Government of every State is carried in accordance with the provisions of the Constitution. Such situation cannot held to be interfering with the independent existence of the State concerned.

203. Similar test should be applied where application of Section 435(1)(b) or (c). It can be visualized that where the property of the Central Government referred to relates to the security borders of this country or the property in the control and possession of the Army or other security forces of the country or the warships or such other properties or the personnel happen to be in the services of the Centre holding very sensitive positions and in possession of very many internal secrets or other vulnerable information and indulged in conduct putting the interest of the Nation in peril, it cannot be said that in such cases, the nature of 'Consultation' will be a mere formality. It must be held that even in those cases the requirement of 'Consultation' will assume greater significance and primacy to the Center.

204. It must also be noted that the nature of requirement contemplated and prescribed in Section 435(1) and (2) is distinct and different. As because the expression "Concurrence" is used in sub-section (2) it cannot be held that the expression "Consultation" used in sub-section (1) is lesser in force. As was pointed out by us in sub-para 'n', the situations arising under sub-section (1)(a) to (c) will have far more far reaching consequences if allowed to be operated upon without proper check. Therefore, even

though the expression used in sub-section (1) is 'Consultation', in effect, the said requirement is to be expressed far more strictly and with utmost care and caution, as each one of the sub-clauses (a) to (c) contained in the said sub-section, if not properly applied in its context may result in serious violation of Constitutional mandate as has been set out in Article 355 of the Constitution. It is therefore imperative that it is always safe and appropriate to hold that in those situations covered by sub-clauses (a) to (c) of Section 435(1) falling within the jurisdiction of Central Government, it will assume primacy and consequently the process of "Consultation" should in reality be held as the requirement of "Concurrence".

205. For our present purpose, we can apply the above principles to the cases which come up for consideration, including the one covered by the present Writ Petition. Having paid our detailed analysis as above on the various questions, we proceed to answer the questions in seriatim.

206. Answer to the preliminary objection as to the maintainability of the Writ Petition:

207. Writ Petition at the instance of Union of India is maintainable.

208. Answers to the questions referred in seriatim

209. Question 52.1 Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of Swamy Shraddananda (2), a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

210. Ans. Imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of life of the convict. The right to claim remission, commutation, reprieve etc. as provided under Article 72 or Article 161 of the Constitution will always be available being Constitutional Remedies untouchable by the Court.

211. We hold that the ratio laid down in *Swamy Shraddananda* (supra) that a special category of sentence; instead of death can be substituted by the punishment of imprisonment for life or for a term exceeding 14 years and put that category beyond application of remission is well-founded and we

answer the said question in the affirmative.

212. Question No. 52.2 Whether the "Appropriate Government" is permitted to exercise the power of remission under Sections 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its Constitutional power under Article 32 as in this case?

213. Ans. The exercise of power under Sections 432 and 433 of Code of Criminal Procedure will be available to the Appropriate Government even if such consideration was made earlier and exercised under Article 72 by the President or under Article 161 by the Governor. As far as the application of Article 32 of the Constitution by this Court is concerned, it is held that the powers under Sections 432 and 433 are to be exercised by the Appropriate Government statutorily and it is not for this Court to exercise the said power and it is always left to be decided by the Appropriate Government.

214. Question Nos. 52.3, 52.4 and 52.5

215. 52.3 Whether Section 432(7) of the Code clearly gives primacy to the Executive Power of the Union and excludes the Executive Power of the State where the power of the Union is coextensive?

216. 52.4 Whether the Union or the State has primacy over the subject-matter enlisted in List III of the Seventh Schedule to the Constitution of India for exercise of power of remission?

217. 52.5 Whether there can be two Appropriate Governments in a given case under Section 432(7) of the Code?

218. Ans. The status of Appropriate Government whether Union Government or the State Government will depend upon the order of sentence passed by the Criminal Court as has been stipulated in Section 432(6) and in the event of specific Executive Power conferred on the Centre under a law made by the Parliament or under the Constitution itself then in the event of the conviction and sentence covered by the said law of the Parliament or the provisions of the Constitution even if the Legislature of the State is also empowered to make a law on the same subject and coextensive, the Appropriate Government will be the Union Government having regard to the prescription contained in the proviso to Article 73(1)(a) of the Constitution.

The principle stated in the decision in *G.V. Ramanaiah* (supra) should be applied. In other words, cases which fall within the four corners of Section 432(7)(a) by virtue of specific Executive Power conferred on the Centre, the same will clothe the Union Government the primacy with the status of Appropriate Government. Barring cases falling under Section 432(7)(a), in all other cases where the offender is sentenced or the sentence order is passed within the territorial jurisdiction of the concerned State, the State Government would be the Appropriate Government.

219. Question 52.6 Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in sub-section (2) of the same section is mandatory or not?

220. Ans. No suo motu power of remission is exercisable under Section 432(1) of Code of Criminal Procedure It can only be initiated based on an application of the person convicted as provided under Section 432(2) and that ultimate order of suspension or remission should be guided by the opinion to be rendered by the Presiding Officer of the concerned Court.

221. Question No. 52.7 Whether the term "Consultation" stipulated in Section 435(1) of the Code implies "Concurrence"?

222. Ans. Having regard to the principles culled out in paragraph 160(a) to (n), it is imperative that it is always safe and appropriate to hold that in those situations covered by sub-clauses (a) to (c) of Section 435(1) falling within the jurisdiction of the Central Government it will assume primacy and consequently the process of "Consultation" in reality be held as the requirement of "Concurrence".

223. We thus answer the above questions accordingly.

Uday Umesh Lalit, J.: "224. This Writ Petition has been placed before the Constitution Bench pursuant to reference made by a Bench of three learned Judges of this Court in its order dated 25.04.2014, hereinafter referred to as the Referral Order. Background Facts:-

225. On the night of 21.05.1991 Rajiv Gandhi, former Prime Minister of India was assassinated by a human bomb at Sriperumbudur in Tamil Nadu. With him fifteen persons including nine policemen died and forty three persons suffered injuries. Crime No. 329 of 1991 of Sriperumbudur Police Station was immediately registered. On 22.05.1991 a notification

was issued by the Governor of Tamil Nadu under Section 6 of Delhi Special Police Establishment Act (Act No. 25 of 1946) according consent to the extension of the powers and jurisdiction of the members of the Delhi Police Establishment to the whole of the State of Tamil Nadu for the investigation of the offences in relation to Crime No. 329 of 1991. This was followed by a notification issued by the Government of India on 23.05.1991 under Section 5 read with Section 6 of Act No. 25 of 1946 extending such powers and jurisdiction to the whole of the State of Tamil Nadu for investigation of offences relating to Crime No. 329 of 1991. After due investigation, a charge of conspiracy for offences under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA for short), Indian Penal Code (IPC for short), Explosive Substances Act, 1908, Arms Act, 1959, Passport Act, 1967, Foreigners Act, 1946 and the Indian Wireless Telegraphy Act, 1933 was laid against forty-one persons, twelve of whom were already dead and three were marked as absconding. Remaining twenty six persons faced the trial before the Designated Court which found them guilty of all the charges and awarded punishment of fine of varying amounts, rigorous imprisonment of different periods and sentenced all of them to death. The Designated Court referred the case to this Court for confirmation of death sentence of all the convicts. The convicts also filed appeals against their conviction and the sentence awarded to them. These cases were heard together.

226. In the aforesaid Death Reference Cases and the appeals, this Court rendered its judgment on 11.05.1999, reported in *State through Superintendent of Police, CBI/SIT* v. *Nalini*. At the end of the judgment, the following order was passed by this Court:

> "732. The conviction and sentence passed by the trial court of the offences of Section 3(3), Section 3(4) and Section 5 of the TADA Act are set aside in respect of all those appellants who were found guilty by the trial court under the said counts.
>
> 733. The conviction and sentence passed by the trial court of the offences under Sections 212 and 216 of the Indian Penal Code, Section 14 of the Foreigners Act, 1946, Section 25(1-B) of the Arms Act, Section 5 of the Explosive Substances Act, Section 12 of the Passport Act and Section 6(1-A) of the Wireless Telegraphy Act, 1933, in respect of those

> accused who were found guilty of those offences, are confirmed. If they have already undergone the period of sentence under those counts it is for the jail authorities to release such of those against whom no other conviction and sentence exceeding the said period have been passed.
>
> 734. The conviction for the offence under Section 120-B read with Section 302 Indian Penal Code as against A-1 (Nalini), A-2 (Santhan @ Raviraj), A-3 (Murugan @ Thas), A-9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran @ Ravi) and A-18 (Perarivalan @ Arivu) is confirmed.
>
> 735. We set aside the conviction and sentence of the offences under Section 302 read with Section 120-B passed by the trial court on the remaining accused.
>
> 736. The sentence of death passed by the trial court on A-1 (Nalini), A-2 (Santhan), A-3 (Murugan) and A-18 (Arivu) is confirmed. The death sentence passed on A-9 (Robert), A-10 (Jayakumar) and A-16 (Ravichandran) is altered to imprisonment for life. The Reference is answered accordingly.
>
> 737. In other words, except A-1 (Nalini), A-2 (Santhan), A-3 (Murugan), A- 9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran) and A-18 (Arivu), all the remaining appellants shall be set at liberty forthwith."

227. Two sets of Review Petitions were preferred against the aforesaid judgment dated 11.05.1999. One was by convicts A-1, A-2, A-3 and A-18 on the question of death sentence awarded to them. These convicts did not challenge their conviction. The other was by the State through Central Bureau of Investigation (CBI for short), against that part of the judgment which held that no offence under Section 3(3) of TADA was made out. These Review Petitions were dismissed by order dated 08.10.1999. Wadhwa, J. with whom Quardi J. concurred, did not find any error in the judgment sought to be reviewed and therefore dismissed both sets of Review Petitions. Thomas J. opined that the Review Petition filed in respect of A- 1 (Nalini) alone be allowed and her sentence be altered to

imprisonment for life. Thus, in the light of the order of the majority, these Review Petitions were dismissed.

228. The convicts A-1, A-2, A-3 and A-18 then preferred Mercy Petitions before the Governor of Tamil Nadu on 17.10.1999 which were rejected on 27.10.1999. The rejection was challenged before Madras High Court which by its order dated 25.11.1999 set-aside the order of rejection and directed reconsideration of those Mercy Petitions. Thereafter Mercy Petition of A-1 (Nalini) was allowed while those in respect of the convicts A-2, A-3 and A-18 were rejected by the Governor on 25.04.2000. Said convicts A-2, A-3 and A-18 thereafter preferred Mercy Petitions on 26.4.2000 to the President of India under Article 72 of the Constitution. The Mercy Petitions were rejected by the President on 12.08.2011 which led to the filing of Writ Petitions in Madras High Court. Those Writ Petitions were transferred by this Court to itself by order dated 01.05.2012. By its judgment dated 18.02.2014 in *V. Sriharan @ Murugan* v. *Union of India* a Bench of three learned Judges of this Court commuted the death sentences awarded to convicts A-2, A-3 and A-18 to that of imprisonment for life and passed certain directions. Paragraph 32 of the judgment is quoted hereunder:

> "32.8 In the light of the above discussion and observations, in the cases of *V. Sriharan alias Murugan*, *T. Suthendraraja alias Santhan* and *A.G. Perarivalan alias Arivu*, we commute their death sentence into imprisonment for life. Life imprisonment means end of one's life, subject to any remission granted by the appropriate Government under Section 432 of the Code of Criminal Procedure, 1973 which, in turn, is subject to the procedural checks mentioned in the said provision and further substantive check in Section 433-A of the Code. All the writ petitions are allowed on the above terms and the transferred cases are, accordingly, disposed of."

229. On the next day i.e. 19.02.2014 Chief Secretary, Government of Tamil Nadu wrote to the Secretary, Government of India, Ministry of Home Affairs that Government of Tamil Nadu proposed to remit the sentence of life imprisonment imposed on convicts A-2, A-3 and A-18 as well as on the other convicts namely A-9, A-10 and A-16. It stated that these six convicted accused had already served imprisonment for 23 years, that since the crime was investigated by the CBI, as per Section 435 of CrPC the Central Government was required to be consulted and as such the

Central Government was requested to indicate its views within three days on the proposal to remit the sentence of life imprisonment and release those six convicts.

230. Union of India immediately filed Crl.M.P. Nos. 4623-25 of 2014 on 20.02.2014 in the cases which were disposed of by the judgment dated 18.02.20145 praying that the State of Tamil Nadu be restrained from releasing the convicts. On 20.02.2014 said Crl.M.P. Nos. 4623-25 of 2014 were taken up by this Court and the following order was passed:

> "Taken on Board.
>
> Issue notice to the State of Tamil Nadu; Inspector General of Prisons, Chennai; the Superintendent, Central Prison, Vellore and the convicts viz. V. Sriharan @ Murugan, T. Suthendraraja @ Santhan and A.G. Perarivalan @ Arivu returnable on 6th March, 2014.
>
> Mr. Rakesh Dwivedi, learned senior counsel accepts notice on behalf of the State of Tamil Nadu and other two officers.
>
> Till such date, both parties are directed to maintain status quo prevailing as on date in respect of convicts viz. V. Sriharan @ Murugan, T. Suthendraraja @ Santhan and A.G. Perarivalan @ Arivu.
>
> List on 6th March, 2014."

231. On 20.02.2014 Union of India filed Review Petitions being R.P. (Crl.) Nos. 247-249 of 2014 against the judgment dated 18.02.20145 which were later dismissed on 01.04.2014. It also filed Writ Petition No. 48 of 2014 i.e. the present writ petition on 24.02.2014 with following prayer:

> "(a) Issue an appropriate writ in the nature of a mandamus, or certiorari, and quash the letter no. 58720/Cts IA/2008 dated 19.02.2014 and the Decision of the Respondent no. 8, Government of Tamil Nadu to consider commutation/remission of the sentences awarded to the Respondents No. 1 to 7;"

232. After hearing rival submissions in the present writ petition, the Referral Order was passed which formulated and referred seven questions for the consideration of the Constitution Bench. Paragraph Nos. 49 and 52 to 54 of the Referral Order were to the following effect:-

> "49. The issue of such a nature has been raised for the first time in this Court, which has wide ramification in determining the scope of application of power of remission by the executives, both the Centre and the State. Accordingly, we refer this matter to the Constitution Bench to decide the issue pertaining to whether once power of remission under Articles 72 or 161 or by this Court exercising constitutional power under Article 32 is exercised, is there any scope for further consideration for remission by the executive."
>
> 52. The following questions are framed for the consideration of the Constitution Bench:
>
> 52.1. Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of Swamy Shraddananda(2)[6] a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?
>
> 52.2. Whether the "appropriate Government" is permitted to exercise the power of remission under Sections 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its constitutional power under Article 32 as in this case?
>
> 52.3. Whether Section 432(7) of the Code clearly gives primacy to the executive power of the Union

> and excludes the executive power of the State where the power of the Union is co-extensive?
>
> 52.4. Whether the Union or the State has primacy over the subject-matter enlisted in List III of the Seventh Schedule to the Constitution of India for exercise of power of remission?
>
> 52.5. Whether there can be two appropriate Governments in a given case under Section 432(7) of the Code?
>
> 52.6. Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in sub-section (2) of the same section is mandatory or not?
>
> 52.7. Whether the term "consultation" stipulated in Section 435(1) of the Code implies "concurrence"?
>
> 53. All the issues raised in the given case are of utmost critical concern for the whole of the country, as the decision on these issues will determine the procedure for awarding sentences in the criminal justice system. Accordingly, we direct to list Writ Petition (Crl.) No. 48 of 2014 before the Constitution Bench as early as possible, preferably within a period of three months.
>
> 54. All the interim orders granted earlier will continue till a final decision is taken by the Constitution Bench in Writ Petition (Crl.) No. 48 of 2014."

233. In terms of the Referral Order, this petition came up before the Constitution Bench on 09.03.2014 which issued notices to all the State Governments and pending notice the State Governments were restrained from exercising power of remission to life convicts. This order was subsequently varied by this Court on 23.07.2015 and the order so varied is presently in operation. While the present writ petition was under consideration by this Court, Curative Petitions Nos. 22-24 of 2015 arising out of the dismissal of the review petition vide order dated 01.04.2014 came up before this Court which were dismissed by order dated 28.07.2015.

PRELIMINARY OBJECTIONS

234. At the outset when the present writ petition was taken up for hearing, Mr. Rakesh Dwivedi, learned Senior Advocate appearing for the State of Tamil Nadu and Mr. Ram Jethmalani, learned Senior Advocate appearing for the respondents convicts raised preliminary objections regarding maintainability of this writ petition at the instance of Union of India. It was argued that in the petition as originally filed, nothing was indicated about alleged violation of any fundamental right of any one and it was only when the State had raised preliminary submissions, that additional grounds were preferred by Union of India seeking to espouse the cause of the victims. It was submitted that the issues sought to be raised by Union of India as regards the powers and jurisdiction of the State of Tamil Nadu were essentially federal in nature and that the only remedy available for agitating such issues could be through a suit under Article 131 of the Constitution. In response, it was submitted by Mr. Ranjit Kumar, learned Solicitor General that neither at the stage when the Referral Order was passed, nor at the stage when notices were issued to various State Governments, such preliminary objections were advanced and that the issue had now receded in the background. It was submitted that after Criminal Law Amendment Act 2013, rights of victims stand duly recognized and that the instant crime having been investigated by the CBI, Union of India in its capacity as parens patriae was entitled to approach this Court under Article 32. It was submitted that since private individuals, namely the convicts were parties to this lis, a suit under Article 131 would not be a proper remedy. We find considerable force in the submissions of the learned Solicitor General. Having entertained the petition, issued notices to various State Governments, entertained applications for impleadment and granted interim orders, it would not be appropriate at this stage to consider such preliminary submissions. At this juncture, the following passage from the judgment of the Constitution Bench in *Mohd. Aslam alias Bhure* v. *Union of India* would guide us:-

> "10. On several occasions this Court has treated letters, telegrams or postcards or news reports as writ petitions. In such petitions, on the basis of pleadings that emerge in the case after notice to different parties, relief has been given or refused. Therefore, this Court would not approach matters where public interest is involved in a technical or

> a narrow manner. Particularly, when this Court has entertained this petition, issued notice to different parties, new parties have been impleaded and interim order has also been granted, it would not be appropriate for this Court to dispose of the petition on that ground."

235. In the circumstances, we reject the preliminary submissions and proceed to consider the questions referred to us.

DISCUSSION

236. We have heard Mr. Ranjit Kumar, learned Solicitor General, assisted by Ms. V. Mohana, learned Senior Advocate for Union of India. The submissions on behalf of the State Governments were led by Mr. Rakesh Dwivedi, learned Senior Advocate who appeared for the States of Tamil Nadu and West Bengal, Mr. Ram Jethmalani, learned Senior Advocate and Mr. Yug Mohit Chaudhary, learned Advocate appeared for respondents - convicts, namely, A-2, A-3, A-18, A-9, A-10 and A-16. We have also heard Mr. Ravi Kumar Verma, learned Advocate General for Karnataka, Mr. A.N.S. Nadkarni, learned Advocate General for Goa, Mr. V. Giri, learned Senior Advocate for State of Kerala, Mr. Gaurav Bhatia, learned Additional Advocate General for State of Uttar Pradesh, Mr. T.R. Andhyarujina, learned Senior Advocate for one of the intervenors and other learned counsel appearing for other State Governments, Union Territories and other intervenors. We are grateful for the assistance rendered by the learned Counsel.

237. The Challenge raised in the instant matter is principally to the competence of the State Government in proposing to remit or commute sentences of life imprisonment of the respondents-convicts and the contention is that either the State Government has no requisite power or that such power stands excluded. The questions referred for our consideration in the Referral Order raise issues concerning power of remission and commutation and as to which is the "appropriate Government" entitled to exercise such power and as regards the extent and ambit of such power. It would therefore be convenient to deal with questions 3, 4 and 5 as stated in Paras 52.3, 52.4 and 52.5 at the outset.

> Re: Question Nos. 3, 4 and 5 as stated in para Nos. 52.3, 52.4 and 52.5 of the Referral Order

52.3. Whether Section 432(7) of the Code clearly gives primacy to the executive power of the Union and excludes the executive power of the State where the power of the Union is co-extensive?

52.4. Whether the Union or the State has primacy over the subject-matter enlisted in List III of the 7th Schedule to the Constitution of India for exercise of power of remission?

52.5. Whether there can be two appropriate Governments in a given case under Section 432(7) of the Code?

238. Powers to grant pardon and to suspend, remit or commute sentences are conferred by Articles 72 and 161 of the Constitution upon the President and the Governor. Articles 72 and 161 are quoted here for ready reference:

"72. Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.-

The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence-

in all cases where the punishment or sentence is by the Court Martial;

in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

in all cases where the sentence is a sentence of death.

Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by the Court Martial.

Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence

> of death exercisable by the Governor of a State under any law for the time being in force.
>
> "161. Power of Governor to grant pardons, etc, and to suspend, remit or commute sentences in certain cases.-The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

239. Before we turn to the matters in issue, a word about the nature of power under Articles 72 and 161 of the Constitution. In *K.M. Nanavati* v. *State of Bombay* it was observed by Constitution Bench of this Court, "……. Pardon is one of the many prerogatives which have been recognized since time immemorial as being vested in the sovereign, wherever the sovereignty may lie…….".

240. In *Kehar Singh* v. *Union of India* Constitution Bench of this Court quoted with approval the following passage from *U.S.* v. *Benz* [75 Lawyers Ed. 354, 358]

> "The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua a judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance."

241. The Constitution Bench further observed:

> "It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of

> the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court."

242. In *Epuru Sudhakar* v. *Government of Andhra Pradesh* Pasayat J. speaking for the Court observed:-

> "16. The philosophy underlying the pardon power is that "every civilised country recognises, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy.
>
> 17. The rationale of the pardon power has been felicitously enunciated by the celebrated Holmes, J. of the United States' Supreme Court in Biddle v. Perovich [71 L Ed 1161: 274 US 480 (1927)] in these words (L Ed at p. 1163): "A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."

243. In his concurring judgment Kapadia J. (as the learned Chief Justice then was) stated:

> "65. Exercise of executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty. This discretion, therefore, has to be exercised on public considerations alone. The President and the

Governor are the sole judges of the sufficiency of facts and of the appropriateness of granting the pardons and reprieves. However, this power is an enumerated power in the Constitution and its limitations, if any, must be found in the Constitution itself. Therefore, the principle of exclusive cognizance would not apply when and if the decision impugned is in derogation of a constitutional provision. This is the basic working test to be applied while granting pardons, reprieves, remissions and commutations.

66. Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an executive action that mitigates or sets aside the punishment for a crime. It eliminates the effect of conviction without addressing the defendant's guilt or innocence. The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter. It can no longer be said that prerogative power is ipso facto immune from judicial review. An undue exercise of this power is to be deplored. Considerations of religion, caste or political loyalty are irrelevant and fraught with discrimination. These are prohibited grounds. The Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central plan in the Rule of Law. Every prerogative has to be subject to the Rule of Law. That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent. The Rule of Law principle comprises a requirement of "Government according to law". The ethos of "Government according to law" requires the prerogative to be exercised in a manner which is consistent with the basic principle of fairness and certainty. Therefore, the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or

> the Governor, as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future."

244. The power conferred upon the President under Article 72 is under three heads. The Governor on the other hand is conferred power under a sole head i.e. in respect of sentence for an offence against any law relating to the matter to which the executive power of the State extends. Apart from similar such power in favour of the President in relation to matter to which the executive power of the Union extends, the President is additionally empowered on two counts. He is given exclusive power in all cases where punishment or sentence is by the Court Martial. He is also conferred power in all cases where the sentence is a sentence of death. Thus, in respect of cases of sentence of death, the power in favour of the President is regardless whether it is a matter to which the executive power of the Union extends. Therefore a person convicted of any offence and sentenced to death sentence under any law relating to a matter to which the executive power of the State extends, can approach either the Governor by virtue of Article 161 or the President in terms of Article 72(1)(c) or both. To this limited extent there is definitely an overlap and powers stand conferred concurrently upon the President and the Governor.

245. Articles 73 and 162 of the Constitution delineate the extent of executive powers of the Union and the State respectively. Said Articles 73 and 162 are as under:-

> "73. Extent of executive power of the Union-(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend-
>
> to the matters with respect to which Parliament has power to make laws; and
>
> to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:
>
> Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

> (2) until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer of authority thereof could exercise immediately before the commencement of this Constitution.
>
> 162. Extent of executive power of State.- Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws: Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

246. As regards clause (b) of Article 73(1) there is no dispute that in such matters the executive power of the Union is absolute. The area of debate is with respect to clause (a) of Article 73(1) and the Proviso to Article 73(1) and the inter-relation with Article 162. Clause (a) of Article 73(1) states that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. Parliament has exclusive power in respect of legislative heads mentioned in List I of the 7th Schedule whereas in respect of the entries in the Concurrent List namely List III of the 7th Schedule, both Parliament and the State have power to legislate in accordance with the scheme of the Constitution. The Proviso to Article 73(1) however states, subject to the saving clause therein, that the executive power so referred to in sub-clause (a) shall not extend in any State to matters with respect to which the legislature of the State has also power to make laws. The expression "also" is significant. Under the Constitution the State has exclusive power to make laws with respect to List II of the 7th Schedule and has also concurrent power with respect to entries in Concurrent List namely List III of the Constitution. The Proviso thus deals with situations where the matter relates to or is with respect to subject where both Parliament and the Legislature of the State are empowered to make laws under the Concurrent List. Subject

to the saving clause mentioned in the Proviso, it is thus mandated that with respect to matters which are in the Concurrent List namely where the Legislature of the State has also power to make laws, the executive power of the Union shall not extend. The saving clause in the Proviso deals with two exceptions namely, where it is so otherwise expressly provided in the Constitution or in any law made by Parliament. In other words, only in those cases where it is so expressly provided in the Constitution itself or in any law made by Parliament, the executive power of the Union will be available. But for such express provision either in the Constitution or in the law made by Parliament which is in the nature of an exception, the general principle which must govern is that the executive power under sub-clause (a) of Article 73 shall not extend in any State to matters with respect to which the legislature of the State has also power to make laws. In the absence of such express provision either in the Constitution or in the law made by Parliament, the normal rule is that the executive power of the Union shall not extend in a State to matters with respect to which the legislature of the State has also power to make laws.

247. It will be instructive at this stage to see the debates on the point in the Constituent Assembly. The proceedings dated 30th December, 1948 in the Constituent Assembly show that while draft Article 60 which corresponds to present Article 73 was being discussed, an Hon'ble Member voiced his concern in following words:

> "B. Pocker Sahib Bahadur (Madras : Muslim): Mr. Vice-President, this clause as it stands is sure to convert the Federation into an entirely unitary form of Government. This is a matter of very grave importance. Sir, we have been going on under the idea, and it is professed, that the character of the Constitution which we are framing is a federal one. I submit, Sir, if this article, which gives even executive powers with reference to the subjects in the Concurrent List to the Central Government, is to be passed as it is, then there will be no justification at all in calling this Constitution a federal one. It will be a misnomer to call it so. It will be simply a camouflage to call this Constitution a federal one with provisions like this. It is said that it is necessary to give legislative powers to the Centre with regard to certain subjects mentioned in the Concurrent

> List, but it is quite another thing, Sir, to give even the executive powers with reference to them to the Centre. These provisions will have the effect of practically leaving the provinces with absolutely nothing. Even in the Concurrent List there is a large number of subjects which ought not to have found place in it. We shall have to deal with them when the time comes. But this clause gives even executive powers to the Centre with reference to the subjects which are detailed in the Concurrent List……."

248. After considerable debate on the point the clarification by Hon'ble Member Dr. B.R. Ambedkar is noteworthy. His view was as under:

> "The Honourable Dr. B.R. Ambedkar (Bombay : General): Mr. Vice-President, Sir, I am sorry that I cannot accept either of the two amendments which have been moved to this proviso, but I shall state to the House very briefly the reasons why I am not in a position to accept these amendments. Before I do so I think I think it is desirable that the House should know what exactly is the difference between the position as stated in the proviso and the two amendments which are moved to that proviso. Taking the proviso as it stands, it lays down two propositions. The first proposition is that generally the authority to execute laws which relate to what is called the Concurrent field, whether the law is passed by the Central Legislature or whether it is passed by the Provincial or State Legislature, shall ordinarily apply to the Province or the State. That is the first proposition which this proviso lays down. The second proposition which the proviso lays down is that if in any particular case Parliament thinks that in passing a law which relates to the Concurrent field the execution ought to be retained by the Central Government, Parliament shall have the power to do so. Therefore, the position is this; that in all cases, ordinarily, the executive authority so far as the Concurrent List is concerned will rest with the units, the Provinces as well as the States. It is only

> in exceptional cases that the Centre may prescribe that the execution of a Concurrent law shall be with the centre."

249. The first proposition as stated by Dr. Ambedkar was that generally the authority to execute laws which relate to subjects in the Concurrent field, whether the law was passed by the Central Legislature or by the State Legislature, was ordinarily to be with the State. The second proposition pertaining to the Proviso was quite eloquent in that if in any particular case Parliament thinks the execution ought to be retained by the Centre, Parliament shall have the power to do so and that save and except such express provision, in all cases, the authority to execute insofar as the Concurrent List is concerned shall rest with the States.

250. In *Rai Sahib Ram Jawaya Kapur* v. *State of Punjab* this Court while dealing with Article 162 of the Constitution, observed as under:-

> "….Thus under this article the executive authority of the State is exclusive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by the Parliament. Similarly, Article 73 provides that the executive powers of the Union shall extend to matters with respect to which the Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to be State it would be open to the Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also." (Emphasis added)

251. The same principle as regards the extent of Executive Power of the Union and the State as stated in Articles 73 and 162 of the Constitution finds echo in Section 55A of the Indian Penal Code which defines appropriate Government as under:

> "55A. Definition of "appropriate Government". -- In Sections 54 and 55 the expression "appropriate Government" means:-

(a) in cases where the sentence is a sentence of death or is for an offence against any law relating to a matter to which the executive power of the Union extends, the Central Government; and

(b) in cases where the sentence (whether of death or not) is for an offence against any law relating to a matter to which the executive power of the State extends, the Government of the State within which the offender is sentenced."

252. At this stage we may quote Sections 432 to 435 of the Code of Criminal Procedure, 1973 (hereinafter referred to as CrPC):-

"432. Power to suspend or remit sentences. (1) 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.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the. presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, In the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without

warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in section 433, the expression "appropriate Government" means,-

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

433. Power to commute sentence. The appropriate Government may, without the consent of the person sentenced, commute-

(a) a sentence of death, for any other punishment provided by the Indian Penal Code;

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine.

433A. Restriction on powers of remission or Commutation in certain cases. Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person 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 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

434. Concurrent power of Central Government in case of death sentences. The powers conferred by sections 432 and 433 upon the State Government may, in the case of sentences of death, also be exercised by the Central Government.

435. State Government to act after consultation with Central Government in certain cases. (1) The powers conferred by sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence Is for an offence-

which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special

> Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, or
>
> which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or
>
> which was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, shall not be exercised by the State Government except after consultation with the Central Government.
>
> (2) No order of suspension, remission or commutation of sentences passed by the State Government in relation to a person, who has been convicted of offences, some of which relate to matters to which the executive power of the Union extends, and who has been sentenced to separate terms of imprisonment which are to run concurrently, shall have effect unless an order for the suspension, remission or commutation, as the case may be, of such sentences has also been made by the Central Government in relation to the offences committed by such person with regard to matters to which the executive power of the Union extends."

253. As regards definition of appropriate Government, Section 432(7) of CrPC adopts a slightly different approach. It defines Central Government to be the appropriate Government in cases where the sentence is for an offence against any law relating to a matter to which the executive power of the Union extends. In that sense it goes by the same principle as in Article 73 of the Constitution and Section 55A of the IPC. The residuary area is then left for the State Government and it further states that in cases other than those where the Central Government is an appropriate Government, the Government of the State within which the offender is sentenced shall be the appropriate Government. In other words, it carries the same essence and is not in any way different from the principle in Article 73 read with Article 162 on one hand and Section 55A of the IPC on the other. The specification as to the State where the offender is sentenced serves

an entirely different purpose and helps in finding amongst more than one State Governments which is the appropriate Government as found in *State of Madhya Pradesh* v. *Ratan Singh*, *State of Madhya Pradesh* v. *Ajit Singh*, *Hanumant Dass* v. *Vinay Kumar* and *Govt. of A.P.* v. *M.T. Khan*. According to this provision, even if an offence is committed in State A but if the trial takes place and the sentence is passed in State B, it is the latter State which shall be the appropriate Government.

254. There is one more provision namely Section 435(2) of Cr. P.C. which needs to be considered at this stage. It is possible that in a given case the accused may be convicted and sentenced for different offences, in respect of some of which the executive power of the Union may extend and to the rest the executive power of the State may extend. Since the executive power either of the Union or the State is offence specific, both shall be appropriate Governments in respect of respective offence or offences to which the executive power of the respective government extends. For instance, an offender may be sentenced for an offence punishable under an enactment relatable to subject under List I of the Constitution and additionally under the Indian Penal Code. Such eventuality is taken care of by sub-section (2) of Section 435 and it is stipulated that even if the State Government in its capacity as an appropriate Government in relation to an offence to which the executive power of the State Government extends, were to order suspension, remission or commutation of sentence in respect of such offence, the order of the State Government shall not have effect unless an appropriate order of suspension, remission or commutation is also passed by the Central Government in relation to the offence(s) with respect to which executive power of the Union extends. Relevant to note that it is not with respect to a specific offence that both the Central Government and State Government have concurrent power but if the offender is sentenced on two different counts, both could be the appropriate governments in respect of that offence to which the respective executive power extends.

255. It was submitted on behalf of the petitioner that if the Executive Power is co-extensive with the Legislative Power and the law making power of the State must yield to the Legislative Power of the Union in respect of a subject in the Concurrent List, reading of these two principles would inevitably lead to the conclusion that the executive power of the Union takes primacy over that of the State thereby making it i.e. the Central Government the appropriate Government under Section 432(7) of Cr. P.C. It was further submitted that it was Parliament which made

law contained in CrPC in exercise of power relatable to Entry 1 and 2 of List III and that the provisions in the IPC (existing law under Article 13) and under the Cr. P.C., both relatable to the powers of Parliament, which provide for "appropriate Government" as prescribed in Section 55A of the IPC and 432(7) of the CrPC without any validity enacted conflicting or amending law by the State, would clearly show that it is the Union which has the primacy. In our considered view, that is not the correct way to approach the issue. For the purposes of Article 73(1) it is not material whether there is Union law holding the field but what is crucial is that such law made by Parliament must make an express provision or there must be such express provision in the Constitution itself as regards executive power of the Union, in the absence of which the general principle as stated above must apply. If the submission that since the IPC and Cr. P.C. are relatable to the powers of Parliament, it is the executive power of the Union which must extend to aspects covered by these legislations is to be accepted, the logical sequitor would be that for every offence under IPC the appropriate Government shall be the Central Government. This is not only against the express language of Article 73(1) but would completely overburden the Central Government.

256. In the instant case as the order passed by this Court in *State* v. *Nalini*, the respondents-convicts were acquitted of the offences punishable under Section 3(3), 3(4) and 5 of the TADA. Their conviction under various central laws like Explosive Substances Act, Passport Act, Foreigners Act and Wireless Telegraphy Act were all for lesser terms which sentences, as on the date, stand undergone. Consequently, there is no reason or occasion to seek any remission in or commutation of sentences on those counts. The only sentence remaining is one under Section 302 IPC which is life imprisonment. It was submitted by Mr. Rakesh Dwivedi, learned Senior Advocate that Section 302 IPC falls in Chapter XVI of the IPC relating to offences affecting the human body. In his submission, Sections 299 to 377 IPC involve matters directly related to "public order" which are covered by Entry 1 List II. It being in the exclusive executive domain of the State Government, the State Government would be the appropriate Government. It was further submitted that assuming Sections 302 read with Section 120B IPC are relatable to Entry 1 of List III being part of the Indian Penal Code itself, then the issue may arise whether Central Government or the State Government shall be the appropriate Government and resort has to be taken to provisions of Articles 73 and 162 of the Constitution to resolve the issue.

257. At this stage it would be useful to consider the decision of this Court in *G.V. Ramanaiah* v. *The Superintendent of Central Jail Rajahmundry*. In that case the appellant was convicted of offences punishable under Section 489-A to 489-D of IPC and sentenced to imprisonment for 10 years. On a question whether the State Government would be competent to remit the sentence of the appellant, this Court observed as under:

> "9. The question is to be considered in the light of the above criterion. Thus considered, it will resolve itself into the issue: Are the provisions of Sections 489-A to 489-D of the Penal Code, under which the petitioner was convicted, a law relating to a matter to which the legislative power of the State or the Union extends?
>
> 10. These four Sections were added to the Penal Code under the caption, "Of Currency Notes and Bank Notes", by Currency Notes Forgery Act, 1899, in order to make better provisions for the protection of Currency and Bank Notes against forgery. It is not disputed; as was done before the High Court in the application under Section 491(1), Criminal Procedure Code, that this bunch of Sections is a law by itself. "Currency, coinage and legal tender" are matters, which are expressly included in Entry No. 36 of the Union List in the Seventh Schedule of the Constitution. Entry No. 93 of the Union List in the same Schedule specifically confers on the Parliament the power to legislate with regard to "offences against laws with respect to any of the matters in the Union List". Read together, these entries put it beyond doubt that Currency Notes and Bank Notes, to which the offences under Sections 489-A to 489-D relate, are matters which are exclusively within the legislative competence of the Union Legislature. It follows therefrom that the offences for which the petitioner has been convicted, are offences relating to a matter to which the executive power of the Union extends, and the "appropriate Government" competent to remit the sentence of the petitioner, would be the Central Government and not the State Government."

258. This Court went on to observe that the Indian Penal Code is a compilation of penal laws, providing for offences relating to a variety of matters, referable to the various entries in the different lists of the 7th Schedule to the Constitution and that many of the offences in the Penal Code related to matters which are specifically covered by entries in the Union list. Since the offences in question pertained to subject matter in the Union list, this Court concluded that the Central Government was the appropriate Government competent to remit the sentence of the appellant. The decision in G.V. Ramanaiah thus clearly lays down that it is the offence, the sentence in respect of which is sought to be commuted or remitted, which determines the question as to which Government is the appropriate Government.

259. In *Zameer Ahmed Latifur Rehman Sheikh* v. *State of Maharashtra* challenge was raised to the competence of the State Legislature to enact Maharashtra Control of Organised Crime Act, 1999. While rejecting the challenge, it was observed by this Court as under:-

> "48. From the ratio of the judgments on the point of public order referred to by us earlier, it is clear that anything that affects public peace or tranquillity within the State or the Province would also affect public order and the State Legislature is empowered to enact laws aimed at containing or preventing acts which tend to or actually affect public order. Even if the said part of MCOCA incidentally encroaches upon a field under Entry 1 of the Union List, the same cannot be held to be ultra vires in view of the doctrine of pith and substance as in essence the said part relates to maintenance of public order which is essentially a State subject and only incidentally trenches upon a matter falling under the Union List. Therefore, we are of the considered view that it is within the legislative competence of the State of Maharashtra to enact such a provision under Entries 1 and 2 of List II read with Entries 1, 2 and 12 of List III of the Seventh Schedule of the Constitution."

260. While considering the ambit of expression "public order" as appearing in Entry 1 List II of the 7th Schedule to the Constitution this Court referred to earlier decisions on the point and arrived at the aforesaid conclusion.

Similarly in *People's Union for Civil Liberties* v. *Union of India* the validity of Prevention of Terrorism Act, 2002 and in *Kartar Singh* v. *State of Punjab* validity of TADA were questioned. In both the cases it was observed that the Entry "public order" in List II empowers the State to enact the legislation relating to public order or security insofar as it affects or relates to a particular State and that the term has to be confined to disorder of lesser gravity having impact within the boundaries of the State and that activity of more serious nature which threatens the security and integrity of the country as a whole would not be within the field assigned to Entry 1 of List II. In both these cases the validity of Central enactments were under challenge on the ground that they in pith and substance were relatable to the subject under Entry 1 of List II. In both the cases the challenges were negatived as the legislations in question dealt with "terrorism" in contra-distinction to the normal issues of "public order".

261. We are however concerned in the present case with offence under Section 302 IPC simplicitor. The respondents-convicts stand acquitted insofar as offences under the TADA are concerned. We find force in the submissions of Mr. Rakesh Dwivedi, learned Senior Advocate that the offence under Section 302 IPC is directly related to "public order" under Entry 1 of List II of the 7th Schedule to the Constitution and is in the exclusive domain of the State Government. In our view the offence in question is within the exclusive domain of the State Government and it is the executive power of the State which must extend to such offence. Even if it is accepted for the sake of argument that the offence under Section 302 IPC is referable to Entry 1 of List III, in accordance with the principles as discussed hereinabove, it is the executive power of the State Government alone which must extend, in the absence of any specific provision in the Constitution or in the law made by Parliament. Consequently, the State Government is the appropriate Government in respect of the offence in question in the present matter. It may be relevant to note that right from *K.M. Nanavati* v.*State of Bombay* (supra) in matters concerning offences under Section 302 IPC it is the Governor under Article 161 or the State Government as appropriate Government under the CrPC who have been exercising appropriate powers.

262. In the light of the aforesaid discussion our answers to questions 3, 4 and 5 as stated in paragraph 52.3, 52.4 and 52.5 are as under:

> Our answer to Question 52.3 in Para 52.3 is:-
>
> Question 52.3. Whether Section 432(7) of the Code clearly gives primacy to the executive power of the

Union and excludes the executive power of the State where the power of the Union is co-extensive?

Answer: The executive powers of the Union and the State normally operate in different fields. The fields are well demarcated. Keeping in view our discussion in relation to Articles 73 and 162 of the Constitution, Section 55A of the IPC and Section 432(7) of CrPC it is only in respect of sentence of death, even when the offence in question is referable to the executive power of the State, that both the Central and State Governments have concurrent power under Section 434 of CrPC If a convict is sentenced under more than one offences, one or some relating to the executive power of the State Government and the other relating to the Executive Power of the Union, Section 435(2) provides a clear answer. Except the matters referred herein above, Section 432(7) of Cr. P.C. does not give primacy to the executive power of the Union.

Our Answer to Question posed in Para 52.4. is:-

Question 52.4. Whether the Union or the State has primacy over the subject-matter enlisted in List III of the 7th Schedule to the Constitution of India for exercise of power of remission?

Answer: In respect of matters in list III of the 7th Schedule to the Constitution, ordinarily the executive power of the State alone must extend. To this general principle there are two exceptions as stated in Proviso to Articles 73(1) of the Constitution. In the absence of any express provision in the Constitution itself or in any law made by Parliament, it is the executive power of the State which alone must extend.

Our Answer to Question posed in Para 52.5. is:-

Question 52.5. Whether there can be two appropriate Governments in a given case under Section 432(7) of the Code?

> Answer: There can possibly be two appropriate Governments in a situation contemplated under Section 435(2) of CrPC Additionally, in respect of cases of death sentence, even when the offence is one to which the executive power of the State extends, Central Government can also be appropriate Government as stated in Section 434 of CrPC Except these two cases as dealt with in Section 434 and 435(2) of CrPC there cannot be two appropriate Governments.
>
> Re: Question No. 6 as stated in para 52.6 of the Referral Order
>
> 52.6. Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in sub-section (2) of the same section is mandatory or not?

263. We now turn to the exercise of power of remission under Section 432(1) of CrPC Remissions are of two kinds. The first category is of remissions under the relevant Jail Manual which depend upon the good conduct or behavior of a convict while undergoing sentence awarded to him. These are generally referred to as 'earned remissions' and are not referable to Section 432 of CrPC but have their genesis in the Jail Manual or any such Guidelines holding the field. In *Shraddananda(2)* this aspect was explained thus:

> "80. From the Prisons Acts and the Rules it appears that for good conduct and for doing certain duties, etc. inside the jail the prisoners are given some days' remission on a monthly, quarterly or annual basis. The days of remission so earned by a prisoner are added to the period of his actual imprisonment (including the period undergone as an undertrial) to make up the term of sentence awarded by the Court. This being the position, the first question that arises in mind is how remission can be applied to imprisonment for life. The way in which remission is allowed, it can only apply to a fixed term and life

> imprisonment, being for the rest of life, is by nature indeterminate."

264. The exercise of power in granting remission under Section 432 is done in a particular or specific case whereby the execution of the sentence is suspended or the whole or any part of the punishment itself is remitted. The effect of exercise of such power was succinctly put by this Court in *Maru Ram* v. *Union of India* in following words:-

> "……. In the first place, an order of remission does not wipe out the offence it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by the Court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of remission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power of grant remission is executive power and cannot have the effect of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court……..
>
> …….. Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched."

265. The difference between earned remissions "for good behaviour" and the remission of sentence under Section 432 is clear. The first depends upon the Jail Manual or the Policy in question and normally accrues and

accumulates to the credit of the prisoner without there being any specific order by the appropriate Government in an individual case while the one under Section 432 requires specific assessment in an individual matter and is case specific. Could such exercise be undertaken under Section 432 by the appropriate Government on its own, without there being any application by or on behalf of the prisoner? This issue has already been dealt with in following cases by this Court.

266. A]. In *Sangeet* v. *State of Haryana*, it was observed in paras 59, 61 and 62 as under:-

> "59. There does not seem to be any decision of this Court detailing the procedure to be followed for the exercise of power under Section 432 CrPC. But it does appear to us that sub-section (2) to sub-section (5) of Section 432 CrPC lay down the basic procedure, which is making an application to the appropriate Government for the suspension or remission of a sentence, either by the convict or someone on his behalf. In fact, this is what was suggested in *Samjuben Gordhanbhai Koli* v.*State of Gujarat* when it was observed that since remission can only be granted by the executive authorities, the appellant therein would be free to seek redress from the appropriate Government by making a representation in terms of Section 432 CrPC.
>
> 61. It appears to us that an exercise of power by the appropriate Government under sub-section (1) of Section 432 CrPC cannot be suo motu for the simple reason that this sub-section is only an enabling provision. The appropriate Government is enabled to "override" a judicially pronounced sentence, subject to the fulfilment of certain conditions. Those conditions are found either in the Jail Manual or in statutory rules. Sub-section (1) of Section 432 CrPC cannot be read to enable the appropriate Government to "further override" the judicial pronouncement over and above what is permitted by the Jail Manual or the statutory rules. The process of granting "additional" remission under this section is set into motion in a case only through

> an application for remission by the convict or on his behalf. On such an application being made, the appropriate Government is required to approach the Presiding Judge of the court before or by which the conviction was made or confirmed to opine (with reasons) whether the application should be granted or refused. Thereafter, the appropriate Government may take a decision on the remission application and pass orders granting remission subject to some conditions, or refusing remission. Apart from anything else, this statutory procedure seems quite reasonable inasmuch as there is an application of mind to the issue of grant of remission. It also eliminates "discretionary" or en masse release of convicts on "festive" occasions since each release requires a case-by-case basis scrutiny.
>
> 62. It must be remembered in this context that it was held in *State of Haryana* v. *Mohinder Singh* that the power of remission cannot be exercised arbitrarily. The decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 Cr.P.C does provide this check on the possible misuse of power by the appropriate Government."

267. B] In *Mohinder Singh* v. *State of Punjab* the observations in para 27 were to the following effect:

> "27. In order to check all arbitrary remissions, the Code itself provides several conditions. Sub-sections (2) to (5) of Section 432 of the Code lay down basic procedure for making an application to the appropriate Government for suspension or remission of sentence either by the convict or someone on his behalf. We are of the view that exercise of power by the appropriate Government under sub-section (1) of Section 432 of the Code cannot be suo motu for the simple reason that this is only an enabling provision and the same would be possible subject to fulfilment of certain conditions.

> Those conditions are mentioned either in the Jail Manual or in statutory rules. This Court in various decisions has held that the power of remission cannot be exercised arbitrarily. In other words, the decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 of the Code itself provides this check on the possible misuse of power by the appropriate Government. As rightly observed by this Court in *Sangeet* v. *State of Haryana*, there is a misconception that a prisoner serving life sentence has an indefeasible right to release on completion of either 14 years' or 20 years' imprisonment. A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under Section 432 of the Code which in turn is subject to the procedural checks mentioned in the said provision and further substantive check in Section 433-A of the Code."

268. C] In *Yakub Abdul Razak Memon* v. *State of Maharashtra through CBI, Bombay*, it was observed in paras 921 and 922 as under:

> "921. In order to check all arbitrary remissions, the Code itself provides several conditions. Sub-sections (2) to (5) of Section 432 of the Code lay down basic procedure for making an application to the appropriate Government for suspension or remission of sentence either by the convict or someone on his behalf. We are of the view that exercise of power by the appropriate Government under sub-section (1) of Section 432 of the Code cannot be automatic or claimed as a right for the simple reason, that this is only an enabling provision and the same would be possible subject to fulfilment of certain conditions. Those conditions are mentioned either in the Jail Manual or in statutory rules. This Court, in various decisions, has held that the power of remission cannot be exercised arbitrarily. In other words, the decision to grant remission has to be well informed,

> reasonable and fair to all concerned. The statutory procedure laid down in Section 432 of the Code itself provides this check on the possible misuse of power by the appropriate Government.
>
> 922. As rightly observed by this Court in Sangeet v. State of Haryana, there is misconception that a prisoner serving life sentence has an indefeasible right to release on completion of either 14 years or 20 years' imprisonment. A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under Section 432 of the Code, which in turn is subject to the procedural checks mentioned in the said provision and to further substantive check in Section 433-A of the Code."

269. Relying on the aforesaid decisions of this Court, it was submitted by the learned Solicitor General that there cannot be suo motu exercise of power under Section 432 and that even when the power is to be exercised on an application made by or on behalf of the prisoner, opinion of the Presiding Judge of the Court before or by which the conviction was confirmed, must be sought. In the submission of Mr. Rakesh Dwivedi, learned Senior Advocate, power under Section 432(1) can be exercised suo motu and that Section 432(2) applies only when an application is made and not where power is exercised suo motu.

270. We find force in the submission of the learned Solicitor General. By exercise of power of remission, the appropriate Government is enabled to wipe out that part of the sentence which has not been served out and over-ride a judicially pronounced sentence. The decision to grant remission must, therefore, be well informed, reasonable and fair to all concerned. The procedure prescribed in Section 432(2) is designed to achieve this purpose. The power exercisable under Section 432(1) is an enabling provision and must be in accord with the procedure under Section 432(2).

271. Thus, our answer to question posed in para 52.6 is:-

> Question 52.6. Whether suo motu exercise of power of remission under Section 432(1) is permissible

> in the scheme of the section, if yes, whether the procedure prescribed in sub-section (2) of the same section is mandatory or not?
>
> Answer: That suo motu exercise of power of remission under Section 432(1) is not permissible and exercise of power under Section 432(1) must be in accordance with the procedure under Section 432(2) of CrPC
>
> Re: Question No. 7 as stated in Para 52.7 of the Referral Order:
>
> 52.7. Whether the term "consultation" stipulated in Section 435(1) of the Code implies "concurrence"?

272. Section 435(1) of CrPC sets out three categories under clauses (a), (b) and (c) thereof and states inter alia that the powers conferred by Sections 432 and 433 of CrPC upon the State Government shall not be exercised except after consultation with the Central Government. The language used in this provision and the expressions "… shall not be exercised" and "except after consultation", signify the mandatory nature of the provision. Consultation with the Central Government must, therefore, be mandatorily undertaken before the State Government in its capacity as appropriate Government intends to exercise powers under Sections 432 and 433. This is an instance of express provision in a law made by Parliament as referred to in proviso to Article 73(1) of the Constitution. The question is whether such consultation stipulated in Section 435(1) implies concurrence on part of the Central Government as regards the action proposed by the State Government. Relying on the decisions of this Court in *L&T McNeil Ltd.* v. *Govt. of Tamil Nadu*, *State of U.P.* v. *Johri Mal*, *State of Uttar Pradesh* v. *Rakesh Kumar Keshar*, *Justice Chandrashekaraiah (Retd.)*v. *Janekere C. Krishna* Mr. Rakesh Dwivedi, learned Senior Advocate submitted that the term consultation as appearing in Section 435 ought not to be equated with concurrence and that the action on part of the State of Tamil Nadu in seeking views of the Central Government as regards the proposed action did satisfy the requirement under Section 435. On the other hand, the learned Solicitor General relied upon *Supreme Court Advocates-on-Record Association* v. *Union of India* and *State of Gujarat* v. *Justice R.A. Mehta(Retd.)* to submit that the consultation referred to in the provision must mean concurrence on part of the Central Government. In his submission without such concurrence, no action could

be undertaken.

273. Speaking for the majority in *Supreme Court Advocates-on-Record Association* (supra) J.S. Verma, J (as the learned Chief Justice then was) considered the effect of the phrase "consultation with the Chief Justice of India" appearing in Article 222 of the Constitution. The observations in paragraphs 438 to 441 are quoted hereunder:

> "438. The debate on primacy is intended to determine who amongst the constitutional functionaries involved in the integrated process of appointments is best equipped to discharge the greater burden attached to the role of primacy, of making the proper choice; and this debate is not to determine who between them is entitled to greater importance or is to take the winner's prize at the end of the debate. The task before us has to be performed with this perception.
>
> 439. The primacy of one constitutional functionary qua the others, who together participate in the performance of this function assumes significance only when they cannot reach an agreed conclusion. The debate is academic when a decision is reached by agreement taking into account the opinion of everyone participating together in the process, as primarily intended. The situation of a difference at the end, raising the question of primacy, is best avoided by each constitutional functionary remembering that all of them are participants in a joint venture, the aim of which is to find out and select the most suitable candidate for appointment, after assessing the comparative merit of all those available. This exercise must be performed as a pious duty to discharge the constitutional obligation imposed collectively on the highest functionaries drawn from the executive and the judiciary, in view of the great significance of these appointments. The common purpose to be achieved, points in the direction that emphasis has to be on the importance of the purpose and not on the comparative importance of the participants

> working together to achieve the purpose. Attention has to be focussed on the purpose, to enable better appreciation of the significance of the role of each participant, with the consciousness that each of them has some inherent limitation, and it is only collectively that they constitute the selector.
>
> 440. The discharge of the assigned role by each functionary, viewed in the context of the obligation of each to achieve the common constitutional purpose in the joint venture will help to transcend the concept of primacy between them. However, if there be any disagreement even then between them which cannot be ironed out by joint effort, the question of primacy would arise to avoid stalemate.
>
> 441. For this reason, it must be seen who is best equipped and likely to be more correct in his view for achieving the purpose and performing the task satisfactorily. In other words, primacy should be in him who qualifies to be treated as the 'expert' in the field. Comparatively greater weight to his opinion may then be attached."

274. The principle which emerges is that while construing the term 'consultation' it must be seen who is the best equipped and likely to be more correct in his view for achieving the purpose and performing the tasks satisfactorily and greater weight to his opinion may then be attached.

275. While considering the phrase "after consultation of the Chief Justice of the High Court", this Court in *State of Gujarat* v. *R.A. Mehta* (supra) stated the principles thus:

> "32. Thus, in view of the above, the meaning of "consultation" varies from case to case, depending upon its fact situation and the context of the statute as well as the object it seeks to achieve. Thus, no straitjacket formula can be laid down in this regard. Ordinarily, consultation means a free and fair discussion on a particular subject, revealing all material that the parties possess in relation to each

> other and then arriving at a decision. However, in a situation where one of the consultees has primacy of opinion under the statute, either specifically contained in a statutory provision, or by way of implication, consultation may mean concurrence. The court must examine the fact situation in a given case to determine whether the process of consultation as required under the particular situation did in fact stand complete."

276. It is thus clear that the meaning of consultation varies from case to case depending upon the fact situation and the context of the statute as well as the object it seeks to achieve.

277. In the light of the aforesaid principles, we now consider the object that sub-clauses (a), (b) and (c) of Section 435(1) of the CrPC seek to achieve. Clause (a) deals with cases which are investigated by the Delhi Special Police Establishment i.e. the Central Bureau of Investigation or by any other agency empowered to make investigation into an offence under any Central Act.

278. The investigation by CBI in a matter may arise as a result of express consent or approval by the concerned State Government under Sections 5 and 6 of the Delhi Special Police Establishment Act or as a result of directions by a Superior Court in exercise of its writ jurisdiction in terms of the law laid down by this Court in *State of West Bengal* v. *Committee for Protection of Democratic Rights, West Benga*. For instance, in the present case the investigation into the crime in question i.e. Crime No. 3 of 1991 was handed over to the CBI on the next day itself. The entire investigation was done by the CBI who thereafter carried the prosecution right up to this Court.

279. In a case where the investigation is thus handed over to the CBI, entire carriage of the proceedings including decisions as to who shall be the public prosecutor, how the prosecution be conducted and whether appeal be filed or not are all taken by the CBI and at no stage the concerned State Government has any role to play. It has been laid down by this Court in *Lalu Prasad Yadav* v. *State of Bihar* that in matters where investigation was handed over to the CBI, it is the CBI alone which is competent to decide whether appeal be filed or not and the State Government cannot even challenge the order of acquittal on its own. In such cases could the State Government then seek to exercise powers under Sections 432 and 433 on its own?

280. Further, in certain cases investigation is transferred to the CBI under express orders of the Superior Court. There are number of such examples and the cases could be of trans-border ramifications such as stamp papers scam or chit fund scam where the offence may have been committed in more than one States or it could be cases where the role and conduct of the concerned State Government was such that in order to have transparency in the entirety of the matter, the Superior Court deemed it proper to transfer the investigation to the CBI. It would not then be appropriate to allow the same State Government to exercise power under Sections 432 and 433 on its own and in such matters, the opinion of the Central Government must have a decisive status. In cases where the investigation was so conducted by the CBI or any such Central Investigating Agency, the Central Government would be better equipped and likely to be more correct in its view. Considering the context of the provision, in our view comparatively greater weight ought to be attached to the opinion of the Central Government which through CBI or other Central Investigating Agency was in-charge of the investigation and had complete carriage of the proceedings.

281. The other two clauses, namely, clauses (b) and (c) of Section 435 deal with offences pertaining to destruction of any property belonging to the Central Government or where the offence was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty. Here again, it would be the Central Government which would be better equipped and more correct in taking the appropriate view which could achieve the purpose satisfactorily. In such cases, the question whether the prisoner ought to be given the benefit under Section 432 or 433 must be that of the Central Government. Merely because the State Government happens to be the appropriate Government in respect of such offences, if the prisoner were to be granted benefit under Section 432 or 433 by the State Government on its own, it would in fact defeat the very purpose.

282. Our Answer to Question post in Para 52.7 is:-

> Question 52.7. Whether the term "consultation" stipulated in Section 435(1) of the Code implies "concurrence"?
>
> Answer: In the premises as aforesaid, in our view the expression "consultation" ought to be read as concurrence and primacy must be accorded to

> the opinion of the Central Government in matters covered under clauses (a), (b) and (c) of Section 435(1) of the CrPC
>
> Re: Question No. 2 as stated in para 52.2 of the Referral Order
>
> 52.2. Whether the "appropriate Government" is permitted to exercise the power of remission under Sections 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its constitutional power under Article 32 as in this case?

283. As regards this question, the submissions of the learned Solicitor General were two-fold. According to him the Governor while exercising power under Article 161 of the Constitution, having declined remission in or commutation of sentences awarded to the respondents-convicts, second or subsequent exercise of executive power under Section 432/433 by the State Government was not permissible and it would amount to an over-ruling or nullification of the exercise of constitutional power vested in the Governor. In his submission, the statutory power under Section 432/433 CrPC could not be exercised in a manner that would be in conflict with the decision taken by the constitutional functionary under Article 161 of the Constitution. It was his further submission that Sections 432 and 433 of CrPC only prescribe a procedure for remission, while the source of substantive power of remission is in the Constitution. According to him Sections 432 and 433, CrPC are purely procedural and in aid of constitutional power under Article 72 of 161. He further submitted that as laid down in *Maru Ram* (supra), while exercising powers under Articles 72 and 161, the President or the Governor act on the aid and advice of the Council of Ministers and thus the Council of Ministers, that is to say the executive having already considered the matter and rejected the petition, a subsequent exercise by the same executive is impermissible. On the other hand, it was submitted by Mr. Rakesh Dwivedi, learned Senior Advocate that there was nothing in the statute which would bar or prohibit exercise of power on the second or subsequent occasion and in fact Section 433A of CrPC itself gives an indication that such exercise is permissible. It was further submitted that the power conferred upon an authority can be exercised successively from time to time as occasion requires.

284. We would first deal with the submission of the learned Solicitor General that the provisions of Section 432/433 CrPC are purely procedural and in aid of the constitutional power. This Court had an occasion to deal with the issue, though in a slightly different context, in *Maru Ram* (supra). We may quote paragraphs 58 and 59 of the decision, which are as under:

> "58. …….What is urged is that by the introduction of Section 433-A, Section 432 is granted a permanent holiday for certain classes of lifers and Section 433(a) suffers eclipse. Since Sections 432 and 433(a) are a statutory expression and modus operandi of the constitutional power, Section 433-A is ineffective because it detracts from the operation of Sections 432 and 433(a) which are the legislative surrogates, as it were, of the pardon power under the Constitution. We are unconvinced by the submissions of counsel in this behalf.
>
> 59. It is apparent that superficially viewed, the two powers, one constitutional and the other statutory, are coextensive. But two things may be similar but not the same. That is precisely the difference. We cannot agree that the power which is the creature of the Code can be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States. The source is different, the substance is different, the strength is different, although the stream may be flowing along the same bed. We see the two powers as far from being identical, and, obviously, the constitutional power is "untouchable" and "unapproachable" and cannot suffer the vicissitudes of simple legislative processes. Therefore, Section 433-A cannot be invalidated as indirectly violative of Articles 72 and 161. What the Code gives, it can take, and so, an embargo on Sections 432 and 433(a) is within the legislative power of Parliament."

285. The submission that Sections 432 and 433 are a statutory expression and modus operandi of the constitutional power was not accepted in *Maru Ram* (supra). In fact this Court went on to observe that though these two

powers, one constitutional and the other statutory, are co-extensive, the source is different, the substance is different and the strength is different. This Court saw the two powers as far from being identical. The conclusion in para 72(4) in *Maru Ram* (supra) was as under:

> "72. (4) We hold that Section 432 and Section 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar power, and Section 433-A, by nullifying wholly or partially these prior provisions does not violate or detract from the full operation of the constitutional power to pardon, commute and the like."

286. It is thus well settled that though similar, the powers under Section 432/433 CrPC on one hand and those under Article 72 and 161 on the other, are distinct and different. Though they flow along the same bed and in same direction, the source and substance is different. We therefore reject the submission of the learned Solicitor General.

287. Section 433A of CrPC inter alia states, "…… where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life", such person shall not be released from prison unless he had served at least 14 years of imprisonment. It thus contemplates an earlier exercise of power of commuting the sentence under Section 433 CrPC It may be relevant to note that under Section 433 a sentence of death can be commuted for any other punishment including imprisonment for life. A prisoner having thus been granted a benefit under Section 433 CrPC can certainly be granted further benefit of remitting the remainder part of the life sentence, subject of course to statutory minimum period of 14 years of actual imprisonment. We therefore accept the submission of Mr. Rakesh Dwivedi, learned Senior Advocate that there is nothing in the statute which either expressly or impliedly bars second or subsequent exercise of power. In fact Section 433A contemplates such subsequent exercise of power. At this stage, the observations in *G. Krishta Goud and J. Bhoomaiah* v. *State of Andhra Pradesh* in the context of constitutional power of clemency are relevant:

> "10. ……. The rejection of one clemency petition does not exhaust the power of the President or the Governor."

288. This principle was re-iterated in para 7 of the decision in *Krishnan* v. *State of Haryana* as follows:-

> "In fact, Articles 72 and 161 of the Constitution provide for residuary sovereign power, thus, there could be nothing to debar the authorities concerned to exercise such power even after rejection of one clemency petition and even in the changed circumstances."

289. In *State of Haryana* v. *Jagdish* it was observed by this Court as under:

> "46. At the time of considering the case of premature release of a life convict, the authorities may require to consider his case mainly taking into consideration whether the offence was an individual act of crime without affecting the society at large; whether there was any chance of future recurrence of committing a crime; whether the convict had lost his potentiality in committing the crime; whether there was any fruitful purpose of confining the convict any more; the socio-economic condition of the convict's family and other similar circumstances."

290. In *Kehar Singh* v. *Union of India* (supra) it was observed, "…….. the power under Article 72 is of the widest amplitude, can contemplate myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of States may be profoundly assisted by prevailing occasion and passing of time". Having regard to its wide amplitude and the status of the functions to be discharged thereunder, it was found unnecessary to spell out any specific guidelines for exercise of such power. The observations made in the context of power under Article 72 will also be relevant as regards exercise under Section 432/433 CrPC

291. In *State (Govt. of NCT of Delhi)* v. *Prem Ram* it was observed thus:

> "14. The powers conferred upon the appropriate Government under Section 433 have to be exercised reasonably and rationally keeping in view the reasons germane and relevant for the purpose of

> law, mitigating circumstances and/or commiserative facts necessitating the commutation and factors like interest of the society and public interest."

292. We see no hindrance or prohibition in second or subsequent exercise of power under Section 432/433 CrPC As stated above, such exercise is in fact contemplated under Section 433A. An exercise of such power may be required and called for depending upon exigencies and fact situation. A person may be on the death bed and as such the appropriate Government may deem fit to grant remission so that he may breathe his last in the comfort and company of his relations. Situations could be different. It would be difficult to put the matter in any straight jacket or make it subject to any guidelines, as was found in Kehar Singh. The aspects whether "the convict had lost his potentiality in committing the crime and whether there was any fruitful purpose of confining the convict any more" as stated in *State of Haryana* v.*Jagdish* (supra) could possibly yield different assessment after certain period and can never be static. Every case will depend on its individual facts and circumstances. In any case, if the repeated exercise is not for any genuine or bona fide reasons, the matter can be corrected by way of judicial review. Further, in the light of our decision as aforesaid, in any case an approach would be required to be made under Section 432(2) CrPC to the concerned court which would also result in having an adequate check.

293. In the instant case, A-1 Nalini and other convicts A-2, A-3 and A-18 who were awarded death sentence had initially preferred mercy petition under Article 161 of the Constitution. The petition preferred by A-1 Nalini was allowed, while those of other three were rejected. Those three convicts then preferred mercy petition under Article 72 of the Constitution which was rejected after considerable delay. On account of such delay in disposal of the matters, this Court commuted the sentence of those three convicts to that of life imprisonment. The other convicts namely A-9, A-10 and A-16 had not preferred any petition under Article 161 against their life imprisonment. Thus the Governor while exercising power under Article 161 on the earlier occasion had considered the cases of only three of the convicts and that too when they were facing death sentence. The cases of other three were not even before the Governor. In the changed scenario namely the death sentence having been commuted to that of the imprisonment for life under the orders of this Court, the approach would not be on the same set of circumstances. Each of the convicts having undergone about 23 years of actual imprisonment, there is definitely

change in circumstances. An earlier exercise of power under Article 72 or 161 may certainly have taken into account the gravity of the offence, the effect of such offence on the society in general and the victims in particular, the age, capacity and conduct of the offenders and the possibility of any retribution. Such assessment would naturally have been as on the day it was made. It is possible that with the passage of time the very same assessment could be of a different nature. It will therefore be incorrect and unjust to rule out even an assessment on the subsequent occasion.

294. While commuting the death sentence to that of imprisonment for life, on account of delay in disposal of the mercy petition, this Court in its jurisdiction under Article 32 concentrates purely on the factum of delay in disposal of such mercy petition as laid down by this Court in *Shatrughan Chauhan* v. *Union of India*. The merits of the matter are not required and cannot be gone into. The commutation by this Court in exercise of power under Article 32 is therefore completely of a different nature. On the other hand, the consideration under Section 432/433 is of a different dimension altogether.

295. Our Answer to Question posed in Para 52.2 is:-

> Question 52.2. Whether the "appropriate Government" is permitted to exercise the power of remission under Sections 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its constitutional power under Article 32 as in this case?
>
> Answer: In the circumstances, in our view it is permissible to the appropriate Government to exercise the power of remission under Section 432/433 CrPC even after the exercise of power by the President under Article 72 or the Governor under Article 161 or by this Court in its constitutional power under Article 32.
>
> Re: Question No. 1 as stated in para 52.1 of the Referral Order
>
> 296. Question no. 1 as formulated in the Referral Order comprises of two sub-questions, as set out hereunder:

Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission? And

Whether as per the principles enunciated in paragraphs 91 to 93 of Swamy *Shraddananda(2)*[6], a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment for imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

Re: Sub-question (a) of question No. 1 in Para 52.1

Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission?

297. In *Gopal Vinayak Godse* v. *The State of Maharashtra*, the petitioner was convicted on 10.02.1949 and given sentences including one for transportation for life. According to him, he had earned remissions to the tune of 2893 days upto 30.09.1960 and if such earned remissions were added, his actual term of imprisonment would exceed 20 years and therefore he prayed that he be set at liberty forthwith. Repelling these submissions, it was observed by the Constitution Bench of this Court that in order to get the benefit of earned remissions the sentence of imprisonment must be for a definite and ascertainable period, from and out of which the earned remissions could be deducted. However, transportation for life or life imprisonment meant that the prisoner was bound in law to serve the entire life term i.e. the remainder of his life in prison. Viewed thus, unless and until his sentence was commuted or remitted by an appropriate authority under the relevant provisions, the prisoner could not claim any benefit. It was observed:

> "…….. As the sentence of transportation for life or its prison equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death."

298. In *Maru Ram* (supra) while considering the effect of Section 433A of CrPC this Court summed up the issue as under:

"…Ordinarily, where a sentence is for a definite term, the calculus of remissions may benefit the prisoner to instant-release at that point where the subtraction results in zero. Here, we are concerned with life imprisonment and so we come upon another concept bearing on the nature of the sentence which has been highlighted in *Godse's case* Where the sentence is indeterminate and of uncertain duration, the result of subtraction from an uncertain quantity is still an uncertain quantity and release of the prisoner cannot follow except on some fiction of quantification of a sentence of uncertain duration. Godse was sentenced to imprisonment for life. He had earned considerable remissions which would have rendered him eligible for release had life sentence been equated with 20 years of imprisonment a la Section 55 I. P. C. On the basis of a rule which did make that equation, Godse sought his release through a writ petition under Article 52 of the Constitution. He was rebuffed by this Court. A Constitution Bench, speaking through Subba Rao, J., took the view that a sentence of imprisonment for life was nothing less and nothing else than an imprisonment which lasted till the last breath. Since death was uncertain, deduction by way of remission did not yield any tangible date for release and so the prayer of Godse was refused. The nature of a life sentence is incarceration until death, judicial sentence of imprisonment for life cannot be in jeopardy merely because of long accumulation of remissions. Release would follow only upon an order under Section 401 of the Criminal Procedure Code, 1898 (corresponding to Section 432 of the 1973 Code) by the appropriate Government or on a clemency order in exercise of power under Article 72 or 161 of the Constitution. *Godse* (supra) is authority for the proposition that a sentence of imprisonment for life is one of "imprisonment for the whole of the remaining period of the convicted person's natural life"

299. Conclusion No. 6 in Maru Ram was to the following effect:

> "We follow *Godse's case* (supra) to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by Government."

300. Section 53 of the IPC envisages different kinds of punishments while Section 45 of the IPC defines the word 'life' as the life of a human being unless the contrary appears from the context. The life of a human being is till he is alive that is to say till his last breath, which by very nature is one of indefinite duration. In the light of the law laid down in Godse and Maru Ram, which law has consistently been followed the sentence of life imprisonment as contemplated under Section 53 read with Section 45 of the IPC means imprisonment for rest of the life or the remainder of life of the convict. The terminal point of the sentence is the last breath of the convict and unless the appropriate Government commutes the punishment or remits the sentence such terminal point would not change at all. The life imprisonment thus means imprisonment for rest of the life of the prisoner.

301. In paras 27 and 38 of the decision in *State of Haryana* v. *Mahender Singh*, this Court observed:-

> "27. It is true that no convict has a fundamental right of remission or shortening of sentences. It is also true that the State in exercise of its executive power of remission must consider each individual case keeping in view the relevant factors. The power of the State to issue general instructions, so that no discrimination is made, is also permissible in law.
>
> 38. A right to be considered for remission, keeping in view the constitutional safeguards of a convict under Articles 20 and 21 of the Constitution of India, must be held to be a legal one. Such a legal right emanates from not only the Prisons Act but also from the Rules framed thereunder. Although no convict can be said to have any constitutional right for obtaining remission in his sentence, he in view

> of the policy decision itself must be held to have a right to be considered therefor. Whether by reason of a statutory rule or otherwise if a policy decision has been laid down, the persons who come within the purview thereof are entitled to be treated equally. (State of Mysore v. H. Srinivasmurthy)"

302. The convict undergoing the life imprisonment can always apply to the concerned authority for obtaining remission either under Articles 72 or 161 of the Constitution or under Section 432 CrPC and the authority would be obliged to consider the same reasonably. This was settled in the case of Godse which view has since then been followed consistently in *State of Haryana* v. *Mahender Singh* (supra), *State of Haryana* v. *Jagdish* (supra), *Sangeet* v. *State of Haryana* (supra) and *Laxman Naskar*v. *Union of India*. The right to apply and invoke the powers under these provisions does not mean that he can claim such benefit as a matter of right based on any arithmetical calculation as ruled in Godse. All that he can claim is a right that his case be considered. The decision whether remissions be granted or not is entirely left to the discretion of the concerned authorities, which discretion ought to be exercised in a manner known to law. The convict only has right to apply to competent authority and have his case considered in a fair and reasonable manner.

303. Our Answer to sub question (a) of Question in Para 52.1 is:

> Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission?
>
> Answer: The sentence of life imprisonment means imprisonment for the rest of life or the remainder of life of the convict. Such convict can always apply for obtaining remission either under Articles 72 of 161 of the Constitution or under Section 432 Cr. P.C. and the authority would be obliged to consider the same reasonably.
>
> Re: sub-question (b) of Question No. 1 in Para 52.1
>
> (b) Whether as per the principles enunciated in paragraphs 91 to 93 of Swamy Shraddananda(2), a

> special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment for imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

304. In *Swamy Shraddananda(1)* the appellant was convicted for the offence of murder and given death sentence, which conviction and sentence was under appeal in this Court. A Bench of two learned Judges of this Court affirmed the conviction of the appellant but differed on the question of sentence to be imposed. Sinha J. was of the view that instead of death sentence, life imprisonment would serve the ends of justice. He however, directed that the appellant would not be released from the prison till the end of his life. Katju J. was of the view that the appellant deserved death sentence. The matter therefore came up before a Bench of three learned Judges. While dealing with the question of sentence to be imposed, this Court was hesitant in endorsing the death penalty awarded by the trial court and confirmed by the High Court. Paragraph nos. 55 and 56 of the judgment in *Swamy Shraddananda(2)* may be quoted here:

> "55. We must not be understood to mean that the crime committed by the appellant was not very grave or the motive behind the crime was not highly depraved. Nevertheless, in view of the above discussion we feel hesitant in endorsing the death penalty awarded to him by the trial court and confirmed by the High Court. The absolute irrevocability of the death penalty renders it completely incompatible to the slightest hesitation on the part of the Court. The hangman's noose is thus taken off the appellant's neck.
>
> 56. But this leads to a more important question about the punishment commensurate to the appellant's crime. The sentence of imprisonment for a term of 14 years, that goes under the euphemism of life imprisonment is equally, if not more, unacceptable. As a matter of fact, Mr. Hegde informed us that the appellant was taken in custody on 28-3-1994 and submitted that by virtue of the provisions relating

to remission, the sentence of life imprisonment, without any qualification or further direction would, in all likelihood, lead to his release from jail in the first quarter of 2009 since he has already completed more than 14 years of incarceration. This eventuality is simply not acceptable to this Court. What then is the answer? The answer lies in breaking this standardisation that, in practice, renders the sentence of life imprisonment equal to imprisonment for a period of no more than 14 years; in making it clear that the sentence of life imprisonment when awarded as a substitute for death penalty would be carried out strictly as directed by the Court. This Court, therefore, must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed, in appropriate cases as a uniform policy not only by this Court but also by the High Courts, being the superior courts in their respective States. A suggestion to this effect was made by this Court nearly thirty years ago in Dalbir Singh v. State of Punjab. In para 14 of the judgment this Court held and observed as follows: (SCC p. 753)

"14. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in Rajendra Prasad case. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the men's life but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder.

> We think that it is time that the course suggested in Dalbir Singh should receive a formal recognition by the Court."

305. The discussion in aforesaid paragraph 56 shows the concern that weighed with this Court was the standardization rendering the sentence of life imprisonment in practice as equal to imprisonment for a period of no more than fourteen years. Relying on *Dalbir Singh* v. *State of Punjab* which in turn had considered *Rajendra Prasad* v. *State of U.P.*, it was observed that the Court must in appropriate cases put the punishment of life imprisonment awarded as a substitute for death penalty, beyond any remission and direct it to be carried out as directed by the Court. Paragraphs 91 to 93 of the decision in Shraddananda(2) which gives rise to sub-question (b) of the first question in the Referral Order were as under:

> "91. The legal position as enunciated in Pandit Kishori Lal, Gopal Vinayak Godse, Maru Ram, Ratan Singh and Shri Bhagwan and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.
>
> 92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option

> is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.
>
> 93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh besides being in accord with the modern trends in penology."

306. Finally, in paragraph 95 of its Judgment in *Shraddananda(2)* this Court substituted the death sentence given to the appellant to that of imprisonment for life and directed that he would not be released from the prison till the rest of his life. While doing so, this Court made it clear that it was not dealing with powers of the President and the Governor under Article 72 and 161 of the Constitution but only with provisions of commutation, remission etc. as contained in the CrPC and the Prison Acts, as would be evident from paragraph 77 of the judgment which was to the following effect:-

> "77. This takes us to the issue of computation and remission, etc. of sentences. The provisions in regard to computation, remission, suspension, etc. are to be found both in the Constitution and in the statutes. Articles 72 and 161 of the Constitution deal with the powers of the President and the Governors of the States respectively to grant pardons,

> reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted for any offence. Here it needs to be made absolutely clear that this judgment is not concerned at all with the constitutional provisions that are in the nature of the State's sovereign power. What is said hereinafter relates only to provisions of commutation, remission, etc. as contained in the Code of Criminal Procedure and the Prisons Acts and the rules framed by the different States."

307. The decision in *Shraddananda(2)* is premised on the following:

> (a) The life imprisonment, though in theory is till the rest of the life or the remainder of life of the prisoner, in practice it is equal to imprisonment for a period of no more than 14 years.
>
> (b) Though in a given case, in the assessment of the Court the case may fall short of the "rarest of rare" category to justify award of death sentence, it may strongly feel that a sentence of life imprisonment which normally works out to a term of fourteen years may be grossly disproportionate and inadequate.
>
> (c) If the options are limited only to these two punishments the Court may feel tempted and find itself nudged into endorsing the death penalty, which course would be disastrous.
>
> (d) The Court may therefore take recourse to the expanded option namely the hiatus between imprisonment for fourteen years and the death sentence, if the facts of the case justify.
>
> (e) The unsound way in which remissions are granted in cases of life imprisonment makes out a strong case to make a special category for the very few cases where the death penalty is substituted for imprisonment of life.
>
> (f) While awarding life imprisonment the Court may specify that the prisoner must actually undergo

> minimum sentence of period in excess of fourteen years or that he shall not be released till the rest of his life and/or put such sentence beyond the application of remission.

308. The view so taken in *Shraddananda(2)* has been followed in some of the later Bench decisions of this Court. It is the correctness of this view and more particularly whether it is within the powers of the Court to put the sentence of life imprisonment so awarded beyond application of remissions, which is presently in question.

309. We must at the outset state that while commuting the death sentence to that of imprisonment for life, this Court in *V. Sreedhar* v. *Union of India* (supra) had not put any fetters or restrictions on the power of commutation and/or remission. In fact paragraph 32 of the decision expressly mentions that the sentence so awarded is subject to any remission granted by the Appropriate Government under Section 432 of CrPC Strictly speaking, sub-question (b) of the first question does not arise for consideration insofar as the present writ petition is concerned and that precisely was the submission of Mr. Rakesh Dwivedi, learned Senior Advocate. However since the question has been referred for our decision we proceed to deal with said sub-question (b) of question No. 1. Further a doubt has been expressed in *Sangeet* v. *State of Haryana* (supra) regarding correctness of the decision in *Shraddananda(2)*[6] in following words:

> "55. A reading of some recent decisions delivered by this Court seems to suggest that the remission power of the appropriate Government has effectively been nullified by awarding sentences of 20 years, 25 years and in some cases without any remission. Is this permissible? Can this Court (or any court for that matter) restrain the appropriate Government from granting remission of a sentence to a convict? What this Court has done in Swamy Shraddananda and several other cases, by giving a sentence in a capital offence of 20 years' or 30 years' imprisonment without remission, is to effectively injunct the appropriate Government from exercising its power of remission for the specified period. In our opinion, this issue needs further and greater discussion, but as at present advised, we are of the opinion that

> this is not permissible. The appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever be the reason."

310. We therefore deal with the question.

311. The decision of this Court in *Maru Ram* (Supra) refers to the background which preceded the introduction of Section 433 A in Cr. P.C. The Joint Committee which went into the Indian Penal Code (Amendment) Bill had suggested that a long enough minimum sentence should be suffered by both classes of lifers namely, those guilty of offence where death sentence was one of the alternatives and where the death sentence was commuted to imprisonment for life. Paragraph 5 of the decision in Maru Ram sets out the objects and reasons, relevant notes on clauses and the recommendations and was to the following effect:

> "5. The Objects and Reasons throw light on the "why" of this new provision:
>
> "The Code of Criminal Procedure, 1973 came into force on the 1st day of April, 1974. The working of the new Code has been carefully watched and in the light of the experience, it has been found necessary to make a few changes for removing certain difficulties and doubts. The notes on clauses explain in brief the reasons for the amendments."

312. The notes on clauses give the further explanation:-

> "Clause 33.-Section 432 contains provision relating to powers of the appropriate Government to suspend or remit sentences. The Joint Committee on the Indian Penal Code (Amendment) Bill, 1972, had suggested the insertion of a proviso to Section 57 of the Indian Penal Code to the effect that a person who has been sentenced to death and whose death sentence has been commuted into that of life imprisonment and persons who have been sentenced to life imprisonment for a capital offence should undergo actual imprisonment of 14

> years in jail. Since this particular matter relates more appropriately to the Criminal Procedure Code, a new section is being inserted to cover the proviso inserted by the Joint Committee."

313. This takes us to the Joint Committee's recommendation on Section 57 of the Penal Code that being the inspiration for clause 33. For the sake of completeness, we may quote that recommendation:

> "Section 57 of the Code as proposed to be amended had provided that in calculating fractions of terms of punishment, imprisonment for life should be reckoned as equivalent to rigorous imprisonment for twenty years. In this connection attention of the Committee was brought to the aspect that sometimes due to grant of remission even murderers sentenced or commuted to life imprisonment were released at the end of 5 to 6 years. The Committee feels that such a convict should not be released unless he has served at least fourteen years of imprisonment."

314. Thus, as against the then prevalent practice or experience where murderers sentenced or commuted to life imprisonment, were being released at the end of 5-6 years, period of 14 years of actual imprisonment was considered sufficient.

315. *Shraddananda(2)* referred to earlier decision of this Court in *Dalbir Singh* v. *State of Punjab* (supra). In that decision, taking cue from English Legislation on abolition of death penalty, a suggestion was made in following words:-

> "14. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in *Rajendra Prasad case*. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the man's life, but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long

as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder."

62. Committee of Reforms on Criminal Justice System under the Chairmanship of Dr. Justice Malimath in its report submitted in the year 2003 recommended suitable amendments to introduce a punishment higher than life imprisonment and lesser than death penalty, similar to that which exists in USA namely "Imprisonment for life without commutation or remission". The relevant paragraphs of Malimath Committee Report namely paragraphs 14.7.1 and 14.7.2 were as under:-

"ALTERNATIVE TO DEATH PENALTY

14.7.1 Section 53 of the IPC enumerates various kinds of punishments that can be awarded to the offenders, the highest being the death penalty and the second being the sentence of imprisonment for life. At present there is no sentence that can be awarded higher than imprisonment for life and lower than death penalty. In USA a higher punishment called "Imprisonment for life without commutation or remission" is one of the punishments. As death penalty is harsh and irreversible the Supreme Court has held that death penalty should be awarded only in the rarest of rare cases, the Committee considers that it is desirable to prescribe a punishment higher than that of imprisonment for life and lower than death penalty. Section 53 be suitably amended to include "Imprisonment for life without commutation or remission" as one of the punishments.

14.7.2 Wherever imprisonment for life is one of the penalties prescribed under the IPC, the following alternative punishment be added namely "Imprisonment for life without commutation or

> remission". Wherever punishment of imprisonment for life without commutation or remission is awarded, the State Governments cannot commute or remit the sentence. Therefore, suitable amendment may be made to make it clear that the State Governments cannot exercise power of remission or commutation when sentence of "Imprisonment for life without remission or commutation" is awarded. This however cannot affect the Power of Pardon etc. of the President and the Governor under Articles 72 and 161 respectively."

316. In its report submitted in January 2013, Committee on Amendment to Criminal Law under the chairmanship of Justice J.S. Verma made following recommendations on life imprisonment:-

> "On Life Imprisonment
>
> 13. Before making our recommendation on this subject, we would like to briefly examine the meaning of the expression "life" in the term "life imprisonment", which has attracted considerable judicial attention.
>
> 14. Mohd. Munna v. Union of India reported in (2005) 7 SCC 417 reiterates the well settled judicial opinion that a sentence of imprisonment for life must, prima facie, be treated as imprisonment for the whole of the remaining period of the convict's natural life. This opinion was recently restated in Rameshbhai Chandubhai Rathode v. State of Gujarat reported in (2011) 2 SCC 764, and State of U.P. v. Sanjay Kumar reported in (2012) 8 SCC 537, where the Supreme Court affirmed that life imprisonment cannot be equivalent to imprisonment for 14 or 20 years, and that it actually means (and has always meant) imprisonment for the whole natural life of the convict.
>
> 15. We therefore recommend a legislative clarification that life imprisonment must always mean imprisonment "for 'the entire natural life of the convict'."

317. Pursuant to these recommendations, certain Sections were added in the IPC while other Sections were substantially amended by Criminal Law Amendment Act of 2013 (Act 13 of 2013). As a result Sections 370(6), 376-A, 376-D and 376-E now prescribe a punishment of "with imprisonment for life which shall mean imprisonment for the remainder of that persons natural life". Thus what was implicit in the sentence for imprisonment of life as laid down in Godse and followed since then has now been made explicit by the Parliament in certain Sections of the IPC. However, none of the amendments reflected the introduction of punishment suggested by Malimath Committee.

318. Thus despite recommendations of Justice Malimath Committee to introduce a punishment higher than life imprisonment and lesser than death penalty similar to the one which exists in USA, Parliament has chosen not to act in terms of recommendations for last 12 years. In this backdrop, it was submitted by Mr. Rakesh Dwivedi, learned Senior Advocate that in *Shraddananda(2)* this court in fact carved out and created a new form of punishment and resorted to making a legislation on the point. It was further submitted that Section 433A of CrPC prescribes minimum actual imprisonment which must be undergone in cases of life imprisonment on two counts, where death sentence is one of the alternatives or where death sentence is commuted to imprisonment for life. Even the prisoner who at one point of time was awarded a death sentence is entitled, upon his death sentence being commuted to life imprisonment, to be considered under Section 433A. In his submission, it would not be within the powers of the court to put the sentence of life imprisonment in such cases beyond application of remissions, in the teeth of the Statute. Mr. T.R. Andhyarujina, learned Senior Advocate appearing for one of the intervenors submitted that what is within the domain of the judiciary is power to grant or award sentence as prescribed and when it comes to its execution the domain is that of the executive. In his submission howsoever strong be the temptation on account of gravity of the crime, there could be no trenching into the power of the executive. He submitted that it is not for the judiciary to say that there could be no commutation at all, which would be violative of the concept of separation of powers. Reliance was placed on Section 32A of NDPS Act to contend that wherever the Parliament intended that there be no remissions in respect of any offence, it has chosen to say so in specific terms.

319. In a recent decision of this Court in *Vikram Singh @ Vicky* v. *Union of India*, while considering challenge to the award of death sentence for

an offence under Section 364A of the IPC this Court considered various decisions on the issue of punishment. It considered some American decisions holding that fixing of prison terms for specific crimes involves a substantive penalogical judgment which is properly within the province of legislatures and not courts and that the responsibility for making fundamental choices and implementing them lies with the legislature.

320. In the end, the conclusions (b), (c) and (d) as summed up by this Court were as under:

> "(b) Prescribing punishment is the function of the legislature and not the Courts.
>
> (c) The legislature is presumed to be supremely wise and aware of the needs of the people and the measures that the necessary to meet those needs.
>
> (d) Court show deference to the legislative will and wisdom and are slow in upsetting the enacted provisions dealing with the quantum of punishment prescribed for different offences."

321. Section 302 IPC prescribes two punishments, the maxima being the death sentence and the minima to be life sentence. *Shraddananada(2)* proceeds on the footing that the court may in certain cases take recourse to the expanded option namely the hiatus between imprisonment for 14 years and the death sentence, if the facts of the case so justify. The hiatus thus contemplated is between the minima i.e. 14 years and the maxima being the death sentence. In fact going by the punishment prescribed in the statute there is no such hiatus between the life imprisonment and the death sentence. There is nothing that can stand in between these two punishments as life imprisonment, going by the law laid down in *Godse's case* is till the end of one's life. What *Shraddananda(2)* has done is to go by the practical experience of the life imprisonment getting reduced to imprisonment for a period of not more that 14 years and assess that level to be the minima and then consider a hiatus between that level and the death sentence. In our view this assumption is not correct. What happens on the practical front cannot be made basis for creating a sentence by the Courts. That part belongs specifically to the legislature. If the experience in practice shows that remissions are granted in unsound manner, the matter

can be corrected in exercise of judicial review. In any case in the light of our discussion in answer to Question in Para 52.6, in cases of remissions under Section 432/433 of CrPC an approach will necessarily have to be made to the Court, which will afford sufficient check and balance.

322. It may be relevant to note at this state that in England and Wales, the mandatory life sentence for murder is contained in Section 1(1) of the Murder (Abolition of the Death Penalty) Act, 1965. The Criminal Justice Act, 2003 empowers a trial judge, in passing a mandatory life sentence, to determine the minimum term which the prisoner must serve before he is eligible for early release on licence. The statute allows the trial judge to decide that because of the seriousness of the offence, the prisoner should not be eligible for early release (in effect to make a "whole life order" that is to say till the end of his life.

323. In effect, the recommendations of Malimath Committee were on similar lines to add a new form of punishment which could similarly empower the Courts to impose such punishment and state that the prisoner would not be entitled to remissions. Section 32A of the NDPS Act is also an example in that behalf.

324. What is crucial to note is the specific empowerment under the Statute by which a prisoner could be denied early release or remissions. It ma

325. *Shraddananda (2)* does not proceed on the ground that upon interpretation of the concerned provision such as Section 302 of the IPC, such punishment is available for the court to impose. If that be so it would be available to even the first court i.e. Sessions Court to impose such sentence and put the matter beyond any remissions. In a given case the matter would not go before the superior court and it is possible that there may not be any further assessment by the superior court. If on the other hand one were to say that the power could be traceable to the power of confirmation in a death sentence which is available to the High Court under Chapter XXVIII of CrPC, even the High Court while considering death reference could pass only such sentence as is available in law. Could the power then be traced to Article 142 of the Constitution?

326. In *Prem Chand Garg* v. *Excise Commissioner, U.P.*, Constitution Bench of this Court observed:-

> "….The powers of this Court are no doubt very wide and they are intended to be and will always be

> exercised in the interest of justice. But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws…." (emphasis added)

327. In *Supreme Court Bar Association* v. *Union of India* while dealing with exercise of powers under Article 142 of Constitution, it was observed:-

> "47. The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent "clogging or obstruction of the stream of justice". It, however, needs to be remembered that the powers conferred

> on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly. Punishing a contemner advocate, while dealing with a contempt of court case by suspending his licence to practice, a power otherwise statutorily available only to the Bar Council of India, on the ground that the contemner is also an advocate, is, therefore, not permissible in exercise of the jurisdiction under Article 142. The construction of Article 142 must be functionally informed by the salutary purposes of the article, viz., to do complete justice between the parties. It cannot be otherwise. As already noticed in a case of contempt of court, the contemner and the court cannot be said to be litigating parties." (emphasis added)

328. Further, in theory it is possible to say that even in cases where court were to find that the offence belonged to the category of "rarest of rare" and deserved death penalty, such death convicts can still be granted benefit under Section 432/433 of CrPC In fact, Section 433A contemplates such a situation. On the other hand, if the court were to find that the case did not belong to the "rarest of rare" category and were to put the matter beyond any remissions, the prisoner in the latter category would stand being denied the benefit which even the prisoner of the level of a death convict could possibly be granted under Section 432/433 of the CrPC The one who in the opinion of the Court deserved death sentence can thus get the benefit but the one whose case fell short to meet the criteria of "rarest of rare" and the Court was hesitant to grant death sentence, would languish in Jail for entirety of his life, without any remission. If absolute 'irrevocability of death sentence' weighs with the Court in not awarding death sentence, can the life imprisonment ordered in the alternative be so directed that the prospects of remissions on any count stand revoked for such prisoner. In our view, it cannot be so ordered.

329. We completely share the concern as expressed in *Shraddananda(2)* that at times remissions are granted in extremely unsound manner but in our view that by itself would not and ought not to nudge a judge into endorsing a death penalty. If the offence in question falls in the category of the "rarest of rare" the consequence may be inevitable. But that cannot be a justification to create a new form of punishment putting the matter completely beyond remission. Parliament having stipulated mandatory minimum actual imprisonment at the level of 14 years, in law a prisoner would be entitled to apply for remission under the statute. If his case is made out, it is for the executive to consider and pass appropriate orders. Such orders would inter alia consider not only the gravity of the crime but also other circumstances including whether the prisoner has now been de-sensitized and is ready to be assimilated in the society. It would not be proper to prohibit such consideration by the executive. While doing so and putting the matter beyond remissions, the court would in fact be creating a new punishment. This would mean-though a model such a Section 32A was available before the Legislature and despite recommendation by Malimath Committee, no such punishment was brought on the Statute yet the Court would create such punishment and enforce it in an individual case. In our view, that would not be permissible.

330. In *Pravasi Bhalai Sangathan* v. *Union of India*, while emphasizing that the court cannot rewrite, recast or reframe the legislation it was observed as under:-

> "20. Thus, it is evident that the legislature had already provided sufficient and effective remedy for prosecution of the authors who indulge in such activities. In spite of the above, the petitioner sought reliefs which tantamount to legislation. This Court has persistently held that our Constitution clearly provides for separation of powers and the court merely applies the law that it gets from the legislature. Consequently, the Anglo-Saxon legal tradition has insisted that the Judges should only reflect the law regardless of the anticipated consequences, considerations of fairness or public policy and the Judge is simply not authorised to legislate law. "If there is a law, Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it." The court cannot rewrite, recast or reframe the

> legislation for the very good reason that it has no power to legislate. The very power to legislate has not been conferred on the courts. However, of lately, judicial activism of the superior courts in India has raised public eyebrows time and again."

331. Similarly in *Sushil Kumar Sharma* v. *Union of India*, it was observed that if the provision of law is misused and subjected to the abuse, it is for the legislation to amend modify or repeal it, if deemed necessary.

332. The power under Section 432/433 CrPC and the one exercisable under Articles 72 and 161 of the Constitution, as laid down in *Maru Ram* (supra) are streams flowing in the same bed. Both seek to achieve salutary purpose. As observed in *Kehar Singh* (supra) in Clemency jurisdiction it is permissible to examine whether the case deserves the grant of relief and cut short the sentence in exercise of executive power which abridges the enforcement of a judgment. Clemency jurisdiction would normally be exercised in the exigencies of the case and fact situation as obtaining when the occasion to exercise the power arises. Any order putting the punishment beyond remission will prohibit exercise of statutory power designed to achieve same purpose under Section 432/433 CrPC In our view Courts cannot and ought not deny to a prisoner the benefit to be considered for remission of sentence. By doing so, the prisoner would be condemned to live in the prison till the last breath without there being even a ray of hope to come out. This stark reality will not be conducive to reformation of the person and will in fact push him into a dark hole without there being semblance of the light at the end of the tunnel.

333. As stated in *Prem Chand Garg* (supra) an order in exercise of power under Article 142 of the Constitution of India must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws. In *A.R. Antulay* v. *R.S. Naik* a direction by which the petitioner was denied a statutory right of appeal was recalled. A fortiorari, a statutory right of approaching the authority under Section 432/433 CrPC which authority can, as laid down in *Kehar Singh* (supra) and *Epuru Sudhakar* (supra) eliminate the effect of conviction, cannot be denied under the orders of the Court.

334. The law on the point of life imprisonment as laid down in *Godse's case* (supra) is clear that life imprisonment means till the end of one's life

and that by very nature the sentence is indeterminable. Any fixed term sentence characterized as minimum which must be undergone before any remission could be considered, cannot affect the character of life imprisonment but such direction goes and restricts the exercise of power of remission before the expiry of such stipulated period. In essence, any such direction would increase or expand the statutory period prescribed under Section 433A of CrPC Any such stipulation of mandatory minimum period inconsistent with the one in Section 433A, in our view, would not be within the powers of the Court.

335. Our answer to Sub Question (b) of Question in Para 52.1 is:

> Question b: Whether as per the principles enunciated in paragraphs 91 to 93 of Swamy Shraddananda(2), a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment for imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?
>
> Answer. In our view, it would not be open to the Court to make any special category of sentence in substitution of death penalty and put that category beyond application of remission, nor would it be permissible to stipulate any mandatory period of actual imprisonment inconsistent with the one prescribed under Section 433A of Cr. P.C.

336. Reference answered accordingly."

CHAPTER 5
JAIL FACILITIES

Jail Facilities

The Supreme Court has recognized that a prisoner retains her fundamental rights, albeit in a truncated form, behind prison bars. As the Court asserted in **Sunil Batra (II) v. Delhi Administration**,[1] prisoners' right to life, liberty and dignity cannot be suspended without fair procedure. Similarly, in **Prem Shankar Shukla v. Delhi Administration**,[2] the Court not only held that handcuffing of prisoners is a violation of human dignity, but also denounced the classification of prisoners on the basis of social status since all prisoners are equally entitled to the right of dignity. In **A Convict Prisoner v. State**,[3] the Kerala High Court, observing that imprisonment does not impair a person's right to dignity or make her a non-person, issued several directives to improve the condition of prisoners. However, in **D. Bhuvan Mohan Patnaik v. State of Andhra Pradesh**,[4] where, in response to prisoners escaping from prison, the State posted armed police guards around the prison, and also fixed high voltage live electrical wire on top of the jail wall, the Court held that such measures do not interfere with prisoners' fundamental rights since prisoners were not in any danger from such measures unless they were trying to escape.

A recurrent issue before the judiciary has been the scope of the right to free speech and expression in relation to prisoners. In **State of Maharashtra v. Prabhakar Pandurang Sanzgiri**,[5] for example, a detenue wanted to publish a book on theory of elementary particles but he was not permitted to do so. The Court held that as there is no provision dealing with writing or publication of books by detenu, there cannot be a restriction on detenuwhich infringes his personal liberty in respect of publication of books. Similarly, in **Kunnikkal Narayanan v. State of Kerala**,[6] where security prisoners were not allowed to receive or purchase Mao Literature, the Supreme Court struck down the measure since the Government had failed to demonstrate how this literature endangered security or affect public order. So also, in **M.A. Khan v. State**,[7] where prison authorities had rejected aprisoner's

1 (1980) 3 SCC 488
2 (1980) 3 SCC 526
3 1993 SCC OnLine Ker 127
4 (1975) 3 SCC 185
5 (1966) 1 SCR 702
6 1972 SCC OnLine Ker 189
7 1966 SCC OnLineBom 1

request for certain journals and periodicals, even though he had offered to pay for them, on the ground that they had not been included in the official list and were found to be unsuitable by the authorities, the Bombay High Court held that preventing prisoners from reading papers does not in any way relate to maintenance of discipline and hence the restriction was invalid. Moreover, the Court held that the method of choosing unsuitable publications placed a power in the hands of the officials that was arbitrary and should be done away with. Similarly, in **Madhukar Bhagwan Jambhale v. State of Maharashtra**,[8] restricting prisoners from expressing their views on a political matter and restricting them from sending welfare letters to prisoners in other prisonswas struck down.

In **Anukul Chandra Pradhan v. Union of India**,[9] the Supreme Court found it reasonable to deny voting rights even to undertrials and those in police custody, apart from convicted prisoners, in order to curb the criminalisation of politics. The Court held that the right to vote is a statutory not a fundamental right and that a prisoner was "in prison as a result of his own conduct and is, therefore, deprived of his liberty during the period of his imprisonment [and] cannot claim equal freedom of movement, speech and expression with the others who are not in prison."

Through an order in the case of **Prabha Dutt v. Union of India**,[10] the Supreme Court declared that the press has a right to interview convicts in jail subject to the prisoner's consent. Such interviews can be denied only if there are strong reasons to be recorded in writing.

Apart from permitting meetings between prisoners and the press, the Court has also focused on prisoner access to family members and lawyers. In **Francis Coralie Mullin v. Administrator, Union Territory of Delhi**,[11] the Court clarified the rights of prisoners in relation to meeting lawyers and family members. In **Asgar Yusuf Mukadam v. State of Maharashtra**,[12] the Court dealt with the prohibition on home food imposed by the amendment to the Prisons Act, 1894. It held that the power to order home food vests in the Magistrate or the Trial Court and hence the same cannot be restricted by any Act but should be decided on a case to case basis by the Magistrate.

Recently, the High Court of Punjab in **Jasvir Singh v. State of Punjab**,[13] held that prisoners have the right to conjugal visits. In **R.D. Upadhyay v.**

8 1987 MhLJ 68
9 (1997) 6 SCC 1
10 (182) 1 SCC 1
11 (1981) 1 SCC 608
12 (2004) SCC OnLineBom 1221
13 2014 SCC Online P&H 22479

State of A.P.,[14] the Court laid down several guidelinesfor protecting the rights and interests of children who were in prison with their mothers.

Recognizing that prisoners need special measures to help them effectively access legal aid and ensure legal representation, the Court in **M.H. Hoskot v. State of Maharashtra**,[15] directed thatcopies of judgments must be delivered to prisoners and written acknowledgement of receipt of the same obtained from them.

Another issue of concern has been the payment of wages to prisoners for work performed by them. **State of Gujarat v. Hon'ble High Court of Gujarat**[16] dealt with determination of wages that should be paid to prisoners. The Court held that payment of minimum wages is not a necessity because the expenses for food and clothes for the prisoner are undertaken by the State. Hence it directed the payment of equitable wages but not necessarily the minimum wage.

In **Rama Murthy v. State of Karnataka**,[17]where various grievances of prisoners were raised, including allegations that they were being denied rightful wages despite doing hard labour, the Court issues guidelines for compliance with wage norms. In **Nawal Thakur v.Brahmu Ram**,[18] the Himachal Pradesh High Court held that a prisoner cannot be employed by the jail officer for private work of a menial nature against his will, without remuneration, as this would offend human dignity.

The Court has recognized the importance of periodic jail inspections for ensuring that rights of prisoners are protected.[19] While the Court has passed various directions for the betterment of prison conditions,[20] a recent landmark case on this issue is **In Re Inhuman Conditions in 1382 Prisons**.[21] In a series of orders in this case, the Court has issued various directions for jail inspections, implementation of beneficial bail provisions, prison management and protection of prisoners' rights.

14 (2007) 15 SCC 337
15 (1978) 3 SCC 544
16 (1998) 7 SCC 392
17 (1997) 2 SCC 642
18 1985 CriLJ 244
19 State of Maharashtra v. Asha ArunGawli, (2004) 5 SCC 175; Rakesh Kaushik v. B.L. Vig, Superintendent, 1980 SCC (Cri) 834
20 Inacio Manuel Miranda v. State, 1989MhLK 77
21 (2016) 3 SCC 700

IN THE SUPREME COURT OF INDIA

State of Maharashtra v. Prabhakar Pandurang Sanzgiri & Anr.

(1966) 1 SCR 702

K. Subbra Rao, K.N. Wanchoo, J.C. Shah, S.M. Sikri & V. Ramaswami, JJ.

Prabhakar Pandurang Sanzgiri, who was detained by the Government of Maharashtra under the Defence of India Rules, 1962, wrote a book titled "Anucha Antarangaat" (Inside the Atom). The detenu applied for permission to send the manuscript out of the jail for publication but was denied permission. The High Court directed the Government to allow the manuscript to be sent for publication. On appeal, the Supreme Court examined whether, in the absence of any express restriction on writing or publishing books, the Government could impose such restrictions.

Subba Rao, J.: "2. 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) SCR 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 Article 19 of the Constitution as the rights enshrined in the said Article are only the attributes of a free man.3. 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 clauses (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 Section 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 Section 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. 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. …

7. Let us now consider the validity of the argument of the learned Additional Solicitor-General. He relies upon the following observations of Das, J. as he then was, in A.K. Gopalan case [(1950) SCR 88, 291] at p. 291.

> "If a man's person is free, it is then and then only that he can exercise a variety of other auxiliary rights, that is to say he can within certain limits, speak what he likes, assemble where he likes, form any associations or unions, move about freely as his own inclination may direct, reside and settle anywhere he likes and practise any profession or carry on any occupation, trade or business. These are attributes of the freedom of the person and are consequently attached to the person".

Relying upon these observations it is argued that freedom to publish is only a component part of that of speech and expression and that in the light of the said observations, as the detenu ceased to be free in view of his detention, he cannot exercise his freedom to publish his book. In other words, as he is no longer a free man, his right to publish his book, which is only an attribute of personal liberty, is lost. The principle accepted by Das, J., as he then was, does not appear to be the basis of the conclusion arrived at by the other learned Judges who agreed with his conclusion. Different reasons are given by the learned Judges for arriving at the same conclusion. As has been pointed out by this Court in the second Kochunni case [(1960) 3 SCR 887: (AIR 1960 SC 1080)], the views of the learned Judges may be broadly summarized under the following heads: (1) to invoke Article 19(1) of the Constitution, a law shall be made directly

infringing that right; (2) Articles 21 and 22 constitute a self-contained code; and (3) the freedoms in Article 19 postulate a free man. Therefore, it cannot be said that the said principle was accepted by all the learned Judges who took part in A.K. Gopalan case [(1950) SCR 88, 291] . That apart, there are five distinct lines of thought in the matter of reconciling Article 21 with Article 19, namely, (1) if one loses his freedom by detention, he losses all the other attributes of freedom enshrined in Article 19; (2) personnal liberty in Article 21 is the residue of personnal liberty after excluding the attributes of that liberty embodied in Article 19; (3) the personnal liberty included in Article 21 is wide enough to include some or all of the freedoms mentioned in Article 19, but they are two distinct fundamental rights — a law to be valid shall not infringe both the rights; (4) the expression "law" in Article 21 means a valid law and, therefore, even if a person's liberty is deprived by law of detention, the said law shall not infringe Article 19; and (5) Article 21 applies to procedural law, whereas Article 19 to substantive law relating to personal liberty. We do not propose to pursue the matter further or to express our opinion one way or other. We have only mentioned the said views to show that the view expressed by Das, J., as he then was, in A.K. Gopalan case [(1950) SCR 88, 291] is not the last word on the subject.

8. 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 Rules subject to conditions determined in the manner prescribed in sub-rule (4) of Rule 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.

9. 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."

IN THE HIGH COURT OF BOMBAY

M.A. Khan v. State & Anr.

(1966) SCC OnLine Bom 1

Tarkunde & Wagle, JJ.

The prison officials had refused to provide the petitioner with certain journals and periodicals, even though he had offered to pay for them, on the ground that they had not been included in the official list and were found to be unsuitable by the authorities under Clause 16 of the Bombay Conditions of Detention Order, 1951. Hence, in a writ petition under Article 226 of the Constitution the petitioner asked for a direction requiring the respondents to allow him to receive the literature he had asked for.

Tarkunde, J.: "2. … The grievance of the petitioner centers on Cl. 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."

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 R. 30 of the Defence of India Rules do not include a power to impose on detenus a condition like the one contained in Cl. 16 of the Bombay Conditions of Detention Order, 1951 Sub-rule (4) of R. 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 they from time to time determine."

6. … [W]hat is objected to in Cl. 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 R. 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 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 R. 30. It must accordingly be held that the provisions of Cl. 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 and discipline of detenus and are beyond the powers conferred on the State Government by sub-rule (4) of Rule 30.

…

9. 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 Cl. 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 Cl. 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.

10. 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 Cl. 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 Cl. 16, a detenu can get at his own cost such newspapers as 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 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 effect of sub-clause (i) of Cl. 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

11. ... [T]here is nothing in sub-rule (4) of R. 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.

12. It will be noticed that, it is not our conclusion that the whole of Cl. 16 is invalid. In our view, the two sub-clauses of Cl. 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."

IN THE HIGH COURT OF KERALA

Kunnikkal Narayanan v. State of Kerala & Anr.

1972 SCC OnLine Ker 189

P. Govindan Nair, T.S. Krishnamoorthy Iyer & K. Sadasivan, JJ.

Kunnikkal Narayanan, a detenu under the Maintenance of Internal Security Act, 1971 petitioned for a declaration that the rule made under part (b) in paragraph 19(1) of the Kerala Security Prisoners' Order, which prohibited prisoners from receiving or purchasing literature relating to Mao Tse-Tung, is illegal.

P. Govindan Nair, J.: "2. … The relevant portion of Ext. R1 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."

3. 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."

4. 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 as special orders, specify; and

(b) ……"

…

8. Incitement to violence with a view to overthrow Governments established by law will be against the security of the State and against the maintenance of public order. So an order passed in purported exercise of the power under Section 5 can contain provisions with a view to prevent actions that may impair security of the State or which may endanger public order. Reading of such literature as is likely to inflame persons may lead to acts of violence or resort to violence for the purpose of overthrowing established Governments or creating public disorder. Refusing permission to read such literature is a legitimate condition that can be imposed under Section 5 of the Act, Prevention of access to such books or literature can therefore be provided by an order under Section 5. And that is what has been done by clause 19(1) of the Order.

9. It was next contended that clause 19(1) infringed the fundamental rights guaranteed to the petitioner under Article 19(1)(a) of the Constitution. It is said that freedom if speech and expression guaranteed to a citizen by Article 19(1)(a) includes the freedom to acquire knowledge, to peruse books and periodicals and read any type of literature and restrictions relating to such a right which can be said to be reasonable restrictions are only those introduced in the interests of the sovereignty and integrity of India, the security of the State, public order and such other matters as are provided in Article 19(2) of the Constitution. It was urged that the refusal of permission to receive the three books mentioned above is an unreasonable restriction and is beyond the scope of the restrictions envisaged by Article 19(2) of the Constitution. Counsel on behalf of the State invited our attention to a passage from the judgment of Das, J. in A.K. Gopalan v. State of Madras, reported in AIR 1950 SC 27 at page 108 reading as follows:—

"If a man's person is free, it is then and then only that he can exercise a variety of other auxiliary

> rights, that is to say, he can within certain limits, speak what he likes, assemble where he likes, form any associations or unions, move about freely as his 'own inclination may direct', reside and settle anywhere he likes and practise any profession or carry on any occupation, trade or business. These are attributes of the freedom of the person and are consequently attached to the person."

10. On the basis of these observations, it was contended that a detenu who had no freedom of movement during the time he was under detention could not have the fundamental rights of freedom of speech and expression.

11. The above passage from the judgment in A.K. Gopalan's case was noticed by a later decision of the Supreme Court in The State of Maharashtra v. Prabhakar Pandurang reported in AIR 1966 SC 424 and it was said that the view expressed by Das, J., "is not the last word on the subject" and was only one of the five views expressed by the Judges in A.R. Gopalan's case, AIR 1950 SC 27.

12. It is therefore not possible to proceed on the basis that the Supreme Court has ruled that a detenu will not have the fundamental rights under Article 19(1)(a) of the Constitution. 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.

13. 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.

14. 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."

15. 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 pre-judicially 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".

16. 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 Gov eminent 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."

IN THE SUPREME COURT OF INDIA

D. Bhuvan Mohan Patnaik & Ors. v. State of Andhra Pradesh & Ors.

(1975) 3 SCC 185

Y.V. Chandrachud & P.K. Goswami, JJ.

As a response to prisoners escaping from prison, the State posted armed police guards around the prison, and also fixed high voltage live electrical wire on top of the jail wall. In this case, the Supreme Court had to decide whether these measures were constitutional.

Y.V. Chandrachud, J.: "5. Section 3(1) of the Prisons Act 9 of 1894, defines "prison" to mean any jail or place used permanently or temporarily for the detention of prisoners, including "all lands and buildings appurtenant thereto". The Superintendent of the Central Jail, Visakhapatnam, who is the 3rd respondent to the petitions, has filed an affidavit stating that the usual watch and ward staff of the jail having been found to be inadequate, the services of the Andhra Pradesh Special Police Force had to be requisitioned to guard the jail from outside. The affidavit shows that these policemen live in huts built on a part of the vacant jail land and that the officers of the Force are accommodated in the "Jail Club" immediately outside the jail. Their office is situated in a block outside the jail, which was meant to be used as a waiting room for visitors wishing to meet the prisoners. The argument of Mr Garg is that since prison includes lands appurtenant thereto, the members and officers of the Andhra Pradesh Special Police Force must, on the affidavit of the third respondent, be held to occupy a part of the prison and that must be prevented as it is calculated to cause substantial interference with the exercise by the prisoners of their fundamental rights.

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.

…

8. Though, therefore, under our Constitution, the right of personal liberty and some of the other fundamental freedoms are not to be totally denied to a convict during the period of incarceration, we are unable to appreciate that the petitioners have been deprived of any of their fundamental rights by the posting of police-guards immediately outside the jail. The affidavit of the third respondent shows that as many as 146 Naxalites prisoners were lodged in the Visakhapatnam jail, as a result of which the usual watch and ward arrangement proved inadequate. Eleven Naxalite prisoners including two out of three petitioners before us, namely, Nagabhushan Patnaik and P. Hussainar, escaped from the prison on the night of October 8, 1969. It was decided thereafter to take adequate measures for preventing the escape of prisoners from the jail. We do not think that a convict has any right any more than anyone else has, to dictate whether guards ought to be posted to prevent the escape of prisoners. Prisoners will always vote against such measures in order to steal their freedom.

9. The vacant land appurtenant to the jail is by the definition of "prison" in Section 3(1) of The Prisons Act a part of the prison itself. It cannot, therefore, be gainsaid that members of the Andhra Pradesh Special Police Force must be deemed to be in occupation of a part of the prison premises. The infiltration of policemen into prisons must generally be deprecated for, under trial prisoners, like two of the petitioners before us, who are remanded to judicial custody ought to be immune from the coercive influence of the police. 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". But the argument of Mr Garg proceeds from purely hypothetical considerations. The policemen who live on the vacant jail land are not shown to have any access to the jail which is enclosed by high walls. Their presence therefore, in the immediate vicinity of the jail can cause no interference with the personal liberty or the lawful preoccupations of the petitioners.

10. Counsel for the petitioners complained bitterly against the segregation of Naxalite prisoners in a "quarantine" and the inhuman treatment meted out to them as if they were inmates of a "Fascist concentration camp". We would like to emphasise once again, and no emphasis in this context can be too great, that though the Government possesses the constitutional right to initiate laws, it cannot, by taking law into its own hands, resort to oppressive measures to curb the political beliefs of its opponents. No person, not even a prisoner, can be deprived of his "life" or "personal

liberty" except according to procedure established by law. The American Constitution by the 5th and 14th Amendments provides, inter alia, that no person shall be deprived of "life, liberty, or property, without due process of law". Explaining the scope of this provision, Field, J. observed in Munn v. Illinois [(1877) 94 US 113] that the term "life" means something more than mere animal existence and the inhibition against its deprivation extends to all those limits and faculties by which life is enjoyed. This statement of the law was approved by a Constitution Bench of this Court in Kharak Singh v. State of U.P. [AIR 1963 SC 1295 : (1964) 1 SCR 332, 347 : (1963) 2 Cri LJ 329]

11. But, on a perusal of the affidavit of the 3rd Respondent, we are not satisfied that the allegations made by the petitioners are true, though we do not think that the rosy picture drawn by the 3rd Respondent of life in the Visakhapatnam Central Jail can too readily be accepted. "Airy rooms with cross-ventilation"; a "break-fast and two regular meals a day ... the total caloric value of which is about 4000 calories per day as against 2500 which is the average caloric value of food consumed by an Indian"; "250 grams of chicken, a litre of milk and 2 eggs per day" for one of the petitioners who has a duodenal ulcer; "a lot of reading material"; "facilities for playing games like Volleyball, Kabaddi, Badminton, Ring Tennis etc."; the supply of "musical instruments" and "a radio net-work" — these and many other amenities are, according to the 3rd Respondent, made available to the prisoners. We hope and trust that the claim is founded on true facts. But attention of the jail authorities needs to be drawn to what the petitioners have described as the "marathon hunger-strike" by a large number of Naxalite prisoners for improvement in the sub-human conditions of their existence. We are also not prepared to dismiss as wholly untrue the reply of the petitioners to the 3rd Respondent's counter-affidavit, that there is difficulty even in getting a packet of powder for a rickety carrom-board, that the radio net-work consists of a silent museum-piece, that the supply of "musical instruments" consists of an abandoned non-speaking harmonium and a set of dilapidated drums and that all the music that is there is provided by an army of mobile mosquitoes. These, however, are matters of reform and though they ought to receive priority in our Constitutional scheme, their denial may not necessarily constitute an encroachment on the right guaranteed by Article 21 of the Constitution. We cannot do better than say that the directive principle contained in Article 42 of the Constitution that "The State shall make provision for securing just and humane conditions of work" may benevolently be extended to living conditions in jails. There are subtle forms of punishment to which convicts and under trial prisoners are sometimes subjected but it must be realised that these barbarous relics of a bygone era offend against the letter and

spirit of our Constitution. For want of satisfactory proof, we hesitate to accept the contention of the petitioners that the treatment meted out to them is in violation of their right to life and personal liberty.

12. As regards the live-wire mechanism fixed atop the jail walls, Mr Garg argues that the act is unconstitutional because a prisoner attempting to escape is, by the use of the device, virtually subjected to a death penalty. The policy of law as reflected in Section 224 of the Penal Code, says the counsel, is to visit a prisoner attempting to escape or successfully escaping, to a maximum sentence of two years and a fine. The live-wire gadget lacks the authority of law and since it is a flagrant violation of the personal liberty guaranteed by Article 21 of the Constitution, it must be declared unconstitutional. Counsel fears that if the Court puts its seal of approval on the use of the inhuman mechanism, prisons shall have been converted into cremation grounds.

13. This argument has a strong emotional appeal but not to reason. And the appeal to reason is what the court is primarily concerned with in deciding upon the constitutionality of any measure.

14. But before examining the petitioners' contention, it is necessary to make a clarification. Learned Counsel for the respondents harped on the reasonableness of the step taken by the jail authorities in installing the high-voltage live-wire on the jail walls. He contended that the mechanism was installed solely for the purpose of preventing the escape of prisoners and was therefore a reasonable restriction on the fundamental rights of the prisoners. This, in our opinion, is a wrong approach to the issue under consideration. If the petitioners succeed in establishing that the particular measure taken by the jail authorities violates any of the fundamental rights available to them under the Constitution, the justification of the measure must be sought in some "law", within the meaning of Article 13(3)(a) of the Constitution. The installation of the high-voltage wires lacks a statutory basis and seems to have been devised on the strength of departmental instructions. Such instructions are neither "law" within the meaning of Article 13(3)(a) nor are they "procedure established by law" within the meaning of Article 21 of the Constitution. Therefore, if the petitioners are right in their contention that the mechanism constitutes an infringement of any of the fundamental rights available to them, they would be entitled to the relief sought by them that the mechanism be dismantled. The State has not justified the installation of the mechanism on the basis of a "law" or a "procedure established by law".

15. The live-wire is installed on the top of a wall, 14 feet from the ground level, the height of the wall itself being 13 feet. It rests on enamel non-conductors fixed to angle irons which are embedded in the wall. The

wire has no direct contact with the wall and there is no possibility of the electrical current leaking through the wall. The prison-walls are themselves situated at a distance of about 20 feet from the cells where the petitioners are lodged. An electrician inspects the system regularly. Finally, the mechanism is not a secret trap as all prisoners are warned of its existence and a non-electrical barbed-wire fences the jail walls.

16. There is thus no possibility that the petitioners will come into contact with the electrical device in the normal pursuit of their daily chores. There is also no possibility that any other person in the discharge of his lawful functions or pursuits will come into contact with the same. Whatever be the nature and extent of the petitioners' fundamental right to life and personal liberty, they have no fundamental freedom to escape from lawful custody. Therefore, they cannot complain of the installation of the live-wire mechanism with which they are likely to come into contact only if they attempt to escape from the prison. Carrying the petitioners' contention to its logical conclusion, they would also be entitled to demand that the height of the compound wall be reduced from 13 feet to say 4 or 5 feet as a fall from a height of 13 feet is likely to endanger their lives. In fact the petitioners could ask that all measures be taken to render safe their attempts to escape from the prison.

17. In holding that the live-wire mechanism does not interfere with any of the fundamental freedoms of the petitioners, we are not influenced by the consideration so prominently mentioned by the 3rd Respondent in his further affidavit that a similar system is in vogue in Hyderabad, Warangal and Nellore. If the system is unconstitutional, its wide-spread use will not make it constitutional.

…

19. The petitioners are, therefore, not entitled to either of the two reliefs sought by them and the rule must be discharged. But that is on the ground that the acts complained of are not shown to cause any interference with the fundamental rights available to them and not on the ground that prisoners possess no fundamental rights. The rights claimed by the petitioners as fundamental may not readily fit in the classical mould of fundamental freedoms, but "basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right.…To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society" [Per Frankfurter, J, in *Wolf* v. *Colorado*, (1949) 338 US 25, 27]."

IN THE SUPREME COURT OF INDIA

Madhav Hayawadanrao Hoskot v. State of Maharashtra

(1978) 3 SCC 544

V.R. Krishna Iyer, D.A. Desai & O. Chinnappa Reddy, JJ.

The petitioner filed a special leave petition in the Supreme Court challenging the High Court order enhancing his punishment. His petition was filed after a four year delay which he sought to justify on the ground that he was not given a copy of the judgment. This led to the court examining the injustice of the prison system.

Krishna Iyer, J.: "4. The High Court's judgment was pronounced in November 1973 but the special leave petition has been made well over four years later. This hiatus may appear horrendous, all the more so because the petitioner has undergone his full term of imprisonment during this lengthy interregnum. The explanation offered by him for condonation of the delay, if true, discloses a disturbing episode of prison injustice. To start with the petitioner complained that the High Court granted a copy of the judgment of 1973 only in 1978, a further probe disclosed that a free copy had been sent promptly by the High Court, meant for the applicant, to the Superintendent, Yaravada Central Prison, Pune. The petitioner denies having been served that copy and there is nothing on record which bears his signature in token of receipt of the High Court's judgment. The Prison Superintendent, on the other hand, would have us believe that a clerk of his office did deliver it to the prisoner but took it back for the purpose of enclosing it with a mercy petition to the Governor for remission of sentence. This exonerative story may be imaginary or true, but there is no writing to which the petitioner is a party to validate this plea. The fact remains that prisoners are situationally at the mercy of the prison "brass" but their right to appeal, which is part of the constitutional process to resist illegal deprivation of liberty, is in peril, if district jail officials' *ipse dixit* that copies have been served is to pass muster without a title of prisoner's acknowledgement. What is more, there is no statutory provision for free legal services to a prisoner, absent which a right of appeal for the legal illiterates is nugatory and, therefore, a negation of that fair legal procedure which is implicit in Article 21 of the Constitution, as made explicit by this Court in *Maneka Gandhi* [(1978) 1 SCC 248].

…

12. What follows from this appellate imperative? Every step that makes the right of appeal fruitful is obligatory and every action or inaction which stultifies it is unfair and, ergo, unconstitutional. (In a sense even Article 19 may join hands with Article 21, as the *Maneka Gandhi* reasoning discloses). Pertinent to the point before us are two requirements: (*i*) service of a copy of the judgment to the prisoner in time to file an appeal and (*ii*) provision of free legal services to a prisoner who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service. Both these are State responsibilities under Article 21. Where the procedural law provides for further appeals what we have said regarding first appeals will similarly apply.

13. In the present case there is something dubious about the delivery of the copy of the judgment by the Jailor to the prisoner. A simple proof of such delivery is the latter's written acknowledgment. Any jailor who, by indifference or vendetta, withholds the copy thwarts the court process and violates Article 21, and may pave the way for holding the further imprisonment illegal. We hope that Jail Manuals will be updated to include the mandate, if there be any omission, and deviant jail officials punished. And courts, when prison sentence is imposed, will make available a copy of the judgment if he is straight marched into the prison. All the obligations we have specificated are necessarily implied in the right of appeal conferred by the Code read with the commitment to procedural fairness in Article 21. Section 363 of the Criminal Procedure Code is an activist expression of this import of Article 21 and is inviolable. We say no more because we have condoned the delay in the present case although it is pathetic that for want of a copy of judgment the leave is sought after the sentence has been served out.

…

27. While dismissing the Special Leave Petition we declare the legal position to put it beyond doubt:

1. Courts shall forthwith furnish a free transcript of the judgment when sentencing a person to prison term;

2. In the event of any such copy being sent to the jail authorities for delivery to the prisoner, by the appellate, revisional or other court, the official concerned shall, with quick despatch, get it delivered to the sentence and obtain written acknowledgment thereof from him …"

IN THE SUPREME COURT OF INDIA

Sunil Batra (II) v. Delhi Administration

(1980) 3 SCC 488

V.R. Krishna Iyer, R.S. Pathak & O. Chinappa Reddy, JJ.

The Court initiated habeas corpus proceedings in this case after one of the judges received a letter from Sunil Batra, a prisoner in Tihar Jail, Delhi complaining that a jail warden had pierced a baton into the anus of another prisoner to extract money through his visiting relations.

Krishna Iyer, J.: "30. We, therefore, affirm that where the rights of a prisoner, either under the Constitution or under other law, are violated the writ power of the court can and should run to his rescue. There is a warrant for this vigil. The court process casts the convict into the prison system and the deprivation of his freedom is not a blind penitentiary affliction but a belighted institutionalisation geared to a social good. The court has a continuing responsibility to ensure that the constitutional purpose of the deprivation is not defeated by the prison administration. In a few cases, this validation of judicial invigilation of prisoners' condition has been voiced by this Court and finally reinforced by the Constitution Bench in Batra [Sunil Batra v. Delhi Admn., (1979) 1 SCR 392 : (1978) 4 SCC 494 : 1979 SCC (Cri) 155.] : (SCC p. 569, para 213-A)

> "The court need not adopt a 'hands off' attitude . . . in regard to the problem of prison administration. It is all the more so because a convict is in prison under the order and direction of the court."

…

32. The upshot of this discussion is but this. The court has power and responsibility to intervene and protect the prisoner against mayhem, crude or subtle, and may use habeas corpus for enforcing in-prison humanism and forbiddance of harsher restraints and heavier severities than the sentence carries. We hold these propositions to be self-evident in our constitutional order and are supported by authority, if need be. Therefore, we issue the writ to the Lt. Governor and the Superintendent of the Central Jail that the

prisoner, Prem Chand, shall not be subjected to physical manhandling by any jail official, that the shameful and painful torture to which he has been subjected — a blot on government's claim to protect human rights — shall be ended and the wound on his person given proper medical care and treatment. The Central Government will, we are sure, direct its jail staff not to show too pachydermic a disposition for a democratic government. For example, specific guidelines before punishing a prisoner had been given in Batra case [Sunil Batra v. Delhi Admn., (1979) 1 SCR 392 : (1978) 4 SCC 494: 1979 SCC (Cri) 155.] and yet the prisoner Prem Chand has been lodged in the punishment cell, which is almost the same as a solitary cell, with cavalier disregard for procedural safeguards. Merely to plead that many prisoners are "habituals" is no ground for habitual violation of law by officials. We direct that Prem Chand be released from the punishment cell and he shall not be subjected to such severity until fair procedure is complied with.

…

39. At the outset, we notice the widespread prevalence of legal illiteracy even among lawyers about the rights of prisoners. Access to law postulates awareness of law and activist awareness of legal rights is the condition for seeking court justice. So the first need in the juristic twilight is for the State to produce and update a handbook on Prison Justice, lucid, legible for the lay, accurate, comprehensive and, above all, practical in meeting the felt necessities and daily problems of prison life. The Indian Bar has, as part of its judicare tryst special responsibility to assist the State in this behalf. A useful handbook prepared by the American Civil Liberties Union was handed on to us by Dr Chitale titled The Rights of Prisoners. Law in the books and in the courts is of no help unless it reaches the prisoner in understandable language and available form. We, therefore, draw the attention of the State to the need to get ready a prisoners' handbook in the regional language and make them freely available to the inmates. To know the law is the first step to be free from fear of un-law.

40. Prisoners are peculiarly and doubly handicapped. For one thing, most prisoners belong to the weaker segment, in poverty, literacy, social station and the like. Secondly, the prison house is a walled-off world which is incommunicado for the human world, with the result that the bonded inmates are invisible, their voices inaudible, their injustices unheeded. So it is imperative, as implicit in Article 21, that life or liberty, shall not be kept in suspended animation or congealed into animal existence without the freshening flow of fair procedure. The meaning of 'life' given by Field, J.,

approved in Kharak Singh [Kharak Singh v. State of U. P., (1964) 1 SCR 332, 357 : AIR 1963 SC 1295] and Maneka Gandhi [(1978) 1 SCC 248] bears excerption :

> "Something more 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 by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world."

Therefore, inside prisons are persons and their personhood, if crippled by law-keepers turning law-breakers, shall be forbidden by the writ of this Court from such wrongdoing. Fair procedure, in dealing with prisoners, therefore, calls for another dimension of access to law-provision, within easy reach, of the law which limits liberty to persons who are prevented from moving out of prison gates.

…

43. We think it proper to suggest that in our country of past colonial subjection and consequent trepidation in life, publicity officially is necessary for rights to be appreciated even by the beneficiaries. Therefore, large notice boards displaying the rights and responsibilities of prisoners may be hung up in prominent places within the prison in the language of the people. We are dealing with the mechanics of bringing the law within the wakeful ken of the affected persons.

44. Section 61 of the Prisons Act, simplified imaginatively leads to the same result. That section reads :

> "Copies of rules, under Sections 59 and 60 so far as they affect the government of prisons, shall be exhibited, both in English and in the vernacular, in some place to which all persons employed within a prison have access."

45. We think it right to hold that copies of the Prison Manual shall be kept within ready reach of prisoners. Darkness never does anyone any good and light never any harm.

46. Perhaps, the most important right of a prisoner is to the integrity of his physical person and mental personality. This Court in Batra case [Sunil Batra v. Delhi Admn., (1979) 1 SCR 392 : (1978) 4 SCC 494 : 1979 SCC (Cri) 155.] has referred to the international wave of torture of prisoners found in an article entitled "Minds Behind Bars". That heightens our anxiety to solve the issue of prisoners' protection.

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

48. Inflictions may take many protean forms, apart from physical assaults. Pushing the prisoner into a solitary cell, denial of a necessary amenity, and, more dreadful sometimes, transfer to a distant prison where visits or society of friends or relations may be snapped, allotment of degrading labour, assigning him to a desperate or tough gang and the like, may be punitive in effect. Every such affliction or abridgment is an infraction of liberty or life in its wider sense and cannot be sustained unless Article 21 is satisfied. There must be a corrective legal procedure, fair and reasonable and effective. Such infraction will be arbitrary, under Article 14 if it is dependent on unguided discretion, unreasonable, under Article 19 if it is irremediable and unappealable, and unfair, under Article 21 if it violates natural justice. The string of guidelines in Batra [Sunil Batra v. Delhi Admn., (1979) 1 SCR 392 : (1978) 4 SCC 494 : 1979 SCC (Cri) 155.] set out in the first judgment, which we adopt, provides for a hearing at some stages, a review by a superior, and early judicial consideration so that the proceedings may not hop from Caesar to Caesar. We direct strict compliance with those norms and institutional provisions for that purpose.

49. Likewise, no personal harm, whether by way of punishment or otherwise, shall be suffered by a prisoner without affording a preventive, or in special cases, post facto remedy before an impartial, competent, available agency.

50. The court is always ready to correct injustice but it is no practical proposition to drive every victim to move the court for a writ, knowing the actual hurdles and the prison realities. True technicalities and legal

niceties are no impediment to the court entertaining even an informal communication as a proceeding for habeas corpus if the basic facts are found; still, the awe and distance of courts, the legalese and mystique, keep the institution unapproachable. More realistic is to devise a method of taking the healing law to the injured victim. That system is best where the remedy will rush to the injury on the slightest summons. So, within the existing, dated legislation, new meanings must be read. Of course, new legislation is the best solution, but when lawmakers take far too long for social patience to suffer, as in this very case of prison reform, courts have to make do with interpretation and carve on wood and sculpt on stone ready at hand and not wait for far-away marble architecture. Counsel rivetted their attention on this pragmatic engineering and jointly helped the court to constitutionalise the Prison Act prescriptions. By this legal energetics they desired the court to read into vintage provisions legal remedies.

51. Primarily, the prison authority has the duty to give effect to the court sentence (see for e.g. Sections 15 and 16 of the Prisoners Act, 1900). To give effect to the sentence means that it is illegal to exceed it and so it follows that a prison official who goes beyond mere imprisonment or deprivation of locomotion and assaults or otherwise compels the doing of things not covered by the sentence acts in violation of Article 19. Punishment of rigorous imprisonment oblige the inmates to do hard labour, not harsh labour and so a vindictive officer victimising a prisoner by forcing on him particularly harsh and degrading jobs, violates the law's mandate. For example, a prisoner, if forced to carry night-soil, may seek a habeas writ. "Hard labour" in Section 53 has to receive a humane meaning. A girl student or a male weakling sentenced to rigorous imprisonment may not be forced to break stones for nine hours a day. The prisoner cannot demand soft jobs but may reasonably be assigned congenial jobs. Sense and sympathy are not enemies of penal asylums.

51-A. Section 27(2) and (3) of the Prisons Act states :

> "27. The requisitions of this Act with respect to the separations of prisoner are as follows :
>
> (2) in a prison where male prisoners under the age of twenty-one are confined, means shall be provided for separating them altogether from the other prisoners and for separating those of them who have arrived at the age of puberty from those who have not.

(3) unconvicted criminal prisoners shall be kept apart from convicted criminal prisoners; and"

The materials we have referred to earlier indicate slurring over this rule and its violation must be visited with judicial correction and punishment of the jail staff. Sex excesses and exploitative labour are the vices adolescents are subjected to by adults. The young inmates must be separated and freed from exploitations by adults. … It is inhuman and unreasonable to throw young boys to the sex-starved adult prisoners or to run menial jobs for the affluent or tough prisoners. Article 19 then intervenes and shields.

….

53. Visits to prisoners by family and friends are a solace in insulation; and only a dehumanised system can derive vicarious delight in depriving prison inmates of this humane amenity. Subject, of course, to search and discipline and other security criteria, the right to society of fellow-men, parents and other family members cannot be denied in the light of Article 19 and its sweep. Moreover, the whole habilitative purpose of sentencing is to soften, not to harden, and this will be promoted by more such meetings. …

We see no reason why the right to be visited under reasonable restrictions, should not claim current constitutional status. We hold, subject to considerations of security and discipline, that liberal visits by family members, close friends and legitimate callers, are part of the prisoners' kit of rights and shall be respected.

54. Parole, again, is a subject which is as yet unsatisfactory and arbitrary but we are not called upon to explore that constitutional area and defer it. Likewise, to fetter prisoners in irons is an inhumanity unjustified save where safe custody is otherwise impossible. The routine resort to handcuffs and irons bespeaks a barbarity hostile to our goal of human dignity and social justice. And yet this unconstitutionality is heartlessly popular in many penitentiaries so much so a penitent law must prescribe its use in any but the gravest situation.

55. These rights and safeguards need a machinery. The need for internal invigilation and independent oversight cannot be over-emphasised. Prisoners' rights and prison wrongs are a challenge to remedial creativity.

…

57. Indeed, a new chapter of offences carrying severe punishments when prison officials become delinquents is an urgent item on the agenda of

prison reform; and lodging of complaints of such offences together with investigation and trial by independent agencies must also find a place in such a scheme. We are dealing with a morbid world where sun and light are banished and crime has neurotic dimensions. Special situations need special solutions.

58. We reach the most critical phase of counsel's submissions viz., the legal fabrication and engineering of a remedial machinery within the fearless reach of the weakest of victims and worked with independence, accessibility and power to review and punish. Prison power, absent judicial watch tower, may tend towards torture.

59. The Prisons Act and Rules need revision if a constitutionally and culturally congruous code is to be fashioned. The model jail manual, we are unhappy to say and concur in this view with the learned Solicitor General, is far from a model and is, perhaps, a product of prison officials insufficiently instructed in the imperatives of the Constitution and unawakened to the new hues of human rights. We accept, for the nonce, the suggestion of the Solicitor General that within the existing statutory framework the requirements of constitutionalism may be read. He heavily relies on the need for a judicial agency whose presence, direct or by delegate, within the prison walls will deal with grievances. For this purpose, he relies on the Board of Visitors, their powers and duties, as a functional substitute for a Prison Ombudsman. A controllerate is the desideratum for in situ reception and redressal of grievances.

60. After all, the daily happenings, when they hurt harshly, have to be arrested forthwith, especially when it is the prison guards and the head warders who brush with the prison inmates. Their behaviour often causes friction and fear but when their doings are impeached, the institutional defence mechanism tends to protect them from top to bottom. So much so, injustice escapes punishment.

…

62. What, then, are prisoner Prem Chand's rights, in the specific setting of this case, where the complaint is that a jail warder, for pernicious purposes, inflicted physical torture?

63. The Punjab Prison Manual clearly lays down the duties of District Magistrates with reference to Central Jails. Para 41 (1) and (3) read thus :

> "41. (1) It shall be the duty of the Magistrate of the district from time to time to visit and inspect jails

> situate within the limits of his district and to satisfy himself that the provisions of the Prisons Act, 1894, and of all rules, regulations, directions and orders made or issued thereunder applicable to such jail, are duly observed and inforced.
>
> (3) A record of the result of each visit and inspection made, shall be entered in a register to be maintained by the Superintendent for the purpose."

Para 42 is also relevant :

> "In the absence of the Magistrate of the district from headquarters, or in the event of that officer being at any time unable from any cause to visit the jail in the manner in these rules prescribed in that behalf, he shall depute the Magistrate subordinate to him who is available for the duty, to visit and inspect the jail on his behalf. Any officer so deputed may, subject to the control of the Magistrate of the district, exercise all or any of the powers by the Prisons Act, 1894, or these rules, conferred upon the Magistrate of the district."

Para 44 clothes the District Magistrate with powers and makes his orders liable to be obeyed :

> "44. (1) The orders passed under sub-section (2) of Section 11 of the, Prisons Act, 1894, should, except in emergent cases in which immediate action is, in the opinion of such Magistrate necessary, be so expressed that the Superintendent may have time to refer (if he thinks necessary) to the Inspector-General before taking action thereon.
>
> (2) All orders issued by the Magistrate of the district shall, if expressed in terms requiring immediate compliance, be forthwith obeyed and a report made, as prescribed in the said sub-section, to the Inspector-General."

64. We understand these provisions to cover the ground of reception of grievance from prisoners and issuance of orders thereon after prompt enquiry. The District Magistrate must remember that in this capacity

he is a judicial officer and not an executive head and must function as such independently of the prison executive. To make prisoners' rights in correctional institutions viable, we direct the District Magistrate concerned to inspect the jails in his district once every week, receive complaints from individual prisoners and enquire into them immediately. If he is too preoccupied with urgent work, para 42 enables him to depute the Magistrate subordinate to him to visit and inspect the jail. What is important is that he should meet the prisoners separately if they have grievances. The presence of warders or officials will be inhibitive and must be avoided. He must ensure that his enquiry is confidential although subject to natural justice and does not lead to reprisals by jail officials. The rule speaks of the record of the result of each visit and inspection. This empowers him to enquire and pass orders. All orders issued by him shall be immediately complied with since obedience is obligated by para 44(2). In the event of non-compliance he should immediately inform government about such disobedience and advise the prisoner to forward his complaint to the High Court under Article 226 together with a copy of his own report to help the High Court exercise its habeas corpus power. Indeed, it will be practical, as suggested by the learned Solicitor General, if the District Magistrate keeps a grievance box in each ward to which free access shall be afforded to every inmate. It should be kept locked and sealed by him and on his periodical visit, he alone, or his surrogate, should open the box, find out the grievances, investigate their merits and take remedial action, if justified.

65. Chapter V of the Manual deals with visitors who are an important component of jail management. Para 47 specially mentions District and Sessions Judges, District Magistrates, Sub-Divisional Magistrates and Superintendents of Police as members of the Board of Visitors. In fact, Sessions Judges are required to visit the jails periodically — the District Magistrates and Sub-Divisional Magistrates and Magistrates subordinate to them and others appointed by them in this behalf are to visit jails in their jurisdiction once a week under the existing rule. We direct, in implementation of the constitutional obligation we have already discussed at length to safeguard prisoners' fundamental rights, that the Sessions Judges and District Magistrates or other subordinates nominated by them shall visit jails once a week in their visitorial functions.

66. Para 49 has strategic significance and may be reproduced :

> 49.(1) Any official visitor may examine all or any of the books, papers and records of any department of, and may interview any prisoner confined in the jail.

> (2) It shall be the duty of every official visitor to satisfy himself that the provisions of the Prisons Act, 1894, and of the rules, regulations, orders and directions made or issued thereunder, are duly observed, and to hear and bring to notice any complaint or representation made to him by any prisoner."

67. We understand this provision to mean that the Sessions Judge, District Magistrate or their nominees shall hear complaints, examine all documents, take evidence, interview prisoners and check to see if there is deviance, disobedience, delinquency or the like which infringes upon the rights of prisoners. They have a duty "to hear and bring to notice any complaint or representation made to him by any prisoners". Nothing clearer is needed to empower these judicial officers to investigate and adjudicate upon grievances. We direct the Sessions Judges concerned, under his lock and seal, to keep a requisite number of grievance boxes in the prison and give necessary directions to the Superintendent to see that free access is afforded to put in complaints of encroachments, injuries or torture by any prisoner, where he needs remedial action. Such boxes shall not be tampered with by anyone and shall be opened only under the authority of the Sessions Judge. We need hardly emphasise the utmost vigilance and authority that the Sessions Judge must sensitively exercise in this situation since prisoner's personal liberty depends, in this undetectable campus upon his awareness, activism, adjudication and enforcement. Constitutional rights shall not be emasculated by the insouciance of judicial officers.

68. The prison authorities shall not, in any manner, obstruct or non-cooperate with reception or enquiry into the complaints. Otherwise, prompt punitive action must follow the High Court or the Supreme Court must be apprised of the grievance so that habeas corpus may issue after due hearing. Para 53 is important in this context and we reproduce it below :

> "All visitors shall be afforded every facility for observing the state of the jail, and the management thereof, and shall be allowed access under proper regulations, to all parts of the jail and to every prisoner confined therein.
>
> Every visitor should have the power to call for and inspect any book or other record in the jail unless

> the Superintendent, for reasons to be recorded in writing, declines on the ground that its production is undesirable. Similarly, every visitor should have the right to see any prisoner and to put any questions to him out of the hearing of any jail officer. There should, be one visitor's book for both classes of visitors, their remarks should in both cases be forwarded to the Inspector General who should pass such orders as he thinks necessary, and a copy of the Inspector General's order should be sent to the visitor concerned."

Paras 53-B and 53-D are not only supplementary but procedurally vital, being protective provisions from the standpoint of prisoners. We excerpt them here for double emphasis although adverted to earlier :

> "53-B. All visitors, official and non-official, at every visit, shall —
>
> (a) inspect the barracks, cells, wards, workshed and other buildings of the jail generally and cooked food;
>
> (b) ascertain whether considerations of health, cleanliness, and security are attended to, whether proper management and discipline are maintained in every respect, and whether any prisoner is illegally detained, or is detained for an undue length of time, while awaiting trial;
>
> (c) examine jail registers and records;
>
> (d) hear, attend to all representations and petitions made, by or on behalf of prisoners; and
>
> (e) direct, if deemed advisable, that any such representations or petitions be forwarded to government.
>
> 53-D. No prisoner shall be punished for any statement made by him to a visitor unless an enquiry made by the Magistrate results in a finding that it is false."

We hope — indeed, we direct — the judicial and other official visitors to live up to the expectations of these two rules and strictly implement their

mandate. Para 54 is also part of this package of visitatorial provisions with invigilatory relevance. We expect compliance with these provisions and if the situation demands it, report to the High Court for action in the case of any violation of any fundamental right of a prisoner.

69. The long journey through jail law territory proves that a big void exists in legal remedies for prisoner injustices and so constitutional mandates can become living companions of banished humans only if non-traditional procedures, duly oriented personnel and realistic reliefs meet the functional challenge. Broadly speaking, habeas corpus powers and administrative measures are the pillars of prisoners' rights. The former is invaluable and inviolable, but for an illiterate, timorous, indigent inmate community judicial remedies remain frozen. Even so, this constitutional power must discard formalities, dispense with full particulars and demand of the detainer all facts to decide if humane and fair treatment prevails, constitutionally sufficient and comporting with the minimum international standards for treatment of prisoners. Publicity within the prison community of court rulings in this area will go a long way to restore the morale of inmates and, hopefully, of the warders. So we direct the Delhi Administration to reach, in Hindi, the essentials of this ruling to the ken of the jail people.

…

71. The situation in Tihar Jail is a reflection of crime explosion, judicial slow motion and mechanical police action coupled with unscientific negativity and expensive futility of the Prison Administration. The Superintendent wails in court that the conditions are almost unmanageable:

> "(i) Huge overcrowding in the jail. Normal population of the jail remains between 2300-2500 against 1273 sanctioned accommodation.
>
> (ii) No accommodation for proper classification for under trials, females, habituals, casuals, juveniles, political prisoners etc., etc.
>
> (iii) Untrained staff of the Assistant Superintendents. Assistant Superintendents are posted from other various departments of Delhi Admn. viz. Sales Tax, Employment, Revenue, Civil Supplies etc., etc.
>
> (iv) Untrained mostly the warders guard and their being non-transferable.

(v) A long distance from the courts to the jail and production of a large number of under trial prisoners roughly between 250-300 daily and their receiving back into the jail in the evening.

(vi) The population of the jail having a large number of drug addicts, habitual pickpockets having regular gangs outside to look after their interests legal and illegal both from outside."

72. Other jails may compete with Tihar to bear the palm in bad treatment and so the problem is pan-Indian. That is why we have been persuaded by the learned Solicitor General to adventure into this undiscovered territory. The Indian Bar, and maybe, the Bar Council of India and the academic community, must aid the court and country in this Operation Prison Justice. In a democracy, a wrong to someone is a wrong to everyone and an unpunished criminal makes society vicariously guilty. This larger perspective validates our decisional range.

73. Before we crystallise the directions we issue, one paramount thought must be expressed. The goal of imprisonment is not only punitive but restorative, to make an offender a non-offender. In Batra case [Sunil Batra v. Delhi Admn., (1979) 1 SCR 392 : (1978) 4 SCC 494 : 1979 SCC (Cri) 155.] this desideratum was stated and it is our constitutional law, now implicit in Article 19 itself. Rehabilitation is a prized purpose of prison "hospitalization". A criminal must be cured and cruelty is not curative even as poking a bleeding wound is not healing. Social justice and social defence — the sanction behind prison deprivation — ask for enlightened habilitative procedures. A learned Writer has said:

> "The only way that we will ever have prisons that operate with a substantial degree of justice and fairness is when all concerned with that prison — staff and prisoners alike — share in a meaningful way the decision-making process, share the making of rules and their enforcement. This should not mean three 'snitches' appointed by the warden to be an 'inmate advisory committee'. However, if we are to instill in people a respect for the democratic process, which now the free world attempts to live, we are not achieving that by forcing people to live in the most totalitarian institution that we have in our society.

> Thus, ways must be developed to involve prisoners in the process of making decision that affect every aspect of their life in prison."

The Standard Minimum Rules, put out by United Nations Agencies also accent on socialisation of prisoners and social defence :

> "57. Imprisonment and other measures which result in cutting off an offender from the outside world are affective by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.
>
> 58. The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.
>
> 59. To this end, the institution should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners."

74. Prison-processed rehabilitation has been singularly unsuccessful in the West and the recidivism rate in our country also bears similar testimony: To get tough, to create more tension, to inflict more cruel punishment, is to promote more stress, more criminality, more desperate beastliness and is self-defeating though soothing to sadists. Hallock, a professor at the University of Wisconsin says : [Roger G. Lanphear : Freedom From Crime, p. 5]

> "The stresses that lead to mental illness are often the same stresses that lead to crime. Mental illness always has a maladaptive quality, and criminality usually has a maladaptive quality."

75. The final panacea for prison injustice is, therefore, more dynamic, far more positive, strategies by going back to man, the inner man. The ward-warden relationship needs holistic repair if prisons are, in Gandhian terms, to become hospitals, if penology, as modern criminologists claim, is to turn therapeutic. The hope of society from investment in the penitentiary actualises only when the inner man within each man, doing the penance of prison life, transforms his outer values and harmonises the environmental realities with the infinite potential of his imprisoned being. Meditative experiments, follow-up researches and welcome results in many countries lend optimism to techniques of broadening awareness, deepening consciousness and quietening the psychic being.

76. It is of seminal importance to note that the Tamil Nadu Prison Reforms Commission (1978-79) headed by a retired Chief Justice of the High Court of Patna, working with a team of experts, has referred with approval to successful experiments in Transcendental Meditation in the Madurai Central Prison : [Vol. 1, p. 69-70. Also see Vol. III, Appendix XI, p. 26]

> "Success has been claimed for this programme. It is reported that there is "reduction of anxiety and fear symptoms, greater flexibility in dealing with frustration, increased desire to care for others, and ability to interact in group situations via rational rather than purely aggressive means. Some inmates reported spontaneous reduction in clandestine use of alcohol and ganja; and even cigarette smoking was less. Prison authorities informed us that they noticed personality changes in some of these prisoners, and that they now had calm and pleasant exchanges with these inmates. Their behaviour towards others in the prison "and relationship with prison authorities also changed considerably". There is a proposal to extend this treatment to short-term prisoners also. This treatment may also be tried in other prisons where facilities exist. A copy of the report of the Director of the Madurai Institute of Social Work is in Appendix XI."

77. The time for prison reform has come when Indian methodology on these lines is given a chance. We do no more than indicate the signpost to Freedom from Crime and Freedom behind Bars as a burgeoning branch of therapeutic jurisprudence. All this gains meaning where we recognise that mainstreaming prisoners into community life as willing members of

a law-abiding society is the target. Rule 61 of the Standard Minimum Rules stresses this factor: [Standard Minimum Rules for the Treatment of Prisoners and Related Recommendations—U.N. Dept. of Economics & Social Welfare, New York, 1958]

> "61. The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners. There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the minimum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners."

It follows that social resources, helpful to humane treatment and mainstreaming, should be ploughed in, senior law students screened by the Dean of reputed law schools may usefully be deputed to interview prisoners, subject to security and discipline. The grievances so gathered can be fed back into the procedural mechanism viz. the District Magistrate or Sessions Judge. The Delhi Law School, we indicate, should be allowed to send selected students under the leadership of a teacher not only for their own clinical education but as prisoner-grievance-gathering agency. Other Service Organisations, with good credentials, should be encouraged, after due checking for security, to play a role in the same direction. The Prisons Act does provide for rule-making and issuance of instructions which can take care of this suggestion.

Omega

78. The omega of our judgment must take the shape of clear directives to the State and prison staff by epitomizing the lengthy discussion. To clinch the issue and to spell out the precise directions is the next step:

1. We hold that Prem Chand, the prisoner, has been tortured illegally and the Superintendent cannot absolve himself from responsibility even though he may not be directly a party. Lack of vigilance is limited guilt. We do not fix the primary guilt because a criminal

case is pending or in the offing. The State shall take action against the investigating police for the apparently collusive dilatoriness and deviousness we have earlier indicated. Policing the police is becoming a new ombudsmanic task of the rule of law.

2. We direct the Superintendent to ensure that no corporal punishment or personal violence on Prem Chand shall be inflicted. No irons shall be forced on the person of Prem Chand in vindictive spirit. In those rare cases of "dangerousness" the rule of hearing and reasons set out by this Court in Batra case [Sunil Batra v. Delhi Admn., (1979) 1 SCR 392 : (1978) 4 SCC 494 : 1979 SCC (Cri) 155.] and elaborated earlier shall be complied with.

3. Lawyers nominated by the District Magistrate, Sessions Judge, High Court and the Supreme Court will be given all facilities for interviews, visits and confidential communication with prisoners subject to discipline and security considerations. This has roots in the visitatorial 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, Grievance 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 afforded 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.

It is significant to note the Tamil Nadu Prison Reforms Commission's observations:

> "38. 16. Grievance Procedure : — This is a very important right of a prisoner which does not appear to have been properly considered. The rules regulating the appointment and duties of non-official visitors and

> official visitors to the prisons have been in force for a long time and their primary function is 'to visit all parts of the jail and to see all prisoners and to hear and enquire into any complaint that any prisoner may make'. In practice, these rules have not been very effective in providing a forum for the prisoners to redress their grievances. There are a few non-official visitors who take up their duties conscientiously and listen to the grievances of the prisoners. But most of them take this appointment solely as a post of honour and are somewhat reluctant to record in the visitors' book any grievance of a prisoner which might cause embarrassment to the prison staff. The judicial officers viz. the Sessions Judge and the Magistrates who are also ex-officio visitors do not discharge their duties effectively [Vol. II, p. 76] ."

We insist that the judicial officers referred to by us shall carry out their duties and responsibilities and serve as an effective grievance mechanism.

6. No solitary or punitive cell, no hard labour or dietary change as painful additive, no other punishment or denial of privileges and amenities, no transfer to other prisons with penal consequences, shall be imposed without judicial appraisal of the Sessions Judge and where such intimation, on account of emergency, is difficult, such information shall be given within two days of the action.

Conclusion

79. What we have stated and directed constitute the mandatory part of the judgment and shall be complied with by the State. But implicit in the discussion and conclusions are certain directives for which we do not fix any specific time-limit except to indicate the urgency of their implementation. We may spell out four such quasi-mandates.

1. The State shall take early steps to prepare in Hindi, a prisoner's handbook and circulate copies to bring legal awareness home to the inmates. Periodical jail bulletins stating how improvements and habilitative programmes are brought into the prison may create a fellowship which will ease tensions. A prisoners' wallpaper, which will freely ventilate grievances will also reduce stress. All these are implementary of Section 61 of the Prisons Act.

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

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

4. The prisoners' rights shall be protected by the court by its writ jurisdiction plus contempt power. To make this jurisdiction viable, free legal services to the prisoner programmes shall be promoted by professional organisations recognised by the court such as for example. Free Legal Aid (Supreme Court) Society. The District Bar shall, we recommend, keep a cell for prisoner relief.

…

83. In the package of benign changes needed in our prisons with a view to reduce tensions and raise the pace of rehabilitation, we have referred to acclimatisation of the community life and elimination of sex vice vis-à-vis prisoners. We have also referred to the unscientific mixing up in practice of under trials, young offenders and long-term convicts. This point deserves serious attention. A recent book Rape in Prison states : [Anthony M. Scacco, Jr. : Rape in Prison, pp. 18, 33, 113.]

> "One of the most horrendous aspects of a jail sentence is the fact that not only are the young housed with the older offenders, but those awaiting trial share the same quarters as convicted inmates. The latter individuals have little to lose in seeking sexual gratification through assault, for they have to serve their time anyway. . . . As matters now stand, sex is unquestionably the most pertinent issue to the inmates' life behind bars. . . . There is a great need to utilize the furlough system in corrections. Men with record showing good behaviour should be released for weekends at home with their families and relatives."

84. Farewell to this case is not final so far as the jailor and the police investigator are concerned. The former will stand his trial and shall receive justice. We say no more here. The investigator invites our displeasure and the Assistant Public Prosecutor, whom he consulted, makes us unhappy since we have had a perusal of the case diary. The crime alleged is simple, the material relied on is short and yet, despite repeated observations from the Bench the investigator has delayed dawdily the completion of the collection of evidence and the laying of the charge-sheet. The prisoner who is the victim has been repeatedly questioned under different surroundings and divergent statements are recorded. We do not wish to state what we consider to be the obvious inference, but we are taken aback when the Assistant Public Prosecutor has given an opinion which, if we make presumptions in his favour, shows indifference and, if we make contrary inferences, makes us suspect. When offences are alleged to have taken place within the prison, there should be no tinge or trace of departmental collusion or league between the police and the prison staff. We make these minimal observations so that the State may be alerted for appropriate action. Surely, the conduct of the prosecution cannot be entrusted to one who has condemned it in advance."

IN THE SUPREME COURT OF INDIA

Francis Coralie Mullin v. Administrator, Union Territory of Delhi

(1981) 1 SCC 608

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

A British national arrested and detained in Tihar jail petitioned the Court under Article 32 challenging the constitutional validity of sub-clauses (i) and (ii) of clause 3(b) of the Conditions of Detention Order, because these clauses required her lawyer to take a prior appointment from the District Magistrate to meet her and an interview could only take place in the presence of a customs officer and also, under which she was only permitted to meet her 5 year old daughter once a month.

P.N. Bhagwati, J.: "3. 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 559-A 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 she wanted to consult or appear for her 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. …

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. Article 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 Article 22, there is also Article 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] a very narrow and constricted meaning was given to the guarantee embodied in Article 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 Article 21. But in *Maneka Gandhi case* [Under Article 32 of the Constitution] this Court for the first time opened up a new dimension of Article 21 and laid down that Article 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 Article 21. This Court expanded the scope and ambit of the right to life and personal liberty enshrined in Article 21 and sowed the seed for future development of the law enlarging this most fundamental of fundamental rights. This decision in *Maneka Gandhi case* [Under Article 32 of the Constitution] became the starting point — the springboard — for a most spectacular evolution of the law culminating in the decisions in *M.H. Hoskot* v. *State of Maharashtra* [*M.H. Hoskot* v. *State*

of Maharashtra, (1979) 1 SCR 192 : (1978) 3 SCC 544 : 1978 SCC (Cri) 468], *Hussainara Khatoon (I) case* [*Hussainara Khatoon (I)* v. *Home Secy*, (1980) 1 SCC 81, 1980 SCC (Cri) 23] , the first *Sunil Batra case* [*Sunil Batra (I)* v. *Delhi Admn*, (1979) 1 SCR 392 : (1978) 4 SCC 494 : 1979 SCC (Cri) 155] and the second *Sunil Batra case* [*Sunil Batra (II)* v. *Delhi Admn*, (1980) 2 SCR 557 : (1980) 3 SCC 488 : 1980 SCC (Cri) 777] . The position now is that Article 21 as interpreted in *Maneka Gandhi case* [Under Article 32 of the Constitution] 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 Article 22, but also of Article 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 wrongdoing as a result of a 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 J&K* [(1969) 1 SCC 562 : (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.” (SCC p. 567, para 9)

5. The question which then arises is whether a person preventively detained in a prison has any rights which he can enforce in the 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. … 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. (SCC p. 504), "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.

6. 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 case* [Under Article 32 of the Constitution] 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? …

7. Now obviously, the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. In *Kharak Singh* v. *State of U.P*. [(1964) 1 SCR 232] Subba Rao, J. quoted with approval the following passage from the judgment of Field, J. in *Munn* v. *Illinois*[(1877) 94 US 113 : 24 L Ed 77] to emphasize the quality of life covered by Article 21 : [*Sunil Batra (I)* v. *Delhi Admn*, SCR p 503 : SCC p 574 : SCC (Cri) p 235] "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*. 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.

8. 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 necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself 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 pro tanto 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.

9. 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 case* [Under Article 32 of the Constitution] 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.

10. Now obviously when an undertrial prisoner is granted the facility of interviews with relatives and friends twice in a week under Rule 559-A 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 once 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 undertrial prisoner or a convict and, as held by this Court in *Sampat Prakash case* restrictions placed on a

detenu must "consistently 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 insofar 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 at least 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 559-A, 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.

11. The same reasoning must also result in invalidation of sub-clause (*i*) of clause 3(*b*) … 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 or 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.

12. We are therefore of the 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 Articles 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 so as to be within hearing distance of the detenu and the legal adviser."

IN THE SUPREME COURT OF INDIA

Prabha Dutt v. Union of India & Ors.

(1982) 1 SCC 1

Y.V. Chandrachud, C.J., A.P. Sen & Baharul Islam, JJ.

A journalist filed a petition under Article 32 of the Constitution seeking a writ directing the Delhi Administration and the Superintendent of Jail, Tihar, to allow her to interview two convicts who were sentenced to death.

Order: "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(1)(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 a 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 petitions 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 Superintendence 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 great 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 559-A 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 552-A 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.

…

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 the 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."

IN THE HIGH COURT OF HIMACHAL PRADESH

Nawal Thakur v. Brahmu Ram

1985 CriLJ 244

P.D. Desai, C.J. & H.S. Thakur, J.

The petitioner alleged that his co-prisoners were being made to carry buckets of water to the house of the jail officers and the same was being justified on the basis of provisions in the jail manual. It was argued that these provisions violate Article 21 of the Constitution because they took away liberty without giving a just, fair and reasonable procedure and were resulting in forced labor.

Desai, C.J.: "1.The petitioner's allegation that his two co-prisoners are being required to carry buckets of water to the residences of the Jail Officers is admitted in the affidavit-in-reply. It has been admitted that Amar Singh and Keshav Ram, who are undergoing sentences of rigorous imprisonment have been detailed to supply water to the quarters occupied by the Jail Officers. Reliance has been placed in the said affidavit upon the provisions of Para 702 read with the Explanation to Para 703 of the Superintendence and Management of Jails in the Punjab, as applicable to Himachal Pradesh (thereinafter referred to as 'the Manual'), in order to justify the services being taken accordingly from the two prisoners.

2. Para 702 of the Manual reads as under:

> "Small detachments of the sweeper and water-carrier gangs may be permitted to clean out and supply water to the quarters occupied by jail officers (except those of the Superintendent), twice a day; each house shall be visited in turn and the prisoners not allowed to separate or lag behind."

3. Para 703 reads as under:

> "No prisoner shall at any time be employed by any officer of the jail, or other person; on any private work or service of any kind whatsoever:
>
> Provided that nothing in this rule shall be deemed to prohibit the employment of any prisoner on any work carried on within the walls of the jail, in the ordinary course of any jail industry, with the

> knowledge and permission of the Superintendent and subject to the payment of the usual charges for such work
>
> Explanation:- For the purposes of this rule "private work" does not include the supplying of water to, or the cleansing of the quarters occupied by, any subordinate officer, under the orders of the Superintendent"…

4. The Supreme Court as well as this Court have repeatedly observed that fundamental rights do not flee a person as he enters the prison although they may suffer shrinkage necessitated by incarceration. In other words, convicts are not by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. Whether inside prison or outside, a person is not deprived of his guaranteed freedoms save by methods right just and fair.

5. Provisions such as those made in Para 702 read with the Explanation to Para 703 of the Manual are prima facie, violative of Art 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.

6. 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.

7. Under the circumstances, the operation of Para 702 and the Explanation to Para 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 Para 702 and the Explanation to Para 703 of the Manual The State Government will also immediately take up for consideration the question of the repeal of provisions of Para 702 read with Explanation to Para 703 of the Manual and such or similar provisions of anachronistic nature in the 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."

IN THE HIGH COURT OF BOMBAY

Madhukar Bhagwan Jambhale v. State of Maharashtra & Ors.

1987 Mh.L.J. 68

I.G. Shah & V.A. Mohta, JJ.

The petitioner, a convict, wrote to the Bombay High Court challenging as unconstitutional rules which prohibited prisoners from expressing any view on any political matter, and those which prohibited them from sending welfare letters to prisoners in other prisons.

Shah, J.: "2. … 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 lock-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 v. Delhi Administration (1978) 4 SCC 494.

…

4. Before we turn our attention to the various Rules under challenge, it would be relevant to refer to the decisions of the Supreme Court which have consistently held that prisoner does not lose all his rights guaranteed under the Constitution. In *D. B. M. Patnaik v. State of A.P.* (1975) 3 SCC 185 it has been held that 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 'practice' a profession. 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. …

5. In *Sunil Batra v. Delhi Administration* (1978) 4 SCC 494, the Supreme Court declared that it is no more open to debate that convicts are not wholly denuded of their fundamental rights. 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 prisoner 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. In that case the Supreme Court after referring to its earlier decisions in *State of Maharashtra v. Prabhakar Pandurang* (1996) 1 SCR 702 *Maneka Gandhi* [1978] 2 SCR 621held that the law is that for a prisoner all fundamental rights are as enforceable reality, though restricted by the fact of imprisonment and that they are entitled to invoke Articles 14, 19 and 21 of the Constitution.

6. It has been pointed out in *State of Maharashtra v. Prabhakar Pandurang Sanzgiri*, (1996) 1 SCR 702 that the conditions in the Bombay Conditions of Detention Order, regulating the restrictions on the personal liberty of a detenu are not privileges conferred on him but are conditions subject to which his liberty can be restricted. We may also usefully refer to the following observations of the Supreme Court in *Sunil Batra* v. *Delhi Administration*, (1980) 3 SCC 488 : AIR 1980 SC 1579 (paras 31 and 42 of the report). In paragraph 31 of the report it is observed:

> "31. Hoskot (1979) 1 SCR 192 at page 203 ((1978) 3 SCC 544 : AIR 1978 SC 1548) applied the rule in Maneka Gandhi ((1978) 1 SCC 248 : AIR 1978 SC 597) to a prison setting and held that 'one component of fair procedure is natural justice'. Thus, it is now clear law that a prisoner wears the armour of basic freedom even behind bars and 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. The weapon is habaeas, the power is part III and the projectile is Batra ((1978) 4 SCC 494 : AIR 1978 SC 1675).
>
> No iron curtain can be drawn between the prisoner and the Constitution.

It is therefore the Court's concern, implicit in the power to deprive the sentence of his personal liberty, to ensure that no more and no less than is warranted by the sentence happens. If the prisoner breaks down because of mental torture, psychic pressure or physical infliction beyond the licit limits of lawful imprisonment the Prison Administration shall be liable for the excess. On the contrary, if an influential convict is able to buy advances and liberties to avoid or water down the deprivation implied in the sentence the Prison Establishment will be called to order for such adulteration or dilution of Court sentences by executive palliation, if unwarranted by law. One of us, in Batra ((1978) 4 SCC 494 : AIR 1978 SC 1675) observed:

Suffice it to say that, so long as judges are invigilators and enforcers of Constitutionality and performance auditors of legality and convicts serve terms in that grim microcosm called prison by the mandate of the Court a continuing institutional responsibility vests in the system to monitor in the incarceratory process and prevent security 'excesses'. Jailors are bound by the rule of law and cannot inflict supplementary sentence under disguises or defeat the primary purposes of imprisonment.

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42. Rights jurisprudence is important but becomes an abstraction in the absence of remedial jurisprudence. Law is not an omnipotence in the sky but a loaded gun which, when triggered by trained men with ballistic skill, strikes the of fencing bull's eye. We have made it clear that no prisoner can be personally subjected to deprivations not necessitated by the fact of incarceration and the sentence of Court. All other freedoms belong to him to read and write, to exercise and recreation, to meditation and chant, to creative comforts like protection from extreme cold and heat, to

> freedom from indignities like compulsory nudity, forced sodomy and other unbearable vulgarity, to removement within the prison campus subject to requirements of discipline and security, to the minimal joys of self expression, to acquire skills and techniques and all other fundamental rights tailored to the limitation of imprisonment."

7. It is thus 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* (1978) 4 SCC 494 amongst others are landmark decisions emphasising the reformative aspect of the prison administration.

8. 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".

9. 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 propoganda. 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 cases (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".

20. We consider these provisions to be fair and adequate.

21. 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 (1980) 3 SCC 488. 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 there into 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".

22. 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.

6. The prisoner can send a letter or address a petition containing grievances regarding prison administration, to the following authorities:

    1) Regional Deputy Inspector General of Prisons.

    2) The Inspector General of Prisons, Pune.

    3) The Secretary, Home Department, Bombay

    4) The Home Minister/Chief Minister, Mantralaya, Bombay

    5) The District Judge, High Court Judge, or Supreme Court Judge.

    6) Lawyers nominated by the District Judge, as prison visitors.

    7) Lokpal, Lokayukta.

    8) 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".

23. 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.

24. 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."

IN THE HIGH COURT OF BOMBAY

Inacio Manuel Miranda & Ors. v. State

1989 Mh. L.J. 77

C.S. Dharmadhikari & G.D. Kamat, JJ.

Several prisoners wrote to the Bombay High Court complaining about the conditions in prison. The Court directed the District and Sessions Judge to inquire into the complaints and to submit a report. Based on this report, the Court passed various directions to the prison authorities.

C.S. Dharmadhikari, J.: "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. …

3. Therefore, the grievances made in these Writ Petitions will have to be tested on the touchstone of these well established principles. After the matter was heard for some time, ultimately, the complaints crystalized into the following grievances:

4. 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.

5. 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 .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 & other (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, come 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 .08 paise per sheet which is stated to be the cost price.

6. 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 Jailor 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 will0 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.

7. 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.

8. 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, (In the matter of Prison Reforms Enhancement of Wages of Prisoners) 1983 SCC OnLine Ker 84 and a decision of the Andhra Pradesh High Court in Poola Bhaskara Vijaykumar v. State of Andhra Pradesh & another, 1987 SCC OnLine AP 85 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 details. 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.

9. 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, 1989 Supp (2) SCC 511 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".

10. 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.

11. 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, (1978) 4 SCC 494.

12. 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. …

13. We direct the Government of Goa to implement the directions incorporated in the judgment of this Court in Madhukar's case.

…

15. 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. 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."

IN THE HIGH COURT OF KERALA

A Convict Prisoner v. State & Ors.

(1993) SCC Online Ker 127

Chettur Sankaran Nair, J.

A petition was filed in the High Court of Kerala by a convict lodged in Thiruvananthapuram Central Jail complaining about the sub-human conditions prevailing in the prison; connivance of jail officials with certain prisoners due to which some convicts enjoyed liberties to do what they liked; association of first time offenders with habitual offenders which was converting them into hard core criminals; sexual abuse, etc. The petitioner sought remedial measures from the Court.

Nair, J.: "11. Different problems of prison life deserve notice. A major problem is that of over-crowding in prisons. The consequences are unwholesome. Prisoners fight with each other; they, mingle freely, and the freshers get trained by hard core criminals. Indiscriminate mingling of prisoners lead to sexual abuses and homosexuality. Prison riots occur occasionally. The Statement filed by the D.I.G. of Prison on behalf of the Government dt. 2-2-1993 shows that in 1991 the strength of the prisoners in Kerala Jails was 14313 (13077 males and 1236 females). A good many of them were first offenders, almost 10,000.976 had suffered atleast two convictions and 718 atleast three convictions. These hardened criminals influence the first offenders, and the prisons become schools of vice, the accommodation available in the Jails was for 5471 against the actual population of 14313. Only 19,700 sq. Metres of space is available in Kerala Jails. Prison riots have taken place due to overcrowding in New Mexico, Sao Paulo and other places. In Mexico, 1136 prisoners were lodged in the place meant for 800. In the riots, 33 died. Sao Paulo riots claimed 111 lives. Justice Ismail Committee Report stressed the need to avoid overcrowding (Page 91 of the Report). A similar suggestion was made by the R.L. Narasimhan Committee. Provisions of the Kerala Prison Manual also provide for a minimum space. Segregation also is contemplated by rules 197, 200 and 204 of the Kerala Prison Rules. The Model Prison Manual and all India Jail Manual also make provision for segregation. Justice Ismail and Justice Narasimhan Committees found the need for segregation, imperative. Effective action must be taken for segregation and classification of prisoners.

13. With imprisonment, a radical transformation comes over a prisoner, which can be described as prisonisation. He losses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity any autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes.

> 'Crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal'.

(Working Papers - Group on Prisons & Borstals - 1966 U.K.)

14. Prison culture creates new sub cultures; often, the prisoner dies a civil death. The identity of prisoner is always defined in the context of a social group. He becomes socially naked (Louis Bloom Cooper: 'Progress in Penal Reform'). Hence, jails have been called "schools of Crime" (John Lewis Gillin - Criminology and Penology). Recidivism becomes rampant. First offenders, casual offenders and habituals are hurled together like "rats in a hamper" and "pigs in a sty" (J.N.J. Sethna).

15. One way of improving the situation will be by introducing work culture in prisons. Simple imprisonment leaves the prisoner idle, with leisure for idle thoughts. Work will provide necessary therapy against this. The prisoner can earn wages develop work habits gain experience in trades and acquire skills. This will case boredom. Open jails will provide the necessary atmosphere and venue, and experience shows that the conditions have been better in the open jails. That apart, the vast human resources, can be turned productive. In the words of Chief Justice Warren Berger, jails should be "factories with fences rather than warehouses for criminals." Open jails are in existence in this country, as else, where and they have proved successful. Some of those are:

(i) The Neyyar Open Prison.

(ii) Ghurma Open Air Camp-Sone.

(iii) U.P. Prison Cement Factory, Bhadra.

16. Prisoners can be usefully employed and their earnings can support not only their families, but the families of the victims of their crimes. The Kerala Jail Rules make provision for payment of wages to prisoners, who work. The payment ranges from Rs. 1 to 4/-. That will not offer any motivation either to work or to feel the dignity of work. Of course, prisoners cannot expect the same wages, as those outside. But, reasonable wages after

meeting the supporting costs or what is known as the 'user fee', must be paid. This will induce prisoners to work, and part of the earnings could be ear-marked for the victims, or a Fund for victim compensation that the State may maintain. There are certain provisions in the Prison Rules, like rule 254. But, they hardly touch the fringe of the problem. A work force could be developed and could be employed on public works, bringing about much saving-and certainty of progress, to public works undertaken by the State. With adequate regulatory measures, Workforce could be loaned to other agencies. John Lewis Gillin (*Criminology and Penology* - Page 399) refers to five ways in which the work culture can change prison life and identifies the areas. They are:

(i) Alleviation of tedium of prison life.

(ii) Repression of crimes

(iii) Production of economic commodities (which can decrease cost of support).

(iv) Reformation; and

(v) Prison discipline.

17. He also advocated four systems of labour in which the work force could be utilised. They are:

(i) Lease system.

(ii) Contract system.

(iii) Piece-price system; and

(iv) Public work system.

18. Jail which is a spending Department, can be made into a revenue earning Department. The prisoners in the Neyyar jail are engaged in various activities, like growing and tapping rubber trees. What little they earn, goes into the revenue, and there are no funds to generate further activities. If Societies headed by Senior Government Officials are registered, the income generated by the Societies, can be used for further development activities. People can also be employed in activities, other than those now undertaken. They can work in conventional industries like hand-weaving, tailoring, carpentry, smithy etc. There are several skilled persons like painters, artisans, carpenters etc. coming to prisons. They can be profitably employed, generating economic wealth. Vegetable gardens, dairies, etc. could be developed. There is already provision in Chapter XL of the Prison Rules in this regard. Binding of Text Books (now done

by profit making private agencies), making of file boards and tags, and similar activities can be entrusted with prisoners. Saving can be effected by Government and possible Kickbacks can be avoided.

19. Conditions of jails also require improvement. Better jails must be built with educational and recreation facilities. As observed by Louis Bloom Cooper Proposal for Penal Reforms-

> "Philosophically, education and penal reforms make peculiar bed-fellows. Education, like its historical companion Greek drama, wears two masks, one induces individuals into social values, and the other deduces from the individuals their full potential as persons."

20. Jail staff should also be trained in their responsibilities. Corruption among jail staff, must be wiped out. Corruption in jail, and its extent were noticed by the Supreme Court in *Sunil Batra's case* ((1980) 3 SCC 488 : AIR 1980 SC 1579). The Apex Court noticed how certain named prisoners enjoyed luxuries of life. The Court noticed that Air Coolers, food from good hotels and facilities for recreation were available. The Court noticed that some of the Jail staff were pandering to prosperous prisoners; assuring that they would bring "not tarts, but real society girls."

21. The jail monitoring system now covered by rules 12, 13, Chapter XXXII, Chapter LVI etc., must be made more effective. The employment of temporary hands, which I noticed in several jails which I visited, must be dispensed with. Such members of staff have no commitment. Complains are occasionally made about the manner of their functioning. Facilities for prayer, discourses, etc., involving social service groups and missionaries will go a long way in reforming prisoners. I have noticed the involvement of certain religious and social groups in Neyyar Jail, and such, I found absent in the Trivandrum Central Jail and in the Kannur Central Jail. Some of the voluntary organisations that are active in the Kerala Jails are "Jesus Helps", "Shanthi Bhavan" and "Jesus Fraternity" under the Kerala Catholic Bishops' Conference; Provision for proper staff, visits by senior citizens, provision for recreation and education would have a very salutary effect.

22. There are other aspects of prison life to which Shri James Vincent refers. Referring to Havlock Ellis, he submitted that sexual urge is the strongest urge in most people. Repression of this instinct, has bad effects according to him. He referred to the provision for conjugal visits prevailing in some of the Prisons in the United States. James A. Inciardi (University of Delaware) in 'Criminal Justice' quoted Henry Miller to refer to instances of homosexuality, violence and other forms of vice. Shri James

Vincent advocated conjugal visits, which is permitted in some of the State Penitentiary in Mississippi, California, North Carolina etc. This is an area falling outside our jurisdiction, and I do not consider it proper to go into this aspect, or issue any direction.

23. I may also notice some of the complaints voiced by prisoners to which reference is made by Shri James Vincent, who visited several prisons in the State to prepare his Report and submit it before this Court. Some of the prisoners say that they are not aware of the position of their cases, or who defend them, this complaint does not seem to be factually correct. The records in the Criminal Section reveal that the information is furnished. Instances have been brought to my notice, where prisoners have been meeting their counsel while on parole. For that matter, by Crl. M.P. No. 1013/93 the Indion Federation of Women Lawyers (Kerala Branch) submitted that some of the prisoners on parole, have been visiting lady Advocates defending them during late hours of night, causing them embarrassment.

24. Prisoners have also complained about the quality of food given to them. One convict (Ali Moosa: C.4195) insisted that fruits should be supplied. I have seen the food supplied to prisoners in four Jails of the State, making surprise inspections. The food could be better; but consistent with the constraints, the food cannot be considered bad or inadequate. Some of the prisoners (Ext. C.1451) complain of the attitude of society to prisoners. A human approach is needed. But one cannot overlook that:

> "the State of Criminal Law continues to be, as it should be a decisive reflection of the consciousness of society."
>
> (Friedman - Law in changing Society)

25. Some of the prisoners (for example: Convict Nos. 1343 & 1547) complained of bad treatment by Jail Authorities. Some complaints are exaggerated. Employment of dedicated jail staff would obviate these complaints. However, superior Officers should ensure that there are no excesses. It is necessary that short - term employees who have no interest in the Institution should not be engaged.

26. The problems are varied and appreciable financial commitment would be involved in dealing with them. However, absence of resources will be no justification for failing to secure humane conditions in prison. Institutional reform litigations must be put on a higher pedestal. Where Government has a constitutional obligation, it cannot plead want of funds, in excuse for not discharging its sovereign functions (See 1980 (93)) Harward Law Review 465. "The Ordinary and Extra-ordinary in Institutional Litigation" by Theodore

Eisen Berg and Stephen Yeezelin;, and "*Constitution, the Court and Human Rights*" — Michael Perry, Chapter V p. 146). The Supreme Court of India has also pointed out the need and justification for affirmative action in such areas (*Ratlam Municipality* v. *Vardhichand* - (1980) 4 SCC 162 : AIR 1980 SC 1622, *State of H.P.* v. *Umed Ram* - (1986) 2 SCC 68 : AIR 1986 SC 847,*People's Union for Democratic Rights* v. *Union of India* - (1982) 3 SCC 235 : AIR 1982 SC 1473, and *People's Union for Civil Liberties* v. *Union of India* - 1995 Supp (2) SCC 572). It must be remembered that safeguards of liberty have frequently been forged in controversies involving not very nice persons. As Justice Benjemin Cardbzo observed:

> "The great tides and currents which engulf the rest of men, do not pass judges by."

27. The course which Courts should adopt, has been indicated by Oliver Wendell Holmes. The Court must have the capacity.

> "to mould ancient principles to present needs, unique in range 4 and prophetic in power, with the grasp of its significance as the basis, upon which purpose of man are shaped."

28. I have considered the range of problems revealed from the petition, the material placed before me by Shri James Vincent as Amicus Curiae and Shri Mohan C. Menon as Government Pleader, and from my observations while visiting prisons. I have reminded myself of the constraints on the Court in public interest litigations, as also the preceptions that should prevail in institutional litigations. The need for affirmative action indicated by the Supreme Court and the financial constraints on the State have also been borne in mind. Having due regard to these, the following directions are issued:

(1) The State shall build sufficient number of prisons to accommodate prisoners. It is reported that no prisons have been built in recent times. Even jails, should not be cages for human beings. Surroundings make their impact on human mind. Serenity elevates human perceptions, unlike depressing ghettos, Open jails in areas where land is easily available, with necessary security must be thought of. This must be done as expeditiously as possible, making a meaningful beginning within two years from today. High security prisons shall be built to house the category of prisoners who are considered dangerous, and whose numbers are certainly not on the decrease. Scientific classification of prisoners must be made.

(2) State shall effectively implement segregation, keeping habitual offenders away, from freshers, to avoid the possibility of hard core criminals turning jails, to schools of crime.

(3) State will ensure that short-term appointments of prison staff are not made, and that adequate trained staff is provided in jails, keeping in view needs of security.

(4) State will take appropriate action to pay reasonable wages to prisoners so that, motivation for work is generated. Reasonable wages need not be the equivalent of minimum wages. Cost of support of prisoners, circumstances that lead to incarceration etc. can be reckoned in fixing such wages. Broadly stated, something in the neighbourhood of half the statutory minimum wages should be reasonable. State will also take appropriate measures for creation of a Fund, for victim care to which an appreciable part of prisoners earnings could be diverted.

(5) State will consider the possibility of registering societies for managing economic activities in jails on a profitable basis, enabling the ploughing back of the profits-to productive channels instead of treating the income from jails as another source of revenue. The pointer should be to innovation and not to the beaten track.

(6) The State shall consider the feasibility of creating a work force, which can be useful and economical to it. Open jails and a work force go together. Vast human resources can be gainfully utilised.

(7) State may consider the advisability of avoiding short term imprisonment and simple imprisonment, wherever possible. Necessary statutory amendments could be thought of substituting short term sentences with free work with regulated wages. Association with hard core criminals in jail can be avoided, thus.

(8) Considering the grievances voiced by some of the counsel appearing for prisoners, and considering the need to provide facilities to paroled prisoners to meet their counsel, the Registry will make appropriate arrangements for providing a meeting place in the premises of the High Court, where prisoners can meet their counsel and give instructions by prior appointment. A Desk in the Criminal Section for this purpose, can be thought of.

(9) Sufficient provision will be made to segregate civil prisoners and military prisoners, from prisoners convicted of criminal charges.

(10) Proper arrangements will be made for escort of prisoners from jails to courts and back; it has to be considered whether number of postings involving transport of prisoners can be reduced.

(11) A rational parole policy must be evolved. Parole is a salutory measure. But, a prisoner who invites incarceration by his conduct, cannot expect the same freedom as free citizens. Yet, such restricted freedom, as can be granted, could be granted on the basis of, sound considerations. The policy is for the State to make.

(12) Blades for shaving, sterilised needles in Dispensaries and sufficient fans should be provided. Sanitary napkins which are not included in the clothing supplied to female prisoners, should also be supplied.

(13) Necessary facilities for the jail staff must be provided. There are some jails without rooms and toilets and staff who take turns often have to sit on verandhas. It must be remembered that congenial working environment alone can ensure a contented service.

(14) Reservation of a nominal percentage of jobs for convict prisoners of good behaviour, can be an incentive and it would be consistent with the concept of rehabilitation.

(15) Educational and recreational facilities, within reasonable limits may be provided in prisons. Weekly or fortnightly discussions, availing of the good offices of religious or social organisations or enlightened citizens, can go a long way in reforming the convicts."

IN THE SUPREME COURT OF INDIA

Rama Murthy v. State of Karnataka

(1997) 2 SCC 642

Kuldip Singh, B.L. Hansaria & S.B. Majmudar, JJ.

A prisoner in the Central Jail, Bangalore, wrote a letter petition to the Supreme Court regarding various grievances of prisoners in that jail, including allegations that they were being denied rightful wages despite doing hard labour, were being given inedible food and were being subjected to mental and physical torture. The Court issued guidelines to deal with various issues facing the prisoners.

Hansaria, J.: "14. The literature on prison justice and prison reform shows that there are nine major problems which afflict the system and which need immediate attention. These are: (1) overcrowding; (2) delay in trial; (3) torture and ill-treatment; (4) neglect of health and hygiene; (5) insubstantial food and inadequate clothing; (6) prison vices; (7) deficiency in communication; (8) streamlining of jail visits; and (9) management of open-air prisons.

15. We propose to take each of the problems separately and express our view as to what could reasonably be done and should be done to take care of the same.

Overcrowding

16. That our jails are overcrowded is a known fact. ...

17. Though the aforesaid fact is known, what is not known is the controversy as to whether overcrowding itself violates any constitutional right. This question arises because overcrowding contributes to a greater risk of disease, higher noise levels, surveillance difficulties which increase the danger level. This apart, life is more difficult for inmates, and work, more onerous for staff when prisoners are in over capacity.

…

20. Even if overcrowding be not constitutionally impermissible, there is no doubt that the same does affect the health of prisoners for the reasons

noted above. The same also very adversely affects hygienic conditions. It is, therefore, to be taken care of.

21. The recent decision of this Court requiring release on bail of certain categories of under-trial prisoners, who constitute the bulk of prison population, has to result in lessening the over capacity. It would be useful to refer here to the Seventy-Eighth Report of the Law Commission of India on "Congestion of Under-trial Prisoners in Jails". The Commission has in Chapter 9 of the Report made some recommendations, acceptance of which would relieve congestion in jails. These suggestions include liberalisation of conditions of release on bail. It may be pointed out that it has already been held by this Court in *Babu Singh* v. *State of U.P.* [(1978) 1 SCC 579 : 1978 SCC (Cri) 133 : AIR 1978 SC 527 : (1978) 2 SCR 777] and *Gurbaksh Singh Sibbia* v. *State of Punjab* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465 : AIR 1980 SC 1632 : (1980) 3 SCR 383] , that imposing of unjust or harsh conditions, while granting bail, are violative of Article 21.

…

23. Overcrowding may also be taken care of by taking recourse to alternatives to incarceration. These being: (1) fine; (2) civil commitment; and (3) probation. …

24. Overcrowding is reduced by release on parole as well, which is a conditional release of an individual from prison after he has served part of the sentence imposed upon him. …

25. Reference may also be made in this connection to Chapter 20 of the Report of All India Committee on Jail Reforms (headed by Justice A.N. Mulla) (1980-83) Vol. I. That chapter deals with the system of remission, leave and premature release. The Committee has mentioned about various types of remission and has made some recommendations to streamline the remission system. As to premature release, which is the effect of parole, the Committee has stated that this is an accepted mode of incentive to a prisoner, as it saves him from the extra period of incarceration; it also helps in reformation and rehabilitation. The Committee has made certain suggestions in this regard too. We direct the authorities concerned to take appropriate decision on the suggestions within a period of six months from today. It may be pointed out that there is really a grievance about allowing the recommendations to remain in cold storage …

26. 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 spoilt further. So, the problem of overcrowding is required to be tackled in right earnest for a better future.

Delay in Trial

27. 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 judgment 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 judgments of this Court (noted above) requiring release of UTP on bail where the trial gets protracted would hopefully take care to a great extent of the hardship caused in this regard. We desire to see full implementation of the directions given in the aforesaid cases.

28. Another aspect to which we propose to advert is the grievance very often made about non-production of UTPs in courts on remand dates. The District Judge in his report has also found this as a fact. The reason generally advanced for such non-production is want of police escorts. It has to be remembered that production before the court on remand dates is a statutory obligation and the same has a meaning also inasmuch as that the production gives an opportunity to the prisoner to bring to the notice of the court, who had ordered for his custody, if he has faced any ill-treatment or difficulty during the period of remand. It is for this reason that actual production of the prisoner is required to be insured by the trial court before ordering for further remand, as pointed out in a number of decisions by this Court.

…

Torture and ill-treatment

32. Apart from torture, various other physical ill-treatment, like putting of fetters, iron bars are generally taken recourse to in jails. Some of these are under the colour of provisions in jail manuals. The permissible limits of these methods has been spelt out well in many earlier decisions of this Court to which reference has been already made. We do not propose to repeat.

33. What we would rather state is that if what is being done to prisoners in the above regard is to enforce prison discipline mentioned in various jail manuals, there exists a strong need for a new All India Jail Manual to serve as a model for the country, which manual would take note of what has been said about various punishments by this Court in its aforesaid decisions. Not only this, the century-old Indian Prison Act, 1894, needs a thorough look and is required to be replaced by a new enactment which would take care of the thinking of Independent India and of our constitutional mores and mandate. The National Human Rights Commission has also felt that need for such exercise, mention about which has been made in paras 4.18 and 4.21 of the aforesaid Report.

…

36. May we say that the ideal prison and the advance prison system which the enlightened segment of the society visualizes 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

37. The Mulla Committee has dealt with this aspect in Chapters 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 conditions of their incarceration, inmates are exposed to more health hazards than free citizens. Prisoners therefore, suffer from a double handicap.

…

Insubstantial food and inadequate clothing

39. There is not much to doubt that the rules contained in jail manual concerned 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 into 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

40. On this aspect nothing more is required to be said than what was pointed out in *Sunil Batra (II)* [(1980) 3 SCC 488 : 1980 SCC (Cri) 777 : AIR 1980 SC 1579 : (1980) 2 SCR 557] . 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 may take care of themselves, as sexual frustration may become tolerable.

41. The aforesaid seems to us a more rational way to deal with prison vices rather than awarding hard punishment to them. We may not be, however, understood to say that the jail authorities need not take action against the prisoners indulging in vices; but in the situation in which they are placed, a sympathetic approach is also required.

Deficiency in communication

42. 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 liberal 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 to be any plausible reason to deny easy facility to an inmate.

Streamlining of jail visits

43. 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 the spouse are, therefore, of great importance.

44. It is, of course, correct that at times visit may become a difficult task for the visitors. This would be so where prisoners are geographically isolated. This apart, in many jails facilities available to the visitors are degrading. At many places even privacy is not maintained. If the offenders and visitors are screened, the same emphasises their separation rather than retaining common bonds and interests. There is then urgent need to streamline these visits.

45. Dr Mir Mehraj-ud-din in his book *Crime and Criminal Justice System in India* has dealt with different aspects of prison visits in Chapter VI headed "*Resocialisation*: *Search for Goals*". The learned author has said that frequent jail visits by family members go a long way in acceptance of the prisoner by his family and small friendly group after his release from jail finally, as the visits continue the personal relationship during the term of imprisonment, which brings about a psychological communion between him and other members of the family.

46. As to visits by professionals, i.e., the lawyer, the same has to be guaranteed to the required extent, if the prisoner be a pre-trial detainee, in view of the right conferred by Article 22(1) of the Constitution.

Management of open-air prisons

47. 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 p. 150 (of 1984 Edn.) that in terms of finances, open institution is far less costly than a closed establishment and the scheme has a 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.

48. Reference may also be made to what has been stated in Chapter 5 about the change in the human and social outlook, which activities and programmes of those camps bring about. The whole thrust is to see that after release the prisoners may not relapse into crimes, for which purpose they are given incentives to live normal life, as they are trained in the fields of agriculture, horticulture etc. Games, sports and other recreational facilities, which form part of the routine life at the open-air camps, inculcate in the prisoners a sense of discipline and social responsibility. The prayers made regularly provide spiritual strength.

…

50. Open-air prisons, however, create their own problems which are basically of management. We are, however, sure that these problems are not such which cannot be sorted out. For the greater good of the society, which consists in seeing that the inmate of a jail comes out, not as a hardened criminal but as a reformed person, no managerial problem is insurmountable. So, let more and more open-air prisons be opened. To start with, this may be done at all the District Headquarters of the country.

Conclusion

51. We have travelled a long path. Before we end our journey, it would be useful to recapitulate the directions we have given on the way to various authorities. These are:

(1) To take appropriate decision on the recommendations of the Law Commission of India made in its 78th Report on the subject of "*Congestion of undertrial prisoners in jail*" as contained in Chapter 9 (para 22).

(2) To apply mind to the suggestions of the Mulla Committee as contained in Chapter 20 of Vol. I of its Report relating to streamlining the remission system and premature release (parole), and then to do the needful (para 25).

(3) To consider the question of entrusting the duty of producing UTPs on remand dates to the prison staff (para 29).

(4) To deliberate about enacting of new Prison Act to replace the century-old Indian Prison Act, 1894 (para 33). We understand that the National Human Rights Commission has prepared an outline of an all-India statute, which may replace the old Act;

and some discussions at a national level conference also took place in 1995. We are of the view that all the States must try to amend their own enactments, if any, in harmony with the all-India thinking in this regard.

(5) To examine the question of framing of a model new All India Jail Manual as indicated in para 33.

(6) To reflect on the recommendations of the Mulla Committee made in Chapter 29 on the subject of giving proper medical facilities and maintaining appropriate hygienic conditions and to take needed steps (paras 37 and 38).

(7) To ponder about the need of complaint box in all the jails (para 39).

(8) To think about introduction of liberalisation of communication facilities (para 42).

(9) To take needful steps for streamlining of jail visits as indicated in para 44.

(10) To ruminate on the question of introduction of open-air prisons at least in the District Headquarters of the country"

IN THE SUPREME COURT OF INDIA

Anukul Chandra Pradhan v. Union of India & others

(1997) 6 SCC 1

J.S. Verma, C.J., Sujata V. Manohar & B.N. Kirpal, JJ.

A petition was filed under Article 32 of the Constitution challenging the constitutional validity of Section 62(5) of the Representation of the People Act, 1951 that denies the right to vote to a person confined in a prison or in the lawful custody of the police.

Verma, C.J.: "1. By this petition under Article 32 of the Constitution challenge is made to the constitutional validity of sub-section (5) of Section 62 of the Representation of the People Act, 1951. Section 62 relates to the right to vote and is as under:

> "62. *Right to vote.—*
>
> …
>
> (5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police:
>
> Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force."

3. The argument of Shri Rajinder Sachar, the learned counsel for the petitioner, is that sub-section (5) of Section 62 of the Act violates Articles 14 and 21 of the Constitution. The submission is that the expression "or otherwise" in sub-section (5) of Section 62 has a very wide connotation and denies voting rights even to undertrials and other persons detained in a prison for any reason, including the reason of inability to furnish bail. He submitted that the restriction applies to a person in lawful custody of the police which would include a person detained during investigation before a charge-sheet has been filed against him. On the other hand, a person convicted and sentenced to imprisonment but released on bail is permitted to vote. The learned counsel contended that this is discrimination and violates Article 14 of the Constitution. It was further contended by

the learned counsel that there is violation also of Article 21 inasmuch as the restriction placed on the prisoner's right to vote by sub-section (5) of Section 62 of the Act denies dignity of life. In substance, the challenge to the constitutional validity of sub-section (5) of Section 62 is based primarily on Article 14 of the Constitution.

4. It is settled that Article 14 permits reasonable classification which has a rational nexus with the object of classification. The question is whether the classification made by sub-section (5) of Section 62 is reasonable or not.

5. There are provisions made in the election law which exclude persons with criminal background of the kind specified therein, from the election scene as candidates and voters. The object is to prevent criminalisation of politics and maintain probity in elections. Any provision enacted with a view to promote this object must be welcomed and upheld as subserving the constitutional purpose. The elbow room available to the legislature in classification depends on the context and the object for enactment of the provision. The existing conditions in which the law has to be applied cannot be ignored in adjudging its validity because it is relatable to the object sought to be achieved by the legislation. Criminalisation of politics is the bane of society and negation of democracy. It is subversive of free and fair elections which is a basic feature of the Constitution. Thus, a provision made in the election law to promote the object of free and fair elections and facilitate maintenance of law and order which are the essence of democracy must, therefore, be so viewed. More elbow room to the legislature for classification has to be available to achieve the professed object.

6. The effect of sub-section (5) of Section 62 of the Act is that any person who is confined in prison while serving a sentence of imprisonment on his conviction for any offence or is under lawful confinement in a prison or in a police custody for any reason is not entitled to vote in an election, but this restriction does not apply to a person subjected to any kind of preventive detention.

7. The learned counsel, Shri Sachar argues that persons in preventive detention cannot be classified separately. That by itself would not result in the invalidity of the whole of sub-section (5), but can affect the validity only of the proviso therein. The challenge in the present case is not merely to the proviso, but to the whole of sub-section (5). This argument does not, therefore, advance the petitioner's case. However, for the purpose of the present challenge, it is sufficient to say that preventive detention differs from imprisonment on conviction or during investigation of the crime of an accused which permits separate classification of the detenus under preventive detention. Preventive detention is to prevent breach of law while

imprisonment on conviction or during investigation is subsequent to the commission of the crime. This distinction permits separate classification of a person subjected to preventive detention.

8. There are other reasons justifying this classification. It is well known that for the conduct of free, fair and orderly elections, there is need to deploy considerable police force. Permitting every person in prison also to vote would require the deployment of a much larger police force and much greater security arrangements in the conduct of elections. Apart from the resource crunch, the other constraints relating to availability of more police force and infrastructure facilities are additional factors to justify the restrictions imposed by sub-section (5) of Section 62. A person who is in prison as a result of his own conduct and is, therefore, deprived of his liberty during the period of his imprisonment cannot claim equal freedom of movement, speech and expression with the others who are not in prison. The classification of persons in and out of prison separately is reasonable. Restriction on voting of a person in prison results automatically from his confinement as a logical consequence of imprisonment. A person not subjected to such a restriction is free to vote or not to vote depending on whether he wants to go to vote or not; even he may choose not to go and cast his vote. In view of the restriction on movement of a prisoner, he cannot claim that he should be provided the facility to go and vote. Moreover, if the object is to keep persons with criminal background away from the election scene, a provision imposing a restriction on a prisoner to vote cannot be called unreasonable.

9. It may also be mentioned that the nature of right to vote has been held to be a statutory right and not a common law right because of which it depends on the nature of right conferred by the statute. In *N.P. Ponnuswami* v. *Returning Officer, Namakkal Constituency* [1952 SCR 218 : AIR 1952 SC 64] (SCR at p. 236), the Constitution Bench held:

> "The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it."

...

12. In view of the settled law on the point, it must be held that the right to vote is subject to the limitations imposed by the statute which can be exercised only in the manner provided by the statute; and that the challenge to any provision in the statute prescribing the nature of right to elect cannot be made with reference to a fundamental right in the Constitution. The very basis of challenge to the validity of sub-section (5) of Section 62 of the Act is, therefore, not available and this petition must fail."

IN THE SUPREME COURT OF INDIA

State of Gujarat v. Hon'ble High Court of Gujarat

(1998) 7 SCC 392

M.M. Punchi, C.J., K.T. Thomas & D.P. Wadhwa, JJ.

The main issue in this case was whether prisoners should necessarily be paid wages at the rates prescribed under the Minimum Wages Act, for labour performed as part of their sentence.

Thomas, J.: "12. Jail authorities are enjoined by law to impose hard labour on a particular section of the convicted prisoners who were sentenced to rigorous imprisonment. Section 53 of the Indian Penal Code which falls under the chapter entitled "Of Punishments" vivisects punishments into five categories, of which the category "imprisonment" has been further sub-divided into two sub-categories as "rigorous" and "simple". Rigorous imprisonment is explained as "imprisonment with hard labour". Section 60 of the Indian Penal Code confers power on a sentencing court to direct that "such imprisonment shall be wholly rigorous or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple". The sentence of "imprisonment for life" tagged along with a number of offences delineated in the Indian Penal Code is interpreted as "rigorous imprisonment for life" and not simple imprisonment. (Vide the decisions of the Constitution Bench in *Gopal Vinayak Godse* v. *State of Maharashtra* [AIR 1961 SC 600 : (1961) 3 SCR 440] and *Naib Singh* v. *State of Punjab* [(1983) 2 SCC 454 : 1983 SCC (Cri) 536 : AIR 1983 SC 855] .)

13. A person sentenced to simple imprisonment cannot be required to work unless he volunteers himself to do the work. Section 374 of the IPC makes imposition of work on an unwilling person as an offence. The section reads thus:

> "374. Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

14. But the jail officer who requires a prisoner sentenced to rigorous imprisonment to do hard labour would be doing so as enjoined by law and mandated by the court. No prisoner sentenced to rigorous imprisonment can conceivably complain that the jail authorities committed the offence under Section 374 of the IPC by compelling him to do work during the term of his imprisonment. So the task to do labour can be imposed on a prisoner only if he has been sentenced to rigorous imprisonment. Neither the undertrial internees nor the detainees with simple imprisonment nor even detenus who are kept in jails as a preventive measure can be asked to do manual work during their prison term. It is a different matter that he is allowed to do it at his request.

…

16. The first contention before us was that when hard labour is made a part of punishment as lawfully imposed, can it be equated with the normal employer-employee phenomenon so as to entitle the prisoner to the social and legislative benefits which a free employee gets outside the walls of the prison. The picture endeavoured to be portrayed before us, in support of the contention, is that in a country like ours where unemployment among youth is so rampant and acute, a life assuring a reasonably good living and a minimum income at the rates fixed for employees of industrial and commercial establishments would provide great incentive to the unemployed youth to resort to crimes for carving out a route to the jails, albeit under conditions of incarceration. This would gallop the crime rates upward as many among the unemployed may feel tempted to avail themselves of such advantages despite the disadvantages, apprehends the aforesaid school of thought.

17. But that argument will not and should not deter us from considering minimum wages for prisoners, for the average individual would abhor incarceration in jails, whatever comfort and monetary benefit it may provide to him. The reality is that even those inside the jails, by and large, are looking forward to the day of their release so as to get their personal freedom restored so that they can move about freely in society, live with their beloveds and enjoy the free atmosphere of life. Most of them are in certitude of the precise number of months, weeks and days they had already spent in jails as well as the number of days they secured by way of remissions and also the remaining period they have to continue in jails before attaining the cherished exit from the iron gates of the bastions.

…

19. Article 23 of the Constitution prohibits "forced labour" and mandates that any contravention of such prohibition shall be an offence punishable in accordance with law. That article reads thus:

> "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."

20. Articles 23 and 24 are the only two provisions subsumed under the heading "Right against exploitation". The latter provision prohibits children being employed in a factory or mine or other hazardous employments. In the former, three unsocial practices are prohibited: (*1*) traffic in human beings, (*2*) begar and (*3*) similar forms of forced labour. Traffic in human beings means trade in human beings. The ban against traffic in human beings is absolute while prohibition against "forced labour" is made subject to one exception, i.e., the State is permitted to impose compulsory service if such service is necessary for a public purpose. Otherwise the ban against forced labour is also absolute. The expression "forced labour" seems to be collocated with the word "begar". The word "begar" was of Indian origin and has, in the due course of time gained entry into the English vocabulary. That word is understood to be the labour or service which a person is forced to give without receiving any remuneration for it. It was so held by a Division Bench of the Bombay High Court in *S. Vasudevan* v. *S.D. Mital* [AIR 1962 Bom 53 : 63 Bom LR 774] and that was approved by this Court in *People's Union for Democratic Rights* v. *Union of India* [(1982) 3 SCC 235 : 1982 SCC (L&S) 275 : AIR 1982 SC 1473] .

21. When the Constitution qualified "forced labour" by associating it with other words "begar and other similar forms" it was not for shrinking the scope of the prohibition to some types of forced labour. Learned Judges in *People's Union for Democratic Rights* [(1982) 3 SCC 235 : 1982 SCC (L&S) 275 : AIR 1982 SC 1473] have observed that forced labour may arise in several ways, it may be physical force, it may be force exerted through a legal provision such as the 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. The Bench observed thus: (SCC pp. 259-60, para 14)

> "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."

We are in respectful agreement with the aforesaid view.

22. Would the Constitution-makers have thought that imposition of hard labour on the convicted prisoners is not included within the concept of "forced labour" envisaged in Article 23?...

…

25. In this connection it is worthy of notice that during the making of our Constitution, the same exception was thought of in the original draft. Clause 11 of the chapter for fundamental rights as adopted by the Advisory Committee read like this:

> "11. (a) Traffic in human beings, and
>
> (b) forced labour in any form including begar and involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted,
>
> are hereby prohibited and any contravention of this prohibition shall be an offence.
>
> Explanation.—Nothing in this sub-clause shall prevent the State from imposing compulsory service for public purposes without any discrimination on the ground of race, religion, caste or class."

26. After a full debate, the Constituent Assembly adopted clause 11 by chiselling it down to the form in which Article 23 of the Constitution is now shaped (vide pp. 252 to 257 of *The Framing of India's Constitution — A Study* by B. Shiva Rao). B.N. Ambedkar in his summing up remarks said in the Constituent Assembly that the exception envisaged in sub-clause (2) regarding "public purposes" is very wide enough to contain all such exceptional conditions. Thus it is apparently clear that imposition of forced labour on a prisoner will get protection from the ban under Article 23 of the Constitution only if it can be justified as a necessity to achieve some public purpose.

27. So the question now to be considered is, whether such compulsory labour can be justified by testing it on the touchstone of "public purpose". What public purpose can possibly be served by exacting such labour work from convicted prisoners? It is said that hard labour imposed on the proved offenders would have a deterrent effect against others from committing crimes and thus society would, to that extent, be protected from perpetration of criminal offences by others.

28. This is the context to consider whether deterrence is the main objective for punishment. Among the conflicting theories for punishment, modern criminologists are highlighting the reformative effect on the punished criminal as the most germane aspect. Jereme Bentham who propounded the theory of deterrence is now considered as the apostle of a conservative old school of thought. The retributive theory of punishment has waned into a relic of primitivity because civilised society has realised that retribution cannot solve the problem of escalating criminal offences. Crime is now considered to be a problem of social hygiene. That modern diagnosis made by criminologists is now causing a sea change to the whole approach towards crime and punishment. The emphasis involved in punishment has now been transposed from retribution to cure and reform so that the original man, who was mentally healthy, can be recreated from the ailing criminal.

....

31. The theory of reformation through punishment is grounded on the sublime philosophy that every man is born good but circumstances transform him into a criminal. The aphorism that "if every saint has a past every sinner has a future" is a tested philosophy concerning human life. V.R. Krishna Iyer, J. has taken pains to ornately fresco the reformative profile of the principles of sentencing in *Mohd. Giasuddin* v. *State of A.P.* [(1977) 3 SCC 287 : 1977 SCC (Cri) 496] The following passage deserves special mention in this context: (SCC pp. 289-90, para 7)

> "If the psychic perspective and the spiritual insight we have tried to project is valid, the police bully and the prison drill cannot 'minister to a mind diseased', nor tone down the tension, release the repression, unbend the perversion, each of which shows up as debased deviance, violent vice and behavioural turpitude. It is a truism, often forgotten in the hidden vendetta in human bosoms, that barbarity breeds barbarity, and injury recoils as injury, so that if healing

> the mentally or morally maimed or malformed man (found guilty) is the goal, awakening the inner being, more than torturing through exterior compulsions, holds out better curative hopes."

32. Reformation should hence be the dominant objective of a punishment and during incarceration, every effort should be made to recreate the good man out of a convicted prisoner. An assurance to him that his hard labour would eventually snowball into a handsome saving for his own rehabilitation would help him to get stripped of the moroseness and desperation in his mind while toiling with the rigours of hard labour during the period of his jail life. Thus, reformation and rehabilitation of a prisoner are of great public policy. Hence they serve a public purpose.

33. A reformative approach is now very much intertwined with a rehabilitative aspect to a convicted prisoner. It is hence a reasonable conclusion from the above discussion that a directive from the court under the authority of law to subject a convicted person (who was sentenced to rigorous imprisonment) to compulsory manual labour gets legal protection under the exemption provided in clause (2) of Article 23 of the Constitution because it serves a public purpose.

34. All the learned counsel who argued before us are in unison in agreeing to the proposition that no prisoner can be asked to do labour free of wages. It is not only the legal right of a workman to have wages for the work, it is a social imperative and an ethical compulsion. Extracting somebody's work without giving him anything in return is only reminiscent of the period of slavery and the system of begar.

…

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 prisoners 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. The Government of India had set up in 1980 a committee on jail reforms under the Chairmanship of Mr Justice A.N. Mulla, a retired Judge of the Allahabad High Court. The report submitted by the said Committee is known as the "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 the 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 his family including education, medical needs, amenities adequate for preservation of his efficiency. [*Express Newspaper (P) Ltd.* v. *Union of India* [AIR 1958 SC 578 : 1959 SCR 12 : (1961) 1 LLJ 339] .]

38. Several guidelines have been provided by the legislature for fixing the rates of minimum wages and the need to make periodical revisions. Section 3 of the MW Act enjoins a statutory duty on the appropriate Government to fix minimum rates of wages payable to employees employed in an employment and to review the rates of wages so fixed at such intervals as the Government may think fit but not exceeding five years. Section 5 of the MW Act provides that in fixing minimum rates of wages in respect of the scheduled employment for the first time or in revising such rates, the Government shall appoint committees to hold enquiries and advise the Government in respect of such fixation. Alternatively, the Government is obliged to publish its proposals. Fixation or revision of minimum wages

can be made only in consideration of the advice of the Committee and the representations received about it.

39. The State of Kerala in the appeal petition has expressed objection to pay the prisoners at the rates fixed as per MW law. But during arguments, learned counsel for the State submitted that the Government is willing to pay the prisoners wages at the said rates after deducting a certain percentage therefrom which represents the amount needed for the food and clothes supplied to the prisoners. Such a plea for deduction was rejected by the High Courts, mainly on the premise that the obligation to provide food and clothes to the prisoners is the inherent obligation of the State on account of the very fact of their internment in prisons. The Division Bench of the High Court of Himachal Pradesh spurned down the aforesaid plea made on behalf of the State. Learned Judges have quoted from the Full Bench decision of the Gujarat High Court in *Jail Reforms Committee* v. *State of Gujarat* [(1985) Cri. Ref. No. 2 of 1984, dt. 31-1-1985 (Guj) (FB)] as follows: (1992 Cri LJ at p. 2559)

> "Undertrials are in custody in jails and sub-jails. 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 would 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 with human beings, but even 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 retains 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."

40. It is true that the 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 the post-conviction period or the pre-conviction period as undertrial 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.

41. First is this, if wages at the rates fixed under the MW Act are paid to a prisoner without making any such deduction, its net effect would be that he gets wages apparently more than the emoluments of a workman who does the same type of work outside the jail. This is because the latter has to meet his expenses for food and clothes from the minimum wages paid to him.

42. The second angle is, the Government which has to pay wages to the prisoner has the additional liability to supply clothes and food to him because the Government has the duty, willy-nilly, to keep a convicted person in prison during such term as the court sentences him to imprisonment. It is the taxpayer's money which the Government is expending for keeping the prisoner inside the jail by providing him food and clothes and other amenities. It is not because the Government is happy to do it or is looking forward to do it. It is a legal compulsion on the Government. But its incidence is on the common man's coffer.

43. The third angle, and it is very important for this purpose, is that even the MW Act permits the employer to make deductions of certain kinds from the wages of an employed person. Section 12 of the Act permits him to make such deductions as may be authorised and subject to such conditions as may be prescribed by rules. The Minimum Wages (Central) Rules contain the items of such deductions which are permissible. Among such items, the following two are pertinent: (*1*) deductions for house accommodation supplied by the employer (*2*) deductions for such amenities and services

supplied by the employer as the Government may authorise. Thus deduction of cost of clothes and food supplied to an employee from his wages is not inconsistent with the legislative policy.

44. When all aspects are considered, we are inclined to think that the request of the Government to permit them to deduct the expenses incurred for food and clothes of the prisoners from the minimum wages rates is a reasonable request. There is nothing uncivilised or unsociable in it. But the Government cannot deduct any substantial portion from the wages on that account. The Government can arrive at the reasonable percentage to be deducted from the minimum wages taking into account the average amount which the Government is spending per prisoner for providing food, clothes and other amenities to him.

45. We wish to say something more in this connection. We are told that the practice followed in many States, either by virtue of the jail rules or by convention, is that a portion of the money earned by the prisoner is sent to the dependants of the prisoner himself and the balance, after deducting the amount expended by him for his extra expenses, is preserved to be disbursed to him at the time of his release.

46. One area which is totally overlooked in the above practice is the plight of the victims. It is a recent trend in the sentencing policy to listen to the wailings of the victims. Rehabilitation of the prisoner need not be by closing the eyes towards the suffering victims of the offence. A glimpse at the field of victimology reveals two types of victims. The first type consists of direct victims, i.e., those who are alive and suffering on account of the harm inflicted by the prisoner while committing the crime. The second type comprises of indirect victims who are dependants of the direct victims of crimes who undergo sufferings due to deprivation of their breadwinner.

47. Restorative and reparative theories have developed from the aforesaid thinking. In the *Oxford Handbook of Criminology*, Andrew Ashworth, Professor of Oxford University Centre for Criminological Research has contributed the following instructive passage:

> "Restorative and Reparative Theories.—These are not theories of punishment, r ather, their argument is that sentences should move away from punishment of the offender towards restitution and reparation, aimed at restoring the harm done and calculated accordingly. Restorative theories are therefore victim-centred (see e.g., Wright 1991), although in

> some versions they encompass the notion of reparation to the community for the effects of crime. They envisage less resort to custody, with onerous community-based sanctions requiring offenders to work in order to compensate victims and also contemplating support and counselling for offenders to reintegrate them into the community. Such theories therefore tend to act on a behavioural premise similar to rehabilitation, but their political premise is that compensation for victims should be recognized as more important than notions of just punishment on behalf of the State.
>
> Legal systems based on a restorative rationale are rare, but the increasing tendency to insert victim-orientated measures such as compensation orders into sentencing systems structured to impose punishment provides a fine example of Garland's observation that 'institutions are the scenes of particular conflicts as well as being means to a variety of ends, so it is no surprise to find that each particular institution combines a number of often incompatible objectives, and organizes the relations of often antagonistic interest groups'."

48. Section 357 of the Criminal Procedure Code, 1973 provides some reliefs to the victims as the court is empowered to direct payment of compensation to any person for any loss or injury caused by the offence. But in practice, the said provision has not proved to be of much effectiveness. Many persons who are sentenced to long-term imprisonment do not pay the compensation and instead they choose to continue in jail in default thereof. It is only when fine alone is the sentence that the convicts invariably choose to remit the fine. But those are cases in which the harm inflicted on the victims would have been far less serious. Thus the restorative and reparative theories are not translated into real benefits to the victims.

49. It is a constructive thinking for the State to make appropriate law for diverting some portion of the income earned by the prisoner when he is in jail to be paid to deserving victims. In the absence of any law for that

purpose, we are prevented from issuing a direction to set apart any portion of the prisoner's earned wages for payment to the victims because of the interdict contained in Article 300-A of the Constitution. Hence we suggest that the State concerned may bring about a legislation for that purpose.

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 prisoners 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 Governments 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."

IN THE HIGH COURT OF BOMBAY

Asgar Yusuf Mukadam & Ors. v. State of Maharashtra & Anr.

(2004) SCC OnLine Bom 1221

R.M.S. Khandeparkar & R.S. Mohite, JJ.

The petitioners were lodged at the Bombay Central Prison as undertrials. Previously, the petitioners were allowed to receive food from their respective houses. However, after an amendment to Sections 31 and 32 of the Prisons Act, 1894 this was not allowed anymore. The sections were challenged as being violative of Articles 14 and 21 of the Constitution of India.

Khandeparkar, J.: "5. It is the contention of the petitioners that the amended provision in Section 31 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 i.e. unconvicted criminal prisoners by virtue of the amended provision 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. In other words, it is the case of the petitioners that the amended Section 31 seeks to deny the facility of getting home food. Section 32 of the said Act has been further amended to bring it in conformity with the provision contained in amended Section 31.

6. While assailing the amended provision, the learned Advocate appearing for the petitioners submitted that the amended provision seeks to negate cardinal principles of criminal jurisprudence that the accused is deemed to be innocent until proved guilty, and further seeks to punish the under-trial prisoners even before the completion of trial and their guilt is judicially established. His further contention is that the differentiation sought to be made between the unconvicted criminal prisoners, satyagrahis and civil prisoners, violates Articles 14 and 21 of the Constitution of India. It is his further contention that denial of home food deprives the petitioners of their

fundamental right guaranteed under the Constitution and, therefore, the amendment needs *to* be held as being ultra vires constitutional provisions. The learned APP, on the other hand, submitted that at all times and even when the unamended Sections 31 and 32 were in force, the facility regarding food from private sources was granted only pursuant to the order of the Magistrate or the trial Court and not otherwise. She has further submitted that the amended provision to no way causes prejudice to the under-trials inasmuch as that the provisions of the said Act does not debar the Magistrate or the trial Court from exercising its powers to direct the jail authorities to grant such facility to the under-trials. According to her, such facility was always granted unless there were cogent reasons to refuse the same. She has further submitted that apart from making additional provision regarding Satyagrahis, there is no substantial change brought about by the amended provisions. According to her, power to grant such facility is implicit in the power of the trial Court or the Magistrate in Section 167 as well as in Section 437 of the Code of Criminal Procedure while ordering remand of the accused or refusing bail to him. Attention has also been drawn to the decision of the Apex Court in *D.K. Basu* v. *State of West Bengal*, reported in 1997 Cri LJ 743 : ((1997) 1 SCC 416 : AIR 1997 SC 610) and particularly the guidelines which have been laid down by the Apex Court in relation to the arrest or detention of the persons by police or detaining authority.

…

11. Undoubtedly, amended provision excludes the facility of the food from private sources to unconvicted criminal prisoners. According to the learned APP, such a provision has been found necessary on account of undue advantage being taken of the unamended provision to smuggle drugs, messages, weapons, etc. in the prisons for these prisoners or detenus thereby creating threat to the security of the other prisoners as well as to the prisoners themselves, and therefore, the Government was compelled to amend the said provision. It is her contention that in order to stop illegal activities which were sought to be carried out under the guise of supplying food from private sources, the appropriate restrictions were required to be imposed and they were accordingly imposed by amending the said provision. In that respect, attention is also drawn to the statement of objects and reasons of the Amending Act. On the other hand, it is the case of the petitioners that there is no material on record to disclose that the under-trial prisoners had misused the provisions or that there was any act disclosing threat to the security of the other prisoners on account of availability of the facility for supply of home food.

12. Undoubtedly, unamended provision of law in Section 31 permitted the unconvicted criminal prisoners as well as the civil prisoners to have home food subject to the examination and to such rules, as may be approved by the Inspector General however, such facility is not provided to the under-trials under the amended Section 31. The facilities which are provided under the amended Section 31 to the unconvicted criminal prisoners are restricted to maintain themselves and to purchase or receive from private sources at appropriate hours the clothing and bedding, subject of course to examination and to such rules, as may be approved by the Inspector General. However, the facility for home food is conspicuously absent in the said provision of law. At the same time, such facility is continued to be available to the civil prisoners as well as to the prisoners who are remanded on account of their participation in non-violent agitation. Undoubtedly, the prisoners which are remanded on account of involvement in non-violent agitation as well as those who are civil prisoners have been classified in different categories from the one comprised of unconvicted criminal prisoners. There can be no grievance about such classification either being discriminatory or to be in violation of Article 14 of the Constitution. Indeed, the prisoners who are remanded merely on account of participation in non-violent agitation or those who are civil prisoners cannot be grouped in one and the same class to which unconvicted criminal prisoners belong. Besides, it is essentially for the authorities to deal with the aspect of the classification. Undoubtedly it should not disclose total arbitrariness or unreasonableness.

13. While dealing with the issue as regards the right to home food to the under trial prisoners, one cannot lose the sight of the well established law that even the convicts do not lose all their fundamental rights which the citizens are otherwise entitled to, excepting of course those which cannot be possibly indulged on account of the fact of incarceration. Obviously, on account of imprisonment, right to move freely or right to practice a profession which is otherwise available under Article 19(1) (b) or 19(1) (g) could be curtailed. Nevertheless, various other fundamental rights including the right to freedom of expression or to read and write subject to the limitations imposed on account of imprisonment would continue to be enjoyed by the prisoners. The most important right to life guaranteed under Article 21 which includes prohibition against deprivation of such right except according to the procedure established by law, is always available to such prisoners.

…

20. If one peruses the provisions of law comprised under various sections of Code of Criminal Procedure, it would reveal due adherence to the mandate of Article 21 of the Constitution. Section 49 of the Code clearly provides that "the person arrested shall not be subjected to more restraint than is necessary to prevent his escape." Section 436(1) of the said Code assures the persons accused of offence other than non-bailable, to be entitled to be released on bail, being prepared to furnish the same. Even in case of arrest of persons in non-bailable offence, the provision of law speaks of availability of bail on certain conditions. Section 437(1) of the said Code is very clear in that regard. In cases of non-bailable offences, in certain cases, the persons accused of such offences also are entitled to be released on bail even during the pendency of the inquiry in terms of sub-section (2) of Section 437.

…

23. 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 grievance 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.

24. 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 requirements as also which can suit to 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. In fact, 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. It is not only the power of the Magistrate and the Court but it should be their endeavor to ascertain through the executing agency the availability of basic needs to the person to be detained in the custody. The same is implicit in the power to order detention and it would include passing of an appropriate order in relation to such basic needs to the under-trials detained in jail, as and when occasion arises. Undoubtedly, the order has to be a speaking order disclosing the grounds for ordering the facility in relation to the basic needs otherwise than in the manner provided in the jail by its authorities. Being so, whenever an application is filed by an under-trial prisoner for grant of facility for home food, the Magistrate will have power to pass an appropriate order on such application after hearing the authorities and giving reasons for grant of such facility to such person. This power is implicit in the power to order detention or continuation of detention of the accused in custody either at the time of investigation of on filing of the charge-sheet on conclusion of the investigation and till the disposal of the trial.

…

29. It is to be remembered that, as rightly submitted by the learned Advocate for the petitioners, the cardinal principles of criminal jurisprudence is that a person accused of an offence is deemed to be innocent until he is proved guilty. The provision of law, as they stand comprised, under Section 167 of the Code of Criminal Procedure, therefore, discloses implicit power in favor 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. Undoubtedly, the respondents would be entitled to take appropriate steps to ensure that the drugs, messages, weapons, etc. are not transported inside the jail under the guise of supplying home food to the under-trials, and, in case, any such mischief is brought to the notice of the Court, nothing would prevent the Court or the Magistrate either to refuse such facility or even to

recall the order already passed granting such facility, albeit, after hearing the concerned accused and in extreme urgency, even ex parte subject to confirmation after hearing the accused.

30. 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…"

IN THE SUPREME COURT OF INDIA

R.D. Upadhyay v. State of A.P

(2007) 15 SCC 337

Y.K. Sabharwal, C.J., C.K. Thakker & P.K. Balasubramanyan, JJ.

Noting that there were 6496 under-trial women in prison with 1053 children and 1873 convicted women with 206 children, the Supreme Court considered the issue of development of children who are in jail with their mothers and guidelines for their protection and to make provisions for them.

Sabharwal, C.J.: "40. 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 the UN Conventions to which India is a signatory on the rights of the child.

41. 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* [(1997) 6 SCC 241 : 1997 SCC (Cri) 932]).

43. True, several legislative and policy measures, as aforenoted, have been taken over the years in furtherance of the rights of the child…

…

44. 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 the 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-à-vis the children of women prisoners living in prison.

45. In light of various reports referred to above, affidavits of various State Governments, Union Territories, the 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 authorities concerned must ensure that the jail in question has the basic minimum facilities for child delivery as well as for providing prenatal 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 prenatal 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 minimise 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 their 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 relative(s) concerned 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/UT Government shall lay down the scales.

(*b*) State/UT 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 children 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 institutionalised 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 emphasised 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, overdilution 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 in the ages of 6-12 months, 1-3 years and 4-6 years, respectively: cereals and millets—45, 60-120 and 150-210 gm respectively; pulses—15, 30 and 45 gm respectively; milk—500 ml (unless breastfed, in which case 200 ml); roots and tubers—50, 50 and 100 gm respectively; green leafy vegetables—25, 50 and 50 gm respectively; other vegetables—25, 50 and 50 gm respectively; fruits—100 gm; sugar—25, 25 and 30 gm respectively; and fats/oils (visible)—10, 20 and 25 gm respectively. One portion of pulses may be exchanged with one portion (50 gm) of egg/meat/chicken/fish. It is essential that the above food groups 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. The State

Legislatures may consider passing of necessary legislations, wherever necessary, having regard to what is noticed in this judgment.

12. The State Legal Services Authorities shall take necessary measures to periodically inspect jails to monitor that the directions regarding children and mothers 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 judgment shall be sent to the Union of India, all State Governments/Union Territories and the High Courts.

15. Compliance report stating the steps taken by the Union of India, the State Governments, the Union Territories and the State Legal Services Authorities shall be filed in four months whereafter matter shall be listed for directions."

IN THE HIGH COURT OF PUNJAB & HARYANA

Jasvir Singh & Anr v. State of Punjab & Ors.

2014 SCC OnLine P&H 22479

Surya Kant, J.

The petitioners were husband and wife. The wife was convicted to life imprisonment and the husband was given death penalty for kidnapping and murdering a 16 year old for ransom. The petitioners claimed and sought enforcement of their right to have conjugal life and procreate within the jail premises.

Kant, J.: "2. … The issues raised by them are indeed of paramount public importance. Equally significant are the related issues hovering around the concept of 'reasonable restrictions' or 'the extent of suspension of some of the fundamental rights during incarceration', 'radical jail reforms', 'the status of prisoners as protected citizen' within the Constitutional framework as well as the 'international perspective on the right to conjugal life in the precincts of jail', which too call for discussion.

3. … The first petitioner is statedly the only son of his parents and 8 months into their marriage they got caught in the criminal case. The petitioners claim that their demand is not for personal sexual gratification. The petitioners are also open to 'artificial insemination'.

4. The petitioners' main plank is Article 21 of the Constitution. The 'right to life', they insist, has two essential ingredients, namely, (i) preservation of cell; and (ii) propagation of species of which sex life is a vital part. The decision in State of Andhra Pradesh v. Chalaram Krishna Reddy (2000) 5 SCC 712, is relied upon to urge that a prisoner whether convict, under-trial or a detenue, continues to enjoy the fundamental rights including 'right to life' which is one of the basic Human Rights. The petitioners also refer to the well regulated concept of 'conjugal visitations' successfully implemented in the advanced countries like the USA, Canada, Australia, UK, Brazil, Denmark and Russia etc.

5. The State of Punjab has opposed the petitioners' prayer essentially on the plea that the Prisons Act, 1894 contains no provision to permit 'conjugal visitation'; its Section 27 rather mandates proper segregation of male and female prisoners. Para 498 of the Punjab Jail Manual lays down the method for separation of male and female prisoners.

6. Even 'artificial insemination' as a viable and alternative solution suggested by the petitioners, is not acceptable to the State of Punjab as according to its affidavit dated 20th November, 2010 "there is no such provision in the Prisons Act, 1894 and Punjab Jail Manual to allow the husband and wife convicts to be in the same cell in the jail or to allow for artificial insemination of the convicts…".

…

9. The following, amongst others, are the issues which have emerged for determination:-

i. Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?

ii. Whether penalogical interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?

iii. Whether 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?

iv. If question No. (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?

…

ROLE OF JUDICIARY

18. A prison in civil society is the place for enforceability of law. All governmental systems provide incarceration through a judicial order only. The prison or the protectees living there are thus instruments and subjects of justice delivery system. The Judiciary as the principal executor and promoter of the rule of law has to have major stakes in respect of the conditions prevailing in the prisons. The duty of the Courts towards jail reforms has become heavier than before after the enforcement of our Constitution as Article 21 guarantees dignified life to one and all including the prison-inmates.

19. The Hon'ble Supreme Court in D. Bhuvan Mohan Patnaik v. State of Andhra Pradesh, (1975) 3 SCC 185 declared that convicts cannot be denied the protection of fundamental rights which they otherwise possess, merely because of their conviction. A convict whom the law bids to live in confinement though stands denuded of some of the fundamental rights, like the right to move freely or the right to practice a profession, nonetheless, such convict shall continue to enjoy other constitutional

guarantees including the precious right guaranteed by Article 21 of the Constitution.

20. The denial of the facilities like a packet of powder for a rickety carom board, the radio network or musical instruments like harmonium to the Naxalite prisoners in Dr. Bhuvan Mohan (supra) was, however, not interfered with by the Apex Court, for the reason that those were "…matters of reform and though they ought to receive priority in our Constitutional scheme, their denial may not necessarily constitute an encroachment on the right guaranteed by Article 21 of the Constitution…".

21. In his one of the many salutary and historical decision [Sunil Batra v. Delhi Administration, (1978) 4 SCC 494 (popularly known as Sunil Batra-I)], Krishna Iyer, J considered the core issue, whether a prison ipso facto outlaw the rule of law, lock out the judicial process from the jail gates and declare a long holiday for human rights of convicts in confinement or the prison total eclipses judicial justice for those incarcerated under the orders of a judicial Court? The dictum very emphatically espoused the cause of jail-inmates holding that "Prisons are built with stones of Law' (sang William Blake) and so, when human rights are hashed behind bars, constitutional justice impeaches such law. In this sense, courts which sign citizens into prisons have an onerous duty to ensure that, during detention and subject to the Constitution, freedom from torture belongs to the detenu.".

22. Sunil Batra-I, amongst other things, ruled that the condemned prisoner (like Batra) shall be merely kept in custody and shall not be put to work like those sentenced to rigorous imprisonment. Such like convicts shall be entitled to amenities of ordinary inmates in the prison like games, books, newspapers, reasonably good food, the right to expression, artistic and other, and normal clothing and bedding. It was further held that condemned prisoners cannot be denied their right to eat, sleep, work or live together except on specific grounds warranting such a course etc. etc.

23. Sunil Batra-I marched far ahead of its times in emphasising re-humanisation of the prisoners. It stated that "positive experiments in re-humanization-meditation, music, arts of self-expression, games, useful work with wages, prison festivals, sramdan and service-oriented activities, visits by and to families, even participative prison projects and controlled community life, are among the re-humanization strategies which need consideration. Social justice, in the prison context, has a functional versatility hardly explored."

24. The reforms in prison administration also caught attention in Sunil Batra-I which not only emphasized the need of legislative intervention for

replacement of obsolete prison laws but also for the re-orientation and re-visitation of prison house and practices, for "no longer can the Constitution be curtained off from the incarcerated community since pervasive social justice is a fighting faith with Indian humanity." Thus, in the context of Section 30(2) of the Prison Act it was held that such prisoner is not to be completely segregated except in extreme cases of necessity which must be specifically made out.

25. Sunil Batra v. Delhi Administration, (1980) 3 SCC 488 (known as Sunil Batra-II), phenomenally liberated the jail inmates from the atrocities inflicted through mental torture, psychic or physical pressure and it brought a catenation of radical changes in prison conditions like (i) Separation of under-trials from convicts in jails; (ii) Their right to invoke Article 21 of the Constitution; (iii) Separation of young inmates from adults; (iv) Liberal visits by family and friends of prisoners; (v) Ban on confinement in irons; (vi) The duties and obligations of the Courts with respect to rights of prisoners; and (vii) Re-defining the duties of District Magistrate etc.

26. Sunil Batra-II delved deeper into the petrifying effects of loneliness of jail-inmates as is evident from the following passage:-

> "Visits to prisoners by family and friends are a solace in insulation; and only a dehumanised system can derive vicarious delight in depriving prison inmates of this humane amenity. Subject, of course, to search and discipline and other security criteria, the right to society of fellow-men, parents and other family members cannot be denied in the light of Art. 19 and its sweep."

27. It further noticed that even as per the 1973 report of National Advisory Commission "prisoners should have a 'right' to visitation" and that "correctional officials should not merely tolerate visiting but should encourage it, particularly by families…'…it also urged that corrections officials should not eavesdrop on conversations or otherwise interfere with the participants' privacy".

Sunil Batra-II very forcefully ruled that "we see no reason why the right to be visited under reasonable restrictions, should not claim current constitutional status. We hold, subject to considerations of security and discipline, that liberal visits by family members, close friends and legitimate callers, are part of the prisoners' kit of rights and shall be respected."

28. Several maladies within the jail precincts including the victimization of young inmates at the hands of adults drew attention in Sunil Batra-II, prompting the Court to say that:-

> "In the package of benign changes needed in our prisons with a view to reduce tensions and raise the pace of rehabilitation, we have referred to acclimatization of the community life and elimination of sex vice vis a vis prisoner we have also referred to the unscientific mixing up in practice of under-trials, young offenders and long-term convicts. This point deserves serious attention."

…

32. Francis Coralie Mulin v. The Administrator, Union Territory of Delhi, (1981) 1 SCC 608 expanded the expression "personal liberty" embedded in Article 21 of the Constitution in the context of the rights of a detenue and it held that the prisoner or detenue 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. The Court held, in no uncertain terms, that no law which authorizes and no procedure which leads to cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness and thus would plainly be void and violative of Articles 14 & 21.

33. Several other landmarks giving wider connotation to prisoner's rights within the four walls of a jail including (i) State of Maharashtra v. Prabhakar Pandurant Sanzgiri AIR 1966 SC 424; (ii) Sheela Barse v. State of Maharashtra (1983) 2 SCC 96; and (iii) Ramamurthy v. State of Karnataka, (1997) 2 SCC 642, are not being elaborated here to avoid multiplicity.

34. Though these decisions are truly milestones in the recognition and enforcement of prisoner's rights and prison reforms yet they are peripheral to the core issues directly canvassed before me. Sunil Batra-II does notice the prevalence of homosexuality or sexual abuse of underage inmates by their adult counter-parts but the question of 'conjugal visits' or 'right to procreation' to be the 'right to life' or 'personal liberty' of a jail inmate was not raised there. Albeit, the book "Rape In Prison" by Anthony M. Scacco, Jr. referred to in that decision does acknowledge that "sex is unquestionably the most pertinent issue to the inmate's life behind bar… There is a great need to utilize the furlough system in corrections. Men with record showing good behavior should be released for weekends at home with their families and relatives".

35. The Andhra Pradesh High Court in PIL No. 251 of 2012 decided on 16th July, 2012 (Ms. G. Bhargava, President M/s Gareeb Guide (Voluntary Organisation) v. State of Andhra Pradesh) dealt with an identical issue as therein a direction was sought to take immediate steps and allow conjugal visits to spouses of prisoners in jails across the State of Andhra

Pradesh. The Court rejected the claim observing that if conjugal visits are to be allowed keeping in view good behavior of the prisoners, "chances of the environment getting disturbed cannot be ruled out as it will have an adverse impact on the other inmates of the jail who have not been selected and extended such benefit…" and that "the issue raised in the writ petition being a policy decision is within the domain of the State…". The Court further viewed that Chapter-IV of Andhra Pradesh Prison Rules, 1979 provide for the release of prisoners on furlough/leave and parole/ emergency leave therefore "it is not that there is no provision in the Rules to release the prisoners to enable them to lead family life with their spouses when they are granted furlough/leave of course for a limited period.".

36. The vital issue of the 'best interests of unborn child of the petitioners' has been effectively raised by learned counsel for the complainant, citing R.D Upadhyay v. State of Andhra Pradesh (2007) 15 SCC 337 which deals with the welfare of women prisoners and the negative effects of prison environment on them. The Hon'ble Supreme Court in that case took notice of the report prepared by the Tata Institute of Social Science on the situation of children of prisoners which suggested the following five reasons for providing facilities to 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 pattern 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."

37. A Division Bench of this Court also, in Viresh Shandilya v. Union of India, PLR (2005) 139 P&H 357, adjudicated various issues dealing with the rights of prisoners including the issue of cable TV facilities to prisoners in the Model Jail, Burail, Chandigarh. Notwithstanding the fact that the facilities of television, cable network, mobile phones and pagers, etc., were found to have been blatantly and abrasionaly misused by a group of hard-core terrorists including a life convict, this Court declined to accept a blanket ban on these facilities as it would have deprived not only the majority of inmates who were mere "under-trials" from the amenity of viewing TV, it could cause adverse effects upon the reformatory methods required to be adopted in the model jails even in relation to the 'convicts'. It was also observed that in modern era, television has become the fastest source of information and is a component of the right to read and write which has since been recognised as a right under Article 21 of the Constitution even for the "prisoners". …

INTERNATIONAL PERSPECTIVE

38. The woeful conditions like overcrowding, lack of bedding, toilets, inadequate health facilities, unnatural and premature deaths due to chronic disease, unhealthy and mal-nutritious food, lack of vocational training, denial of social orientation, torture, physical assaults by jail staff or co-prisoners, violent protests, drug abuse, non-consensual sex or sodomy and persistent denial of basic human rights with a closed-mindset towards the re-socialisation of the jail inmates - is not the saga of Indian prisons only. They concern all the prisons, new or old, all over the world. The deprivation of the universally-accepted basic human rights within the four walls of jails is thus a serious challenge to the Global justice delivery system and civic society as a whole.

39. The United Nations' Basic Principles for the Treatment of Prisoners, 1990 states that "except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants."

…

FOREIGN COURTS' VIEW ON CONJUGAL VISITS IN PRISONS AND ARTIFICIAL INSEMINATION

American Viewpoint

50. Close to the facts of the case in hand, the United States Court of Appeal, Ninth Circuit, in William Gerber v. Rodney Hickmen, 291 F.3d 617 (2002), considered the claim of an inmate in the California State prison alleging that Mule Creek State Prison is violating his Constitutional right by not allowing him to provide his wife with a sperm specimen that she may use to be artificially inseminated. The convict was 41-years old and was serving sentence to a hundred years to life plus 11 years. His wife was 44 years' old and they wanted to have a baby as no parole date was set for the convict due to the length of his sentence, he wished to inseminate his wife artificially. The question that arose for consideration was whether right to procreate is fundamentally inconsistent with incarceration? The Court of Appeals, with a majority of 6-5, relied upon two previous decisions to hold that (i) "many aspects of marriage that make it a basic civil right, such as cohabitation, sexual intercourse, and the bearing and rearing of children, are superseded by the fact of confinement"; (ii) "prisoners have no Constitutional right while incarcerated to contact visits or conjugal visits", and that keeping in view the nature and goals of a prison system, it would be a wholly unprecedented reading of the Constitution to "command the warden to accommodate Gerber's request to artificially inseminate his wife as a matter of right". The Court of Appeals did not accept the oral argument on the effect of technological advancement on the issue and said that "Our conclusion that the right to procreate is inconsistent with incarceration is not dependent on the science of artificial insemination, or on how easy or difficult it is to accomplish".

51. At the same time, learned Amicus Curiae referred to the dissenting opinion of five Judges in William Gerber (supra), wherein TASHIMA, KOZINSKI, HAWKINS, PAEZ and BERZON, Circuit Judges were of the view that a prison is meant to deny inmates certain rights enjoyed by free people and loss of those rights is the punishment. They held that Gerber's status as an inmate won't permit him vacation in Paris or spend the weekend at home, because the very point of incarceration is to deny prisoners freedom of movement and the comforts of home. They, however, further viewed that:-

> "…This would be a different case if the legislature of California had ordained that prisoners must lose the right to procreate as punishment for their crimes, in addition to loss of physical liberty… But the legislature did no such thing… Nevertheless, could it be that, by ordering imprisonment, the legislature also implicitly cut off a prisoner's right to procreate? Even under the best of circumstances, this would be a difficult

> argument for the state to make, because the term "imprisonment" carries no plausible implication as to any rights other than those necessarily abridged by physical incarceration."
>
> (emphasis applied)

52. Previously, in Steven J. Goodwin v. CA Turner, [908 F.2d 1395] (1990), the U.S Court of Appeals, Eighth Circuit, considered the claim of a federal prisoner incarcerated in Missouri, to whom permission to give sperm to artificially inseminate his wife, was declined by the District Court. The Court of Appeals rejected Goodwin's argument that the prison regulation has a direct impact on his wife's right to procreate and viewed that "by its very nature, incarceration necessarily affects the prisoner's family". The other reasons assigned by the Court of Appeals while refusing Goodwin's prayer included that such a permission will have a significant impact on other inmates and the female inmates would have to be granted expanded medical services "thereby taking resources away from security and other legitimate penological interests".

European Viewpoint

53. Dickson v. The United Kingdom (Application No. 44362/04) - a decision dated 4th December, 2007 rendered by the Grand Chamber of the European Court of Human Rights has been cited with great force. That was a case where two British nationals sought permission for access to artificial insemination facilities. The first applicant was a murder convict and sentenced to life imprisonment. He had no children. He met the second applicant while she was also imprisoned. She had since been released. The applicants got married in 2001. As they wished to have a child, the first applicant applied for facilities for artificial insemination to which the second applicant also joined. They relied on the length of their relationship; first applicant's earliest expected date of release and the age of second applicant to urge that it was unlikely for them to have a child together without the use of artificial insemination facilities. The Secretary of State refused their application. Their challenge to that decision was turned down by the High Court as well.

54. Dickson(s) alleged violation of Articles 8 & 12 of the European Convention on Human Rights which, inter alia, provides that (i) everyone has a right to his private and family life and (ii) that men and women of marriageable age have the right to marry and to find a family, according to the national laws governing the exercise of that right.

55. The Grand Chamber of ECHR held that Article 8 was applicable to the Applicants' complaint as the refusal of artificial insemination facilities

concerned with private and family lives which notions incorporate the right to respect for their decision to become genetic parents. Before inferring the violation of Article 8 of the Convention, the fact "that more than half of the Contracting States allow for conjugal visits for prisoners (subject to a variety of different restrictions), a measure which could be seen as obviating the need for the authorities to provide additional facilities for artificial insemination", was duly noticed. The Court further expressed "…its approval for the evolution in several European countries towards conjugal visits, it has not yet interpreted the Convention as requiring Contracting States to make provision for such visits (see Aliev, cited above, § 188). Accordingly, this is an area in which the Contracting States could enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals."

56. The Court then awarded monetary compensation to the applicants on the strength of Article 41 of the Convention which enables it to afford just satisfaction to the injured party.

SUBMISSIONS OF THE LD. AMICUS CURIAE

…

58. It was urged that the State has denied the right to procreate to the petitioners only because such a right does not find any mention in the Rulebooks or Statutes. In the absence of such a right having been spelt out in a codified-law, it cannot be assumed that the petitioners' prayer contravenes any law. The denial of the right to procreate thus is alleged to be unreasonable, arbitrary as such a right not being violative of any rule or law, its denial amounts to be a monstrous violation of Article 21 of the Constitution.

59. Ld. Amicus Curiae further submitted that this Court in exercise of its discretionary writ jurisdiction possesses ample powers to enforce the subject fundamental right and direct the Prison Authorities to allow conjugal visits for the sole purpose of procreation, as best as the circumstances permit, and if they find any difficulty and explain it with reasons then the petitioners may be allowed, at their expense, the option of artificial insemination. On the question of the "best interest principle of the child", it was explained that the parents of petitioner No. 1 have committed to bear all expenses and bring up the child in the absence of the petitioners.

60. Ld. Amicus Curiae canvassed that the right to life includes right to 'create life' and 'procreate' and this fundamental right does not get suspended when a person is sentenced and awarded punishment thereby limiting him to stay in the jail. The law under which petitioners are sentenced and tried does not extinguish their rights under Article

21, till in a legal manner and as far the procedure established by law, the life of 1st petitioner is extinguished. His right to procreate cannot be taken away only because he has been sentenced and punished for some offence. There is no provision, explicit or implied, in any penal law and/or the Constitution that takes away the petitioners' right to decent life under the set circumstances, which squarely falls within the expanded scope of Article 21. The petitioners seeking to exercise their fundamental right to 'life and procreate' thus ought not to be denied. Petitioner No. 1 has been awarded death sentence and is undergoing punishment but his 'right to life' cannot be taken away till his execution. Until then the right to life includes all rights except the freedom to move which has been taken away by way of punishment of law.

THE OTHER VIEWPOINT

62. Learned counsel for the Complainant, contrarily, relied upon the dissenting opinion of Judges Wildhaber, Zupancic, Jungwiert, Gyulumyan and Myjer, in Dickson opining that no one can be heard to say "…that there is no right to conjugal visits in prisons, but that there is instead a right for the provision of artificial insemination facilities in prisons (this interpretation results implicitly from paragraphs 67-68, 74, 81 and 91). Not only is this contradictory…" The Minority further held that "the margin of appreciation of Member States is wider where there is no consensus within the States and where no core guarantees are restricted. States have direct knowledge of their society and its needs, which the Court does not have. Where they provide for an adequate legal basis, where the legal restrictions serve a legitimate aim and where there is room to balance different interests, the margin of appreciation of States should be recognized…" The learned Judges were also of the view that "…the Court might have wished to discuss the very low chances of a positive outcome of in vitro fertilization of women aged 45 (see Bradley J. Van Voorhis, "In Vitro Fertilization", New England Journal of Medicine 2007 (356): 4 pp. 379-386). The Court also fails to address the question whether all sorts of couples (for example, a man in prison and the woman outside, a woman in prison and the man outside, a homosexual couple with one of the partners in prison and the other outside) may request artificial insemination facilities for prisoners. We are of the opinion that in this respect too States should enjoy an important margin of appreciation…"

63. In R v. Secretary of State for Home Department, [2001] EWCA Civ 472, the Supreme Court of Judicature (Civil Division), UK considered the claim of a convict-appellant who was serving life sentence for murder. He was aggrieved at the denial of access to facilities for artificial insemination of his wife. The Court considered the appellant's claim in the context of violation of Articles 8 & 12 of European Convention on Human Rights and

after referring to the Strasbourg Jurisprudence and relevant decisions of the Commission, it summarized its conclusions as follows:-

> "i) The qualifications on the right to respect for family life that are recognised by Article 8(2) apply equally to the Article 12 rights.
>
> ii) Imprisonment is incompatible with the exercise of conjugal rights and consequently involves an interference with the right to respect for family life under Article 8 and with the right to found a family under Article 12.
>
> iii) This restriction is ordinarily justifiable under the provisions of Article 8(2).
>
> iv) In exceptional circumstances it may be necessary to relax the imposition of detention in order to avoid a disproportionate interference with a human right.
>
> v) There is no case which indicates that a prisoner is entitled to assert the right to found a family by the provision of semen for the purpose of artificially inseminating his wife."

64. The Court nonetheless put a cautious note that the above-reproduced conclusions need not be construed to justify preventing a prisoner from inseminating his wife artificially or naturally. The Court was of the view that interference with fundamental human rights must always involve an exercise in proportionality.

65. The Court in the above-cited case thereafter referred to the policy of the Secretary of the State and culled out three reasons for sustenance of the policy that restricts the provision of facilities for artificial insemination, namely, (i) it is an explicit consequence of incarceration that prisoners should not have the opportunity to beget children whilst serving their sentences, save when they are allowed to take temporary leave; (ii) there is likelihood of a serious and justified public concern if prisoners continue to have the opportunity to conceive children while serving sentences; and (iii) there are disadvantages of single parent families. The Court thus held that the refusal to permit the appellant the facilities to provide semen for artificial insemination of his wife was neither in breach of the convention nor unlawful or irrational.

POLICIES FOR CONJUGAL/FAMILY VISITS ACROSS VARIOUS JURISDICTIONS

66. Learned counsel for the complainant drew attention to policies for conjugal/family visits across various jurisdictions. In Canada, as per the Directive 770 dated 14/08/2008 issued by the Commissioner of the Correctional Service Canada, private family visit is allowed but these are subject to certain restrictions like:

PRIVATE FAMILY VISITING

"22. Eligible inmates shall be offered the opportunity to participate in private family visiting. Private family visiting is intended to support the development and delivery of family programs in the institution and to provide inmates with the opportunity to use separate facilities where they may meet privately with their family to renew or continue personal relationships.

ELIGIBILITY - INMATES

23. All inmates are eligible for private family visiting except those who are:

a. assessed as being currently at risk of becoming involved in family violence;

b. in receipt of unescorted temporary absences for family contact purposes; or

c. in a Special Handling Unit or are awaiting decision or have been approved for transfer to a Special Handling Unit.

ELIGIBILITY - VISITORS

24. Persons eligible to participate in private family visiting shall include spouse, common-law partner, children, parents, foster parents, siblings, grandparents, and persons with whom, in the opinion of the Institutional Head, the inmate has a close familial bond, provided they are not inmates.

Inmates are not eligible to participate in private family visits with other inmates."

67. The policy in Australia's Capital Territory, namely, "Corrections Management (Private Family Visits) Policy 2009" provides that "prisoners are not eligible to participate in private family visits with other prisoners."

ACADEMIC RESEARCH AND OPINION ON CONJUGAL VISITS

68. Learned Amicus Curiae referred to various scholarly articles, books and research papers, throwing invaluable light on the issue of conjugal visits/marital relationship of prisoners/human rights of prisoners. The article Marital Relationships of Prisoners in Twenty - Eight Countries by

Prof. Ruth Shonle Cavan and Prof. Eugene S. Zemans, gives insight of the policies and practices followed in as many as 28 countries in Europe, Asia, Africa and American continents. According to this article "…in only a few countries are provisions for marital contacts extended equally to all categories of prisoners. The limitation may be because of the unreliability or dangerousness of the criminal; or marital contacts may have some connotation of a privilege to be granted only to cooperative and conforming prisoners. In either case, the practice of home leaves or of family residence in a penal colony is not carried out haphazardly but tends to be integrated into the total prison regime.. ..it is worth noting that in general the countries from which we received responses do not favour private or conjugal visits within the prison, with the exception of Mexico."

69. The other research paper authored way back in the year 1964 titled Conjugal Visitations In Prisons - A Sociological Perspective, is a study on the determination of changes of attitudes of prison administrators in USA towards the idea of conjugal visitations. The author concludes that "Conjugal visitations tend to magnify and accentuate problems relating to rehabilitation. It would appear that prison administrators are not in favour of conjugal visitations, foreign precedents to the contrary notwithstanding. This stand by prison administrators, however, is not without some foundation the attitude of the American public is characterised by apathy, un-familiarity, and disinterestedness in the problem as a whole…".

70. Yet another article Attitudes toward Conjugal Visits for Prisoners is a research compilation on conjugal visiting practices including those prevailing in Latin American countries like Brazil, Bolivia, Colombia, Chile etc. The practices in Canada and the California (USA) where conjugal visits had been started also found a mention there. After interviewing the Prison Administrators in California, the author found "deep cleavages and almost irreparable estrangement of wives and children toward the husband and father who is away in prison …..it is our contention that we do not protect society by contributing to the dissolution of the family unit. Family visiting is an attempt by California prison administrators to provide an opportunity for the inmate to visit his wife and children in a relaxed normal-like family setting".

…

72. Learned Amicus Curiae also quoted an article by Professor Baroness Deech on Human Rights and Welfare (2009) which gives a meaningful insight of the case of Yigal Amir, who assassinated the Prime Minister of Israel in the year 1955. Under the Israeli law although the prisoners are allowed to marry and have children, the convict was denied such right due to the heinous nature of the crime. Having married by proxy, the couple petitioned for the right to consummate their marriage and the wife was

allowed a conjugal visit in late 2006. The Courts held that the prisoners have these human rights. The said case underlines the severity of the crime to not be a disqualification in granting rights of procreation/consummation as the same are "human rights".

73. Learned Amicus Curiae lastly referred to an academic paper written by Brenda V. Smith, Analyzing Prison Sex: Reconciling Self-Expression with Safety, Humans Rights Brief (2006) as it gives an overview of the issue 'Human Rights Norms and Prison Sex' across various jurisdictions. The article is extremely informative and states - "Many other countries permit sexual expression in institutional settings, define these visit under the rubric of either intimate or conjugal visits, and permit prisoners to have intimate and other contact with spouses, partners and family. For example, Brazil has implemented a "conjugal visit," which allows prisoners to visit with family and friends without physical restriction, and an "intimate visit," which allows prisoners to receive visits from their partners or spouses in individual prison cells. In the Czech Republic, the Director of prison may allow married couples to visit in rooms specifically designated for intimate contact. It also allows prisoners to receive visits from four close relatives at a time. In Spain, inmates who cannot leave the institution may receive conjugal/intimate visits once a month for one to three hours. Finally, Denmark has implemented a "prison leave" system for prisoners with sentences greater than five months. The leave can last from one day to an entire weekend. Denmark "see[s] leave as a helpful tool in maintaining a stable atmosphere in the prisons and furthermore by keeping contact with relatives outside it is believed that fewer prisoners try to escape".

THE PUNJAB GOOD CONDUCT PRISONERS (TEMPORARY RELEASE) ACT, 1962 AND THE STATE POLICY, INSTRUCTIONS FOR THE RELEASE OF CONVICTS ON PAROLE, FURLOUGH ETC.

74. Coming back to the Indian scenario, it is intriguing to note that it was as far back as in the year 1926 that the Punjab Good Conduct Prisoners' Probational Release Act, 1926 was enacted with the Object that those prisoners whose antecedents or conduct while under restraint give promise that they will justify privilege of conditional release, with opportunities of earning their own livelihood and "of having their families with them", could be released by the State Government, conditionally.

75. The post-Independence era brought a new legislation known as the Punjab Good Conduct Prisoners (Temporary Release) Act, 1962. The Act was legislated keeping in view the recommendations of Jail Reforms Committee, for the grant of 'leave' on 'furlough' to certain categories of long-term prisoners and also to release them on 'parole'. Section 3(1) of the Act enables the State Government to release the prisoners temporarily for a specified period, if it is satisfied that:-

> "(a) a member of the prisoner's family had died or is seriously ill; or
>
> (b) the marriage of the prisoner'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 and no friend of the prisoner or a member of the prisoner's family is prepared to help him in this behalf in his absence;
>
> (d) it is desirable to do so for any other sufficient cause."

76. In addition, Section 4 of the Act empowers the State Government to release prisoners temporarily, on 'furlough' subject to his good behavior and the quantum of sentence awarded or the nature of offence committed. Section 6 of the Act creates an embargo against the release of a prisoner, if it is likely to endanger the security of the State or the maintenance of public order. The Act also prescribes penal consequences if the prisoner fails to surrender on the expiry of release period. The neighbouring State of Haryana too has enacted the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 broadly with similar provisions. Both the States have formulated Statutory Rules and taken policy decisions to give effect to their respective Legislations on the temporary release of prisoners.

77. It may be seen from the words, expressions and phrases used by the Legislature in Section 3 of the 1962 Act that the necessity to keep a prisoner in contact with his/her family; societal expectations of his/her presence on certain occasions and the augmentation of sources of livelihood of the prisoner's family have been manifestly acknowledged. Further, sub-clause (d) of Section 3(1) is of such a wide amplitude that it can encompass any reasonable cause as a sufficient ground for the temporary release of a prisoner.

78. From the conjoint reading of the 1962 Act, Rules and the Punjab Government policy, it is seen that these benefits are extendable to all the prisoners, subject to their good behavior while in jail, except those involved in heinous offences or whose temporary release is likely to endanger State security or public peace and order.

79. Undeniably, the existing Statutes, Rules or Policy do not contain any express or implied provision to facilitate conjugal life or the opportunity for

procreation to a prisoner even if he/she has neither committed 'heinous offence' nor such convict endangers 'State security or public peace and order'. Even the Jail Reforms Committees constituted from time to time have failed to delineate on the issue. The landmarks like Sunil Batra-I & II or the later decisions could not opine whether such right(s), to be or not to be read as a part of Article 21 of the Constitution, for no such issue was ever raised in those cases.

80. The solitary purpose behind travelling into global case-law on the point in issue is to assimilate the broad consensus that has emerged on judicial cplatforms. It may be seen that from U.S to Europe, the rights to conjugal visits, procreation or even artificial insemination facilities have been recognized only partially, being integrally embedded in Articles 8 & 12 of 'European Convention on Human Rights' or as the rights that are fundamental to the liberty and human dignity emanating from the Eighth Amendment, and further subject to the justifiable and proportionate restrictions.

81. Reverting back to the question posed at the outset, there is no gainsaying that ordinarily the right to conjugal visits and procreation is a component of the right to live with dignity and is thus ingrained in the right to life and liberty guaranteed under Article 21 of our Constitution to which a very expansive, dynamic and vibrant meaning has been given by the Apex Court through several historical pronouncements.

82. The right to conjugal visits or procreation or for that matter the right to secure artificial insemination as a supplement, are also, thus, subject to all those reasonable restrictions including public order, moral and ethical issues and budgetary constraints which ought to be read into the enjoyment of such like fundamental right within our Constitutional framework.

83. Incarceration leads to suspension of some of the fundamental rights and is a legal impediment in giving effect to the right to conjugal visits or procreation. The said right inheres right to privacy, dignity, respect and free movements as well. Good behavior of the convict, unlikelihood of his/her endangering the State security, peace and harmony or the social and ethical order, financial and society security of the convict and his/her family etc. etc. are severalother relevant factors to determine the extent and limitations for translating such a right into reality.

84. An equally important and paramount issue is whether eligible convicts should have the facility of conjugal visits within the jail precincts or a provision like Section 3(1)(d) of the 1962 Act can be enlarged enough to serve as a regular measure for their temporary release on parole for such exclusive visits. The other question that needs simultaneous answer is as

to whether these facilities be extended within or outside the precincts of jail to those hardened criminals also whose singular offence might have shaken the conscience of the society? The lack of unanimity in views even amongst the developed nations indeed keeps this riddle unsolved.

CONCLUSION

…

88. Jail reforms have been the priorities of none. A little improvement in guaranteeing basic human rights, though still far from satisfactory, has happened with the tireless efforts of the Indian judiciary and a constant monitoring through jail inspections by the District and High Courts with due help from the public spirited organizations and individuals from the civil society. None of the serious issues like overcrowding, lack of clean and sufficient toilets, requisite and healthy food, medical facilities, telecommunication facilities or re-orientation have been addressed nor there appears to be any commitment of the executive in this direction. There are no comprehensive plans for rehabilitation and re-settlement of the convicts on their release and many of them step out of a dark hole to fall into a darker ditch.

89. There can be no quarrel and as rightly observed by AP High Court in Ms. G. Bhargava (supra) also that the issues like facilitation of conjugal visits of convicts for procreation essentially fall within the domain of policy makers and it has to be left to them to evolve an effective mechanism whether by way of legislation or through executive decision. However, what cannot be overlooked is that the convicts or other jail inmates are a class of persons who have been separated from society by the Courts in performance of their sovereign duties. Jails and other Correctional Centres are the extended limbs of justice delivery system as a measure for the enforcement of judicial verdicts. The management, conditions of living and future responsibilities of the inmates inside the jails etc., cannot be left to the sole desire or discretion of the executive. It is rather the responsibility of Courts to ensure that the rights of every resident of prison(s) or correctional home(s) are duly protected and irrespective of the financial constraints which is the oft-offered explanation by a State, the conditions of living, re-orientation or rehabilitation of the convicts is given effect under the direct supervision, command and control of the Courts.

90. The directions for re-visiting the legislative or executive policy regime which are implicit in the observations made hereinabove are, however, subject to the caveat and conditions like

(i) the gravity of the offence committed by a convict and its likely effect on the society in the event of temporary release;

(i) likelihood of absconding in the case of offenders of heinous crimes;

(ii) good behavior while in jail;

(iii) duration of the actual sentence already undergone;

(iv) the expected date of release on completion of a tenure sentence;

(v) pre-conviction conduct of the convict; etc. etc.

91. Owing to the neglected and limited infrastructure, causing overcrowding, lack of specialized services and above all the prevailing social norms and the societal expectations, it may not be conducive to create space for conjugal visits within the existing prisons. It can nevertheless be introduced on trial basis in Model Jails or Open Air-Free Jails in such a manner that the independent family units of the 'convicts with good behavior' may live like in a small hamlet. For that purpose, as of now, a team comprising (i) District & Sessions Judge, (ii) Deputy Commissioner (iii) Superintendent of Jails can identify the places where such like practices can be introduced to begin with.

92. Since multiple inputs from the social scientists, Criminologists, Jail Administration and Judiciary along with budget allocation for the requisite infrastructures, will have a direct bearing on the policy formulation, it is not expedient or desirable for this Court to direct the actual implementation of its directions or observation(s) in a time-bound manner. The State Government shall in consultation with the High Court constitute Jail Reforms Committee to deal with different aspects of jail reforms keeping in view the observations made in this order and on submission of report by such Committee within one year from the date of its constitution, the State shall admit to the High Court the time-frame within which those recommendations shall be given effect.

93. It is directed that until the State of Punjab effectively addresses the issues either by way of appropriate legislation or through policy framework, the expression "any other sufficient cause" contained in Section 3(1)(d) of the 1962 Act shall treat the conjugal visits of a married and eligible convict as one of the valid and sufficient ground for the purpose of his/her temporary release on 'parole' or 'furlough' though subject to all those conditions as are prescribed under the Statute.

94. Having held that, this Court cannot be oblivious of the fact that the cited decisions of various Courts across the globe voicing their opinion on the right of conjugal visits or artificial insemination of a convict may have some persuasive value in general but the jurisprudential principles expounded therein do not advance the petitioners' claim being vividly distinguishable, for the reasons that (i) the society, its fabric and pragmatic

approach to allow or disallow certain events to happen in the case in hand are laid on entirely different foundations and thus no common pyramid can be structured; (ii) the circumstances which led to the petitioners' incarceration are far grave in nature and different from those where one of the spouse was totally innocent and possessory of all human rights without any curtailment unlike the instant case where both of them are convicts and undergoing death sentence and life conviction, respectively; (iii) even the most liberal view taken by some of the European or American Courts would not justify the claim put forth by the petitioners; and (iv) the existing infrastructure and overall environment do not support emergent measures; I, therefore, decline to issue any direction with reference to the claim put-forth by the petitioners.

95. For the reasons assigned above, I sum up my conclusions and answer the questions as formulated in Para 9 of this order, in the following terms.-

i. Question - (i) Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?

   Yes, the right to procreation survives incarceration. Such a right is traceable and squarely falls within the ambit of Article 21 of our Constitution read with the Universal Declaration of Human Rights.

ii. Whether penological interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?

   The penological interest of the State ought to permit the creation of facilities for the exercise of right to procreation during incarceration, may be in a phased manner, as there is no inherent conflict between the right to procreate and incarceration, however, the same is subject to reasonable restrictions, social order and security concerns;

iii. Whether 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?

   'Right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate). However, the exercise of these rights are to be regulated by procedure established by law, and are the sole prerogative of the State.

iv. If question No. (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?

Ordinarily, all convicts, unless reasonably classified, are entitled to the right to procreation while incarcerated. Such a right, however, is to be regulated as per the policy established by the State which may deny the same to a class or category of convicts as the aforesaid right is not an absolute right and is subject to the penological interests of the State.

96. In the light of the above discussion, the instant writ petition is disposed of with the following directions:-

i. the State of Punjab is directed to constitute the Jail Reforms Committee to be headed by a former Judge of the High Court. The other Members shall include a Social Scientist, an Expert in Jail Reformation and Prison Management amongst others;

ii. the Jail Reforms Committee shall formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and shall identify the categories of inmates entitled to such visits, keeping in mind the beneficial nature and reformatory goals of such facilities;

iii. the said Committee shall also evaluate options of expanding the scope and reach of 'open prisons', where certain categories of convicts and their families can stay together for long periods, and recommend necessary infrastructure for actualizing the same;

iv. the Jail Reforms Committee shall also consider making recommendations to facilitate the process of visitations, by considering best practices in the area of prison reforms from across jurisdictions, with special emphasis on the goals of reformation and rehabilitation of convicts and needs of the families of the convicts;

v. the Jail Reforms Committee shall suggest ways and means of enhancing the facilities for frequent linkage and connectivity between the convict and his/her family members;

vi. the Jail Reforms Committee shall prepare a long-term plan for modernization of the jail infrastructure consistent with the reforms to be carried out in terms of this order coupled with other necessary reforms;

vii. the Jail Reforms Committee shall also recommend the desired amendments in the rules/policies to ensure the grant of parole, furlough for conjugal visits and the eligibility conditions for the grant of such relief;

viii. the Jail Reforms Committee shall also classify the convicts who shall not be entitled to conjugal visits and determine whether the husband and wife who both stand convicted should, as a matter of policy be included in such a list, keeping in view the risk and danger of law and security, adverse social impact and multiple disadvantages to their child;

ix. the Jail Reforms Committee shall make its recommendations within one year after visiting the major jail premises and it shall continue to monitor the infrastructural and other changes to be carried out in the existing jails and in the Prison Administration System as per its recommendations.

x. the Jail Reforms Committee shall be allowed to make use of the services of the employees and officers of the State of Punjab, who is further directed to provide the requisite funds and infrastructure including proper office facilities, secretarial services, travel allowances and all necessary amenities and facilities, as required by the Jail Reforms Committee.

97. Since the scope of this petition was enlarged in the larger public interest beyond the relief sought by the petitioners and the issues raised or answered are equally relevant keeping in view their pari materia Statute(s) or policies, it is directed that the directions issued hereinabove shall apply mutatis mutandis to the State of Haryana and Union Territory of Chandigarh as well.

98. The petitioners - husband and wife, who are undergoing death sentence and life imprisonment, respectively, are not found entitled to any relief, as prayed for by them, for the reasons assigned in paras 91, 92 and especially in para 94 of this order. Their prayer is accordingly declined."

IN THE SUPREME COURT OF INDIA

In Re Inhuman Conditions in 1382 Prisons

(2016) 3SCC 700

Madan B. Lokur & R. K. Agrawal, JJ.

In this suo-moto case, the Supreme Court sought information regarding the condition in prisons across the country, and passed various orders and directions to improve such condition.

Lokur, J.: "6. In this background, a letter on 13-6-2013 addressed by Justice R.C. Lahoti, a former Chief Justice of India to the Hon'ble the Chief Justice of India relating to conditions in prisons is rather disturbing. Justice R.C. Lahoti invited attention to the inhuman conditions prevailing in 1382 prisons in India as reflected in a graphic story appearing in *Dainik Bhaskar* (National Edn.) on 24-3-2013. A photocopy of the graphic story was attached to the letter. Justice R.C. Lahoti pointed out that the story highlights:

(*i*) Overcrowding of prisons;

(*ii*) Unnatural death of prisoners;

(*iii*) Gross inadequacy of staff; and

(*iv*) Available staff being untrained or inadequately trained.

7. Justice R.C. Lahoti also pointed out that the State cannot disown its liability to the life and safety of a prisoner once in custody and that there were hardly any schemes for reformation for first-time offenders and prisoners in their youth and to save them from coming into contact with hardened prisoners.

8. Justice R.C. Lahoti ended the letter by submitting that the graphic story raised an issue that needed to be taken note of and dealt with in public interest by this Court and that he was inviting the attention of this Court in his capacity as a citizen of the country. We may say that Justice R.C. Lahoti has brought an important issue to the forefront, dispelling the view:

"Judges rarely express concern for the inhumane treatment that the person being sentenced is likely to face from fellow prisoners and prison officials, or that time in prison provides poor preparation for a productive life afterwards. Courts rarely consider tragic personal pasts that may be partly responsible for criminal behaviour, or how the communities and families of a defendant will suffer during and long after his imprisonment." [Eva S. Nilsen, "Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse", Boston University School of Law Working Paper Series, Public Law & Legal Theory Working Paper No. 07-33]

9. By an order dated 5-7-2013 [*Inhuman Conditions in 1382 Prisons, In re*, WP (C) No. 406 of 2013, order dated 5-7-2013 (SC), wherein it was directed: "Pursuant to the request we had made on 1-7-2013, the learned Attorney General is before the Court and undertakes to take instructions in the matter. Let this letter petition be registered as writ petition (PIL) and let the authorities concerned of the Union of India and the different States, be made parties to these proceedings. Issue notice to all the parties. The Registry shall take appropriate steps in the matter after obtaining such a list from the office of the learned Attorney General. The matter is made returnable 8 weeks hence."] the letter was registered as a public interest writ petition and the Registry of this Court was directed to take steps to issue notice to the appropriate authorities after obtaining a list from the office of the learned Attorney General.

10. In reply to the notice issued by this Court, several States and Union Territories gave their response either in the form of communications addressed to the Registry of this Court or in the form of affidavits. It is not necessary for us to detail each of the responses. Suffice it to say that on the four issues raised by Justice R.C. Lahoti there is general consensus that the prisons (both Central and District) are overcrowded, some unnatural deaths have taken place in some prisons, there is generally a shortage of staff and it is not as if all of them are adequately and suitably trained to handle issues relating to the management of prisons and prisoners and finally that steps have been taken for the reformation and rehabilitation of prisoners. However, a closer scrutiny of the responses received indicates that by and large the steps taken are facile and lack adequate sincerity in implementation.

11. In view of the above, the Social Justice Bench of this Court passed an order on 13-3-2015 [*Inhuman Conditions in 1382 Prisons, In re*, WP (C)

No. 406 of 2013, order dated 13-3-2015 (SC)] requiring the Union of India to furnish certain information primarily relating to the more serious issue of overcrowding in prisons and improving the living conditions of prisoners. The order passed by the Social Justice Bench on 13-3-2015 [*Inhuman Conditions in 1382 Prisons, In re*, WP (C) No. 406 of 2013, order dated 13-3-2015 (SC)] reads as follows:

> "We have heard the learned Additional Solicitor General and would like information on the following issues:
>
> (i) The utilisation of the grant of Rs 609 crores under the 13th Finance Commission for the improvement of conditions in prisons.
>
> (ii) The grant to the States in respect of the prisons under the 14th Finance Commission.
>
> (iii) Steps taken and being taken by the Central Government as well as by the State Governments for effective implementation of Section 436-A of the Code of Criminal Procedure, 1973.
>
> (iv) Steps taken and being taken by the Central Government and the State Governments for effective implementation of the Explanation to Section 436 of the Code of Criminal Procedure, 1973 and the number of persons in custody due to their inability to provide adequate security/surety for their release on bail.
>
> (v) The number of persons in custody who have committed compoundable offences and are languishing in custody.
>
> (vi) Steps taken for the effective implementation of the Repatriation of Prisoners Act, 2003.
>
> We expect all the State Governments to fully cooperate with the Central Government in this

> regard since the matter involves Article 21 of the Constitution and to furnish necessary information within three weeks.
>
> List the matter on 24-4-2015."

12. In compliance with the aforesaid order, the Union of India through the Ministry of Home Affairs filed a detailed affidavit dated 23-4-2015. It was stated in the affidavit that all States and Union Territories were asked to provide the information as required by this Court but in spite of reminders and meetings, the information had not been received from the State of Uttarakhand and the Union Territories of Dadra & Nagar Haveli, Daman & Diu and Lakshadweep.

13. It was stated that one of the problems faced in aggregating the information that had been received was that management information systems were not in place in a comprehensive manner. To remedy this situation an e-prisons application was being designed so that all essential data could be centrally aggregated. It was stated in the affidavit that a draft project report was being prepared through a project management consultancy so that an e-prisons application could be rolled out with integrated information in all States and Union Territories comprehensively for better monitoring of the status of prisoners, particularly undertrial prisoners.

14. In response to the first issue, it was pointed out in the affidavit in the form of a tabular statement that funds were made available under the 13th Finance Commission for the improvement of conditions in prisons in respect of several States. We are surprised that no grant was allotted in as many as 19 States and in the States where grants were allotted, the utilisation was less than 100%, except in the State of Tripura.

15. With regard to the grant under the 14th Finance Commission, it was stated that the 14th Finance Commission had reported that the States have the appropriate fiscal space to provide for the additional expenditure needs as per their requirements. The 14th Finance Commission did not make any specific fund allocation in favour of the Central Government but the States had projected their demands individually and the tabular statement in that regard is annexed to the affidavit. As far as the Union Territories are concerned, apart from Delhi and Puducherry none of the Union Territories had projected any demand.

16. With regard to the third issue regarding effective implementation of Section 436-A of the Code of Criminal Procedure, (for short "CrPC"), the affidavit stated that an advisory had been issued by the Ministry of Home Affairs of the Government of India on 17-1-2013 to all the States and Union Territories to implement the provisions of Section 436-A CrPC to reduce overcrowding in prisons. Among the measures suggested in this regard by the Ministry of Home Affairs, was the constitution of a Review Committee in every district with the District Judge in the Chair with the District Magistrate and the Superintendent of Police as members to meet every three months and review the cases of undertrial prisoners. The Jail Superintendents were also required to conduct a survey of all cases where undertrial prisoners have completed more than one-fourth of the maximum sentence and send a report in this regard to the District Legal Services Committee constituted under the Legal Services Authorities Act, 1987 as well as to the Review Committee. It was also suggested that the prison authorities should educate undertrials of their right to bail and the District Legal Services Committee should provide legal aid through empanelled lawyers to the undertrial prisoners for their release on bail or for the reduction of the bail amount. The Home Department of the States was also requested to develop a management information system to ascertain the jail-wise progress in this regard.

17. The aforesaid advisory dated 17-1-2013 was followed up through a Letter of the Union Home Minister to the Chief Ministers/Lieutenant Governors on 3-9-2014. It was pointed out in the letter that as per the statistics provided by the National Crime Records Bureau (NCRB) as on 31-12-2013 the number of undertrial prisoners was 67.6% of the entire prison population and that the percentage was unacceptably high. In this context it was suggested that the provisions of Section 436 CrPC as well as Section 436-A CrPC had to be made use of. It was also suggested that steps be taken to utilise the provisions of plea bargaining, the establishment of Fast Track Courts, holding of Lok Adalats and ensuring adequate means for the production of the accused before the Court directly or through video conferencing.

18. Yet another Letter was sent to the Director General of Prisons of all States/Union Territories on 22-9-2014 by the Ministry of Home Affairs drawing attention to the directions of this Court in *Bhim Singh* v. *Union of India* [*Bhim Singh* v. *Union of India*, (2015) 13 SCC 605 : (2016) 1 SCC (Cri) 663] dated 5-9-2014 relating to Section 436-A CrPC and to take necessary steps to comply with the orders passed by this Court.

19. In a similar vein, yet another advisory was issued by the Government of India on 27-9-2014. It was averred in the affidavit that as a result of these advisories and communications, some undertrial prisoners have been released in implementation of the provisions of Section 436-A CrPC.

20. With regard to the fourth issue concerning the effective implementation of Section 436 CrPC, the affidavit stated that an advisory was issued way back on 9-5-2011 in which it was pointed out, inter alia, that prison overcrowding compels prisoners to be kept under conditions that are unacceptable in light of the United Nations Standard Minimum Rules for Treatment of Offenders to which India is the signatory. It was pointed that as per the statistics prepared by NCRB as on 31-12-2008 prisons in India are overcrowded to the extent of 129%. The advisory highlighted some measures taken by some of the States to reduce the number of undertrial prisoners, including their release under the provisions of the Probation of Offenders Act, 1958 and encouraging NGOs in association with District Legal Services Committees to arrange legal aid for unrepresented undertrial prisoners as well as to implement the guidelines issued by the Bombay High Court in *Rajendra Bidkar* v. *State of Maharashtra*, CWP No. 386 of 2004 (unreported decision).

21. With regard to the fifth issue relating to the number of persons who have been languishing in jails in compoundable offences, a chart was annexed to the affidavit which indicated, by and large, that quite a few States had taken no effective steps in this regard particularly Andhra Pradesh, Assam, Chhattisgarh, Haryana, Kerala, Mizoram, Nagaland, Odisha, Punjab, Rajasthan, Telangana, Tripura and Uttar Pradesh. The reason why many undertrial prisoners had not been released was their inability to provide security and surety for their release. The steps taken to have these prisoners released from custody were not indicated in the affidavit.

22. With regard to the effective implementation of the Repatriation of Prisoners Act, 2003 it was stated that agreements on transfer of sentenced persons have been bilaterally signed with 25 countries but the agreements are operational after ratification by both sides only with respect to 18 countries. In addition, transfer arrangements have been made with 19 countries under the Inter-American Convention on Serving Criminal Sentences Abroad thereby making the total number of countries with which transfer arrangements have been made for prisoners to 37 countries.

23. Keeping in view the affidavit dated 23-4-2015 filed by the Ministry of Home Affairs and the somewhat lukewarm response of the States and

Union Territories, the Social Justice Bench passed the following directions on 24-4-2015 [*Inhuman Conditions in 1382 Prisons, In re*, WP (C) No. 406 of 2013, order dated 24-4-2015 (SC)] :

> "1. We have perused the affidavit filed by the Ministry of Home Affairs on 23-4-2015 and have heard the learned counsel. The admitted position is 67% of all the prisoners in jails are undertrial prisoners. This is an extremely high percentage and the number of such prisoners is said to be about 2,78,000 as on 31-12-2013. Keeping this in mind and the various suggestions that have been made in the affidavit, we are of the view that the following directions need to be issued:
>
> 1.1. A Prisoners Management System (a sort of Management Information System) has been in use in Tihar Jail for quite some time, as stated in the affidavit. The Ministry of Home Affairs should carefully study this application software and get back to us on the next date of hearing with any suggestions or modifications in this regard, so that the software can be improved and then deployed in other jails all over the country, if necessary.
>
> 1.2. We would like the assistance of the National Legal Services Authority (Nalsa) in this matter of crucial importance concerning prisoners in the country. We direct the Member-Secretary of Nalsa to appoint a senior judicial officer as the nodal officer to assist us and deal with the issues that have arisen in this case.
>
> 1.3. For the purpose of implementation of Section 436-A of the Code of Criminal Procedure, 1973 (for short 'the Code'), the Ministry of Home Affairs has issued an advisory on 17-1-2013. One of the requirements of the advisory is that an Undertrial Review Committee should be set up in every district. The composition of the Undertrial Review Committee is the District

Judge, as Chairperson, the District Magistrate and the District Superintendent of Police as members. The Member-Secretary of Nalsa will, in coordination with the State Legal Services Authority and the Ministry of Home Affairs, urgently ensure that such an Undertrial Review Committee is established in every district, within one month. The next meeting of each such Committee should be held on or about 30.6.2015.

1.4. In the meeting to be held on or about 30.6.2015, the Undertrial Review Committee should consider the cases of all undertrial prisoners who are entitled to the benefit of Section 436-A of the Code. The Ministry of Home Affairs has indicated that in case of multiple offences having different periods of incarceration, a prisoner should be released after half the period of incarceration is undergone for the offence with the greater punishment. In our opinion, while this may be the requirement of Section 436-A of the Code, it will be appropriate if in a case of multiple offences, a review is conducted after half the sentence of the lesser offence is completed by the undertrial prisoner. It is not necessary or compulsory that an undertrial prisoner must remain in custody for at least half the period of his maximum sentence only because the trial has not been completed in time.

1.5. The Bureau of Police Research and Development had circulated a Model Prison Manual in 2003, as stated in the affidavit. About 12 years have gone by and since then there has been a huge change in circumstances and availability of technology. We direct the Ministry of Home Affairs to ensure that the Bureau of Police Research and Development undertakes a review of the Model Prison Manual within

a period of three months. We are told that a review has already commenced. We expect it to be completed within three months.

1.6. The Member-Secretary of Nalsa should issue directions to the State Legal Services Authorities to urgently take up cases of prisoners who are unable to furnish bail and are still in custody for that reason. From the figures that have been annexed to the affidavit filed by the Ministry, we find that there are a large number of such prisoners who are continuing in custody only because of their poverty. This is certainly not the spirit of the law and poverty cannot be a ground for incarcerating a person. As per the figures provided by the Ministry of Home Affairs, in the State of Uttar Pradesh, there are as many as 530 such persons. The State Legal Services Authorities should instruct the panel lawyers to urgently meet such prisoners, discuss the case with them and move appropriate applications before the appropriate court for release of such persons unless they are required in custody for some other purposes.

1.7. There are a large number of compoundable offences for which persons are in custody. No attempt seems to have been made to compound those offences and instead the alleged offender has been incarcerated. The State Legal Services Authorities are directed, through the Member-Secretary of Nalsa to urgently take up the issue with the panel lawyers so that wherever the offences can be compounded, immediate steps should be taken and wherever the offences cannot be compounded, efforts should be made to expedite the disposal of those cases or at least efforts should be made to have the persons in custody released therefrom at the earliest.

2. A copy of this order be given immediately to the Member-Secretary, Nalsa for compliance. List

> the matter on 7-8-2015 for further directions and updating the progress made. For the present, the presence of the learned counsel for the States and Union Territories is not necessary. Accordingly, their presence is dispensed with."

24. The order dated 24-4-2015 [*Inhuman Conditions in 1382 Prisons, In re*, WP (C) No. 406 of 2013, order dated 24-4-2015 (SC)] made a pointed reference to the extremely high percentage of undertrial prisoners and the total number of prisoners as on 31-12-2013.

25. Reference was also made to the fact that the Bureau of Police Research and Development had circulated a Model Prison Manual in 2003 but since about 12 years had gone by, the Ministry of Home Affairs was directed to ensure that the Bureau of Police Research and Development undertakes a review of the Model Prison Manual within a period of three months.

26. Directions were also issued for the assistance of the National Legal Services Authority (Nalsa) to assist the Social Justice Bench and deal with the issues that had arisen in the case. A direction was also issued to ensure that the Undertrial Review Committee is established within one month in all districts and the next meeting of that Committee in each district should be held on or about 30-6-2015. Nalsa was required to take up the issue of undertrial prisoners particularly in the State of Uttar Pradesh where as many as 530 persons were in custody only because of their poverty.

27. Pursuant to the aforesaid order and directions, Nalsa filed a compliance report on 4-8-2015 in which it was stated that steps have been taken to ensure that Undertrial Review Committees are set up in every district and the State Legal Services Authorities had also been asked to take up the cases of prisoners who were unable to furnish bail bonds and to move appropriate applications on their behalf.

28. The compliance report stated that with regard to the Prisoners Management System, the Ministry of Home Affairs had already appointed a project management consultant to prepare a detailed project report for the e-Prisons project. It was stated that there were four prison software applications that had been developed by (*i*) National Informatics Centre, (*ii*) Goa Electronic Ltd., (*iii*) Gujarat Government through TCS, and (*iv*) Phoenix for Prison Management System in Haryana. The various applications would be evaluated and discussed in a conference of the Director General (Prisons)/Inspector General (Prisons) to be held on 20.8.2015.

29. The compliance report also indicated a break-up of the meetings of the Undertrial Review Committees that had been set up in the various States and that reports of the meeting that were directed to be held on or about 30-6-2015 were still awaited from a few States and Union Territories.

30. As regards the Model Prison Manual it was submitted that a draft had been prepared and was circulated for comments and a further meeting was scheduled to be held in August 2015 to finalise the draft.

31. With regard to the cases of undertrial prisoners who were unable to furnish bail bonds it was stated that as many as 3470 such persons were in custody due to their inability to furnish bail bonds and a maximum number of such undertrial prisoners were in the State of Maharashtra, that is, 797 undertrial prisoners. It was stated that as many as 3278 undertrial prisoners were those who were involved in compoundable offences and efforts were being made to expedite the disposal of their cases.

32. Keeping in view the compliance report as well as some of the gaps that appeared necessary to be filled up, the Social Justice Bench passed an order dated 7-8-2015 [*Inhuman Conditions in 1382 Prisons, In re*, WP (C) No. 406 of 2013, order dated 7-8-2015 (SC)] requiring, inter alia, the Undertrial Review Committee to include the Secretary of the District Legal Services Committee as one of the members of the Review Committee. The Ministry of Home Affairs was directed to issue an appropriate order in this regard.

33. With regard to the Model Prison Manual, it was suggested to the learned Additional Solicitor General appearing on behalf of the Union of India that the composition of the Committee looking into the Model Prison Manual should be a multi-disciplinary body involving members from civil society and NGOs as well as other experts. It was also directed that the Model Prison Manual should look into providing a crèche for the children of prisoners.

34. With regard to the large number of undertrial prisoners in the State of Maharashtra, it was directed that the matter should be reviewed and an adequate number of legal aid lawyers may be appointed so that necessary steps could be taken with regard to the release of undertrial prisoners in accordance with law, particularly those who had been granted bail but were unable to furnish the bail bond due to their poverty.

35. The order dated 7-8-2015 [*Inhuman Conditions in 1382 Prisons, In re*, WP (C) No. 406 of 2013, order dated 7-8-2015 (SC)] reads as follows:

"1. We have gone through the compliance report filed on behalf of Nalsa and we appreciate the work done by Nalsa within the time-frame prescribed. We find from the report that the Undertrial Review Committees have been established in large number of districts but they have not been established in all the districts across the country. Mr Rajesh Kumar Goel, Director, Nalsa — the nodal officer will look into the matter and ensure that, wherever necessary, the Undertrial Review Committee should be established and should meet regularly.

2. We are told that the Undertrial Review Committee consists of the District Judge, the Superintendent of Police and the District Magistrate. Since the issues pertaining to undertrial prisoners are also of great concern of the District Legal Services Authorities, we direct that the Undertrial Review Committee should also have the Secretary of the District Legal Services Authority as one of the members of the Committee. The Ministry of Home Affairs will issue a necessary order in this regard to the Superintendent of Police to associate the Secretary of the District Legal Services Authority in such meetings.

3. It is stated that so far as a software for the prisoners is concerned, the Ministry of Home Affairs has appointed a project management consultant and at present there are four kinds of software in existence in the country with regard to prison management. It is stated that a meeting will be held on 20-8-2015 with the Director General (Prisons)/Inspector General (Prisons) to evaluate the existing application software. We expect an early decision in the matter and early implementation of the decision that is taken.

4. It is stated that a Model Prison Manual is being looked into since the earlier Manual was of considerable vintage. We are told that a meeting is likely to be held towards the end of this month to finalise the Model Prison Manual.

5. The learned ASG is unable to inform us about the composition of the Committee that is looking into

> the Model Prison Manual. We have suggested to him (and this suggestion has been accepted) that a multi-disciplinary body including members from civil society, NGOs concerned with undertrial prisoners as also experts from some other disciplines, including academia and whose assistance would be necessary, should also be associated in drafting the comprehensive Model Prison Manual.
>
> 6. To the extent possible, the Model Prison Manual should be finalised at the earliest and preferably within a month or two, but after having extensive and intensive consultations with a multi-disciplinary body as above.
>
> 7. In the Model Prison Manual, the Ministry of Home Affairs should also look into the possibility of having a crèche for the children of prisoners, particularly women prisoners as it exists in Tihar Jail.
>
> 8. We find that the number of undertrial prisoners in the State of Maharashtra is extremely large and we also think that there is not adequate number of legal aid lawyers to look into the grievances of undertrial prisoner. Mr Rajesh Kumar Goel, Director, Nalsa says on behalf of Nalsa that necessary steps will be taken to appoint adequate number of legal aid lawyers so that necessary steps can be taken with regard to the release of undertrial prisoners in accordance with law including those who have been granted bail but are unable to furnish the bail bond. List the matter on 18.9.2015."

36. When the matter was taken up by the Social Justice Bench on 18.9.2015 [*Inhuman Conditions in 1382 Prisons, In re*, WP (C) No. 406 of 2013, order dated 18-9-2015 (SC)] , Mr Gaurav Agrawal, Advocate was appointed as Amicus Curiae to assist the Social Justice Bench.

37. On that date, the learned Additional Solicitor General informed the Social Justice Bench that the Ministry of Home Affairs had duly written to the Directors General of all the States and Union Territories to ensure that the Secretary of the District Legal Services Committee is included as a member in the Undertrial Review Committee. The learned Additional

Solicitor General also informed that the Model Prison Manual was likely to be made available sometime in the middle of December 2015.

38. It was pointed out on behalf of Nalsa by Mr Rajesh Kumar Goel that some clarity was required with respect to para 4 of the order dated 24.4.2015 [*Inhuman Conditions in 1382 Prisons, In re*, WP (C) No. 406 of 2013, order dated 24-4-2015 (SC)] . In view of this request, it was clarified that there is no mandate that a person who has completed half the period of sentence, in the case of multiple offences, should be released. This was entirely for the Undertrial Review Committee to decide and there was no direction given for release in this regard.

39. With regard to the large number of undertrial prisoners in Maharashtra who were entitled to bail, it was submitted that out of 797 such undertrial prisoners nearly 503 had been released and that steps were being taken with regard to the remaining undertrial prisoners.

40. The order passed by the Social Justice Bench on 18-9-2015 [*Inhuman Conditions in 1382 Prisons, In re*, WP (C) No. 406 of 2013, order dated 18-9-2015 (SC)] reads as follows:

> "1. This petition pertains to what has been described as inhuman conditions in 1382 prisons across the country. On our request, Mr Gaurav Agrawal, Advocate has agreed to assist us in the matter as Amicus Curiae since the complaint was received by post. The Registry should give a copy each of all the documents in this matter to Mr Gaurav Agrawal.
>
> 2. The learned Additional Solicitor General has drawn our attention to the order dated 7-8-2015 [Inhuman Conditions in 1382 Prisons, In re, WP (C) No. 406 of 2013, order dated 7-8-2015 (SC)] and in compliance thereof he has stated that the Ministry of Home Affairs has written to the Directors General of all the States/Union Territories on 14-8-2015 to ensure that the Secretary of the District Legal Services Committee is included as a member in the Undertrial Review Committee. A similar letter was written by Nalsa on 11-8-2015. Nalsa should follow up on this and ensure

that it is effectively represented in the Undertrial Review Committee.

3. It is not yet clear whether the Undertrial Review Committee has been set up in every district. The learned Additional Solicitor General and Mr Rajesh Kumar Goel, Director, Nalsa will look into this and let us know the progress on the next date of hearing. As far as the software for Prison Management is concerned, it is stated by the learned Additional Solicitor General that all the Directors General of Police have been asked to intimate which of the four available software is acceptable to them. He further states that the software will be integrated on cloud so that all information can be made available regardless of which software is being utilised. He expects the needful to be done within a period of about two months.

4. We expect the Directors General of Police in every State/Union Territory to respond expeditiously to any request made by the Ministry of Home Affairs in this regard.

5. With regard to the Model Prison Manual of 2003, it is stated by the learned Additional Solicitor General that meetings have been held in this regard and it is expected that the Model Prison Manual will be made available by sometime in the middle of December 2015. He states that people from academia as well as NGOs are associated in the project. It is expected that the Prison Manual will also take care of establishing a crèche in respect of women prisoners who have children.

6. With regard to the release of undertrial prisoners, particularly in the States of Uttar Pradesh and Maharashtra, as mentioned in our order dated 24-4-2015 [Inhuman Conditions in 1382 Prisons, In re, WP (C) No. 406 of 2013, order dated 24-4-2015 (SC)] , the learned Additional

Solicitor General says that at the present moment he does not have any instructions in this regard, but the Ministry of Home Affairs will write to the State Governments/Union Territories to take urgent steps in terms of our orders.

7. Mr Rajesh Kumar Goel, Director, Nalsa says that legal aid lawyers have been instructed to take steps for the possible release of undertrial prisoners in accordance with law. Mr Rajesh Kumar Goel has also drawn our attention to para 4 of the order dated 24-4-2015 [Inhuman Conditions in 1382 Prisons, In re, WP (C) No. 406 of 2013, order dated 24-4-2015 (SC)] . We make it clear that there is no mandate that a person who has completed half the period of his sentence, in the case of multiple offences, should be released. This is entirely for the Undertrial Review Committee and the competent authority to decide and there is absolutely no direction given by this Court for release of such undertrials. Their case will have to be considered by the Undertrial Review Committee and the competent authority in accordance with law. Mr Rajesh Kumar Goel, Director, Nalsa says that steps are being taken to appoint an adequate number of panel lawyers.

8. With reference to the release of undertrial prisoners, he says that in the State of Maharashtra, as per the information available, 797 undertrial prisoners were entitled to bail and with the efforts of the State Legal Services Authority, nearly 503 have since been released. Steps are being taken with regard to the remaining undertrial prisoners.

9. Mr Rajesh Kumar Goel, Director, Nalsa says that the Member-Secretaries of the State Legal Services Authority will be advised to compile relevant information with regard to the cases of compoundable offences pending in the States so that they can also be disposed of at the earliest. We expect the States of Uttar Pradesh

> and Maharashtra to expeditiously respond to the letter written by Nalsa since the maximum number of cases pertaining to compoundable offences are pending in these States.
>
> 10. List the matter on 16-10-2015."

41. Pursuant to the aforesaid order, Nalsa filed another compliance report dated 14-10-2015 in which it was stated that an Undertrial Review Committee had been set up in every district. However, the annexure to the compliance report indicated that no information was available from the State of Jammu & Kashmir and in some States particularly Gujarat and Uttar Pradesh and the Union Territory of Andaman & Nicobar Islands, the Secretary of the District Legal Services Committee was not made a member of the Review Committee.

42. It was also stated that the State Legal Services Authority had been requested to appoint an adequate number of panel lawyers and to instruct them to take steps for the early release of undertrial prisoners.

43. When the matter was taken up on 16-10-2015 [*Inhuman Conditions in 1382 Prisons, In re*, WP (C) No. 406 of 2013, order dated 16-10-2015 (SC)] the Social Justice Bench expressed its distress that only three States had responded to the information sought by the Ministry of Home Affairs with regard to holding the quarterly meeting of the Undertrial Review Committee on or before 30-9-2015. The learned counsel appearing for the Union of India stated that the matter would be taken up with all the State Governments with due seriousness and it would be ensured that such meetings are held regularly. It was also stated that the latest status report would be filed in the second week of January, 2016.

44. The learned Amicus Curiae informed the Social Justice Bench that the Undertrial Review Committee had been set up in every district and a representative of the District Legal Services Committee was included in the said Committee.

45. The order dated 16-10-2015 [*Inhuman Conditions in 1382 Prisons, In re*, WP (C) No. 406 of 2013, order dated 16-10-2015 (SC)] reads as follows:

> "1. It is very disconcerting to hear from the learned counsel for the Union of India that there is no information available except from three States with regard to the release of undertrial

> prisoners. A meeting of the Undertrial Review Committee was supposed to be held on or before 30-9-2015, but only three States have responded to the information sought by the Ministry of Home Affairs, Government of India.
>
> 2. The learned counsel for the Union of India says that the matter will now be taken up very seriously with all the State Governments and the Union Territories and it will be ensured that the meetings are regularly held in terms of the advisories given by the Ministry of Home Affairs at least once in every three months.
>
> 3. The learned counsel for the Union of India also says that the latest status report will be filed in the second week of January, 2016.
>
> 4. In the meanwhile, the learned Amicus Curiae informs us that the Undertrial Review Committee has been set up in every district and a representative of the District Legal Services Authority has been included in all the Undertrial Review Committees and, therefore, to this extent the order dated 18-9-2015 [Inhuman Conditions in 1382 Prisons, In re, WP (C) No. 406 of 2013, order dated 18-9-2015 (SC)] has been complied with.
>
> 5. List the matter on 29-1-2016. We make it clear that the learned counsel for the Union of India should be fully briefed in all aspects of the case."

46. In compliance with the order passed on 16-10-2015 [*Inhuman Conditions in 1382 Prisons, In re*, WP (C) No. 406 of 2013, order dated 16-10-2015 (SC)] an affidavit dated 22-1-2016 was filed by the Ministry of Home Affairs in which it was stated that a detailed evaluation of the software for the e-Prisons Project had been completed and guidelines had also been circulated to all the States for their proposals and for exercising their option for selecting the appropriate software.

47. It was stated in the affidavit that a provision for funds had been made

for the application software from the Crime and Criminal Tracking Network & System (Cctns) Project and an amount of Rs 227.01 crores had been approved for the implementation of the e-Prisons Project. It was stated that the e-Prisons proposals had been received from seven States and other States/Union Territories had been asked to expedite their proposal for evaluation by the Ministry of Home Affairs.

48. With regard to the Model Prison Manual, it was stated that the revised Model Prison Manual had been approved by the competent authority and it was circulated to all the States and Union Territories. The revised manual also included a provision for a suitable crèche for the children of women inmates in the prison.

49. With regard to the quarterly meetings of the Undertrial Review Committee, the affidavit disclosed the dates on which such Committees had met but on a perusal of the chart annexed to the affidavit there is a clear indication that not every such Committee met on a quarterly basis. This is most unfortunate.

50. With regard to the undertrial prisoners who could be considered for release under the provisions of Section 436-A CrPC, some progress had been made except in the States of Assam, Bihar, Chhattisgarh, Goa, Karnataka, Meghalaya, West Bengal and the Union Territories of Dadra and Nagar Haveli and Lakshadweep. It was stated in the affidavit that notwithstanding the lack of detailed information it did appear that due to the institutionalisation of the exercise, the number of undertrial prisoners eligible for release under Section 436-A CrPC had been considerably reduced in some States.

51. In the hearing that took place on 29-1-2016 it was pointed out that considerable progress had been made inasmuch as the Model Prison Manual had been finalised and perhaps circulated to all the States and Union Territories; Undertrial Review Committees had been set up in every district but unfortunately many of such Committees were not meeting on a regular basis every quarter; the application software for prison management had more or less been identified but a final decision was required to be taken in this regard; steps were required to be taken for the release of undertrial prisoners particularly in the State of Uttar Pradesh and the State of Maharashtra and wherever necessary, the number of panel lawyers associated with the State Legal Services Authority/District Legal Services Committee were required to be increased to meet the requirement of early

release of undertrial prisoners and prisoners who remain in custody due to their poverty and inability to furnish bail bonds. In addition, it was pointed out that steps should be taken to ensure that wherever persons are in custody under offences that are compoundable, steps should be taken to compound the offences so that overcrowding in jails is reduced.

52. Has anything changed on the ground? The prison statistics available as on 31-12-2014 from the website of NCRB [<http://ncrb.nic.in>.] indicate that as far as overcrowding is concerned, there is no perceptible change and in fact the problem of overcrowding has perhaps been accentuated with the passage of time. The figures in this regard are as follows:

	Central Jails	***District Jails***
Capacity	1,52,312	1,35,439
Actual	1,84,386	1,79,695
%	121.1%	132.7%
Undertrials	95,519 (51.8%)	1,43,138 (79.7%)

The maximum overcrowding is in the jail in the Union Territory of Dadra & Nagar Haveli (331.7%) followed by Chhattisgarh (258.9%) and then Delhi (221.6%).

53. It is clear that in spite of several orders passed by this Court from time to time in various petitions, for one reason or another, the issue of overcrowding in jails continues to persist and apart from anything else, appears to have persuaded Justice R.C. Lahoti to address a letter of the Chief Justice of India on this specific issue of overcrowding in prisons.

54. We cannot forget that the International Covenant on Civil and Political Rights, to which India is a signatory, provides in Article 10 that: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Similarly, Article 5 of the Universal Declaration of Human Rights (UDHR) provides: "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment." With reference to UDHR and the necessity of treating prisoners with dignity and as human beings, Vivien Stern (now Baroness Stern) says in *A Sin Against the Future: Imprisonment in the World* as follows:

> "Detained people are included because human rights extend to all human beings. It is a basic tenet of international human rights law that

> nothing can put a human being beyond the reach of certain human rights protections. Some people may be less deserving than others. Some may lose many of their rights through having been imprisoned through proper and legal procedures. But the basic rights to life, health, fairness and justice, humane treatment, dignity and protection from ill treatment or torture remain. There is a minimum standard for the way a State treats people, whoever they are. No one should fall below it." [Vivien Stern, A Sin Against the Future: Imprisonment in the World, (Penguin Books, 1998) 192.]

55. In a similar vein, it has been said, with a view to transform prisons and prison culture:

> "Treating prisoners not as objects, but as the human beings they are, no matter how despicable their prior actions, will demonstrate an unflagging commitment to human dignity. It is that commitment to human dignity that will, in the end, be the essential underpinning of any endeavour to transform prison cultures." [Lynn S. Branham, "The Mess We're In: Five Steps Towards the Transformation of Prison Cultures" (2011) 44 Indiana Law Review 703.]

56. The sum and substance of the aforesaid discussion is that prisoners, like all human beings, deserve to be treated with dignity. To give effect to this, some positive directions need to be issued by this Court and these are as follows:

56.1. The Undertrial Review Committee in every district should meet every quarter and the first such meeting should take place on or before 31-3-2016. The Secretary of the District Legal Services Committee should attend each meeting of the Undertrial Review Committee and follow up the discussions with appropriate steps for the release of undertrial prisoners and convicts who have undergone their sentence or are entitled to release because of remission granted to them.

56.2. The Undertrial Review Committee should specifically look into

aspects pertaining to effective implementation of Section 436 CrPC and Section 436-A CrPC so that undertrial prisoners are released at the earliest and those who cannot furnish bail bonds due to their poverty are not subjected to incarceration only for that reason. The Undertrial Review Committee will also look into issue of implementation of the Probation of Offenders Act, 1958 particularly with regard to first-time offenders so that they have a chance of being restored and rehabilitated in society.

56.3. The Member-Secretary of the State Legal Services Authority of every State will ensure, in coordination with the Secretary of the District Legal Services Committee in every district, that an adequate number of competent lawyers are empanelled to assist undertrial prisoners and convicts, particularly the poor and indigent, and that legal aid for the poor does not become poor legal aid.

56.4. The Secretary of the District Legal Services Committee will also look into the issue of the release of undertrial prisoners in compoundable offences, the effort being to effectively explore the possibility of compounding offences rather than requiring a trial to take place.

56.5. The Director General of Police/Inspector General of Police in charge of prisons should ensure that there is proper and effective utilisation of available funds so that the living conditions of the prisoners is commensurate with human dignity. This also includes the issue of their health, hygiene, food, clothing, rehabilitation, etc.

56.6. The Ministry of Home Affairs will ensure that the Management Information System is in place at the earliest in all the Central and District Jails as well as jails for women so that there is better and effective management of the prison and prisoners.

56.7. The Ministry of Home Affairs will conduct an annual review of the implementation of the Model Prison Manual, 2016 for which considerable efforts have been made not only by senior officers of the Ministry of Home Affairs but also persons from civil society. The Model Prison Manual, 2016 should not be reduced to yet another document that might be reviewed only decades later,

if at all. The annual review will also take into consideration the need, if any, of making changes therein.

56.8. The Undertrial Review Committee will also look into the issues raised in the Model Prison Manual, 2016 including regular jail visits as suggested in the said Manual.

56.9. We direct accordingly.

57. A word about the Model Prison Manual is necessary. It is a detailed document consisting of as many as 32 chapters that deal with a variety of issues including custodial management, medical care, education of prisoners, vocational training and skill development programmes, legal aid, welfare of prisoners, after-care and rehabilitation, Board of Visitors, prison computerisation and so on and so forth. It is a composite document that needs to be implemented with due seriousness and dispatch.

58. Taking a cue from the efforts of the Ministry of Home Affairs in preparing the Model Prison Manual, it appears advisable and necessary to ensure that a similar manual is prepared in respect of juveniles who are in custody either in observation homes or special homes or places of safety in terms of the Juvenile Justice (Care and Protection of Children) Act, 2015.

59. Accordingly, we issue notice to the Secretary, Ministry of Women and Child Development, Government of India, returnable on 14-3-2016. The purpose of issuance of notice to the said Ministry is to require a manual to be prepared by the said Ministry that will take into consideration the living conditions and other issues pertaining to juveniles who are in observation homes or special homes or places of safety in terms of the Juvenile Justice (Care and Protection of Children) Act, 2015."

CHAPTER 6

SPECIAL LEGISLATIONS

Special Legislations–Anti Terror

In light of terror attacks on India, Parliament has enacted various anti-terror law. Some of them, such as the Terrorist and Disruptive Activities (Prevention) Act and the Prevention of Terrorism Act, focused directly on terrorism. More recently, legislations have attempted to deal not only with terrorist acts, but also with crime prevention in perceived emergency/ conflict situations. The main feature of these legislations has been to curtail rights available under the Criminal Procedure Code, such as extending the period of pre-trial detention, making granting of bail more difficult, making confessions to police officers admissible. In earlier chapters (both in this volume and Volume 1), we have discussed cases involving special legislations, where relevant. In this chapter, we discuss and extract cases which were not covered in earlier chapters.

The Terrorist and Disruptive Activities (Prevention) Act (TADA)

In **Hitendra Vishnu Thakur v. State of Maharashtra,**[1] one of the primary issues to be adjudicated upon by the Supreme Court was under what circumstances Section 3 of the TADA could be invoked. The Court noted that acts defined and punished as "terrorist acts" could be prosecuted and punished under the Indian Penal Code and other criminal statutes as well. However, TADA provided for enhanced punishments if the act was done with the motive of leading to terror and fear in the minds of people. If such motive was proved by the prosecution, TADA could be invoked.

The Prevention of Terrorism Act (POTA)

The Supreme Court in **Adambhai Suleman Ajmeri v. State of Gujarat,**[2] dealt with the issue of confessions to a police officer. In *Adambhai,* the prosecution had relied on the evidence of accomplices to corroborate the confessions of the accused. The Court held that this could not be done, in the absence of independent evidence. The Court also examined the powers of the Supreme Court in overturning concurrent findings of fact by

1 (1994) 4 SCC 602
2 (2014) 7 SCC 716

the trial court and the High Court. Noting the perversity of the judgments of both the lower courts, the Supreme Court overturned the conviction and death sentence imposed on the accused.

The Maharashtra Control of Organised Crime Act (MCOCA)

The Supreme Court in **Mahipal Singh v. Central Bureau of Investigation**,[3] ruled that the ingredients constituting an offence under Section 3 of MCOCA had to be satisfied on the date on which the offence was said to have been committed, although procedural requirements for prosecution may be satisfied later.A Full Bench of the Bombay High Court in **State of Maharashtra v. Jagan Gagansingh Nepali @ Jagya & Anr.,**[4] held that the term "other advantage" in the definition of "continuing unlawful activity" under section 2(e) of MCOCA must not be read as ejusdem generis with the words "pecuniary benefits" and "undue economic." It held that the term should be given a wider import, failing which the object of the statute would be frustrated.

In **State of Maharashtra v. Bharat Shanti Lal Shah,**[5] one of the issues before the Supreme Court was the constitutional validity of Section 21(5) of MCOCA, which dealt with bail. Section 21(5) barred the Court from granting bail to the accused if he/she had been out on bail for an offence under MCOCA or any other law, on the date of commission of the offence. The Court struck down the words "any other law" stating that denying a person bail for committing an offence punishable under MCOCA, when on bail for an offence under some other Act is not in consonance with the object of the Act, and also suffers from the vice of unreasonable classification.In **Jamiruddin Ansari v. Central Bureau of Investigation & Anr**.,[6] the Supreme Court held that sections 9 and 23 of the MCOCA are not independent of each other, and that even in a private complaint, cognizance cannot be taken by a Special Judge without due compliance with section 23(1) of the MCOCA. Ruling on confessions to a police officer, the Supreme Court in **State of Maharashtra v. Kamal Ahmed Mohammed Vakil Ansari,**[7] held that Section 18 of MCOCA (which permits confessional statements to police to be admissible), is an exception to

3 (2014) 11 SCC 282
4 2011 SCC OnLine Bom 1049
5 (2008) 13 SCC 5
6 (2009) 6 SCC 316
7 (2013) 12 SCC 17

Sections 25 and 26 of the Indian Evidence Act, only in relation to the trial of the accused or a co-accused, abettor or conspirator who had made the confession, but does not extend to other trials where the person who made the confession is not an accused.

The Unlawful Activities Prevention Act

Section 3(5) of the TADA Act and Section 10 of the Unlawful Activities Prevention Act, 1967 made membership of a banned organization a criminal act. The Supreme Court dealt with the constitutionality of Section 3(5) of TADA in **Arup Bhuyan v. State of Assam,**[8] where it held that the section was unconstitutional. The Court's reasoning was that mere membership of a banned organization cannot be a criminal act, unless the person commits a violent act, or incites violence. In a connected petition, **Indra Das v. State of Assam,**[9] the attention of the Court was drawn to Section 10 of the UAPA, 1967. The Court struck Section 10 down as well, citing the same reasons.

In **State of Maharashtra v. Firoz @ Hamaja Abdul Hamid Sayyed,**[10] there was a challenge to the concurrent applicability of MCOCA and UAPA before the Bombay High Court. The Court held that an individual could be held liable for punishment under the provisions of the MCOCA, regardless of the fact that he was also being tried for the offence punishable under the provisions of the UAPA.

In **Ashruff v. State of Kerala,**[11] the Kerala High Court held that the proviso to section 43(D)(2)(b) which permitted the court to extend the detention of the accused beyond the period of ninety days based on the report of the Public Prosecutor did not grant the magistrate the jurisdiction to do so, and the same power could be exercised only by the Sessions Court.

8 (2011) 3 SCC 377
9 2011 3 SCC 380
10 2015 SCC OnLine Bom 3132
11 2010 SCC OnLine Ker 4917

THE TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT

IN THE SUPREME COURT OF INDIA

Hitendra Vishnu Thakur and Others v. State of Maharashtra and Ors

(1994) 4 SCC 602

Dr. A.S. Anand and Faizanuddin, JJ.

In these Special Leave Petitions and criminal appeals, one of the questions for consideration was when can the provisions of Section 3(1) of the TADA (Prevention) Act, 1987 be attracted.

Dr. A.S. Anand, J.: "2. When can the provisions of Section 3(1) of TADA be attracted?

Learned counsel for the appellants submitted that even though the constitutional validity of Section 3 of TADA has been upheld by a Constitution Bench of this Court in *Kartar Singh* v. *State of Punjab* [(1994) 3 SCC 569 : 1994 SCC (Cri) 899 : JT (1994) 2 SC 423 : 1994 (1) Apex Decisions SC (Cri) 413], nonetheless keeping in view the stringent nature of the provisions of TADA the offence constituted by Section 3 of TADA must be the one which qualifies stricto sensu as a 'terrorist act' and unless the crime alleged against an accused can be classified as a 'terrorist act' in letter and in spirit, Section 3(1) of TADA has no application and an accused shall have to be tried under the ordinary penal law and in such a fact situation, it is a statutory obligation cast on the Designated Court to transfer the case from that court for its trial by the regular courts under the ordinary criminal law in view of the provisions of Section 18 of TADA. It is submitted that the Designated Court should not, without proper application of mind, charge-sheet or convict an accused under Section 3 of TADA simply because the investigating officer decides to include that section while filing the challan and that it is not open to the State to apply TADA to the ordinary problems arising out of disturbance of law and order or even to situations arising out of the disturbance of public order — a more serious type of crime alone would justify trial under TADA.

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.

8. The Constitution Bench noticed that the offences arising out of a terrorist or disruptive activity may overlap the offences covered by the ordinary penal law and dealing with the situation under which the provisions of TADA would be attracted, observed : (SCC p. 653, para 145)

> "As we have indicated above, 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 that 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 of 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." (emphasis supplied)

9. In *Usmanbhai Dawoodbhai Memon* v. *State of Gujarat* [(1988) 2 SCC 271 : 1988 SCC (Cri) 318] , this Court observed : (SCC p. 285, para 17)

> "The legislature by enacting the law has treated terrorism as a special criminal problem and created a special court called a Designated Court to deal

> with the special problem and provided for a special procedure for the trial of such offences. … The Act is a special Act and creates a new class of offences called terrorist acts and disruptive activities as defined in Sections 3(1) and 4(2) and provides for a special procedure for the trial of such offences."

10. Again, in *Niranjan Singh Karam Singh Punjabi, Advocate* v. *Jitendra Bhimraj Bijjaya* [(1990) 4 SCC 76 : 1991 SCC (Cri) 47] , after noticing with approval the opinion of this Court in *Usmanbhai case* [(1988) 2 SCC 271 : 1988 SCC (Cri) 318] it was observed : (SCC p. 86, para 8)

> "… the provisions of the Act need not be resorted to if the nature of the activities of the accused can be checked and controlled under the ordinary law of the land. It is only in those cases where the law-enforcing machinery finds the ordinary law to be inadequate or not sufficiently effective for tackling the menace of terrorist and disruptive activities that resort should be had to the drastic provisions of the Act. While invoking a criminal statute, such as the Act, the prosecution is duty-bound to show from the record of the case and the documents collected in the course of investigation that facts emerging therefrom prima facie constitute an offence within the letter of the law. When a statute provides special or enhanced punishments as compared to the punishments prescribed for similar offences under the ordinary penal laws of the country, a higher responsibility and duty is cast on the Judge to make sure there exists prima facie evidence for supporting the charge levelled by the prosecution. 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."

The Court then considered the facts in *Niranjan Singh case* [(1990) 4 SCC 76 : 1991 SCC (Cri) 47] and referred to the statement of the witnesses which had been relied upon by the prosecution to attract the provisions of Section 3(1) of the Act. The Court found that the intention of the accused persons in that case was merely to eliminate Raju and Keshav for gaining supremacy in the underworld. The Bench noticed that a statement had been made by the investigating agency to the effect that the activities of

the accused were aimed at creating terror and fear in the minds of the people in general and observed : (SCC p. 88, para 10)

> "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. That may indeed be the fall out of the violent act but that cannot be said to be the intention of the perpetrators of the crime. It is clear from the statement extracted earlier that the intention of the accused persons was to eliminate the rivals and gain supremacy in the underworld so that they may be known as the bullies of the locality and would be dreaded as such. But it cannot be said that their intention was to strike terror in the people or a section of the people and thereby commit a terrorist act. It is clear that there was rivalry between the party of the accused on the one hand and Raju and Keshav on the other. The former desired to gain supremacy which necessitated the elimination of the latter. With that in view they launched an attack on Raju and Keshav, killed the former and injured the latter. Their intention was clearly to eliminate them and not to strike terror in the people or a section of the people. It would have been a different matter if to strike terror some innocent persons were killed. In that case the intention would be to strike terror and the killings would be to achieve that objective. In the instant case the intention was to liquidate Raju and Keshav and thereby achieve the objective of gaining supremacy in the underworld. 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."

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* [(1994) 3 SCC 569 : 1994 SCC (Cri) 899 : JT (1994) 2 SC 423 : 1994 (1) Apex Decisions SC (Cri) 413] and from the law laid down by this Court in *Usmanbhai* [(1988) 2 SCC 271 : 1988 SCC (Cri) 318] and *Niranjan* [(1990) 4 SCC 76 : 1991 SCC (Cri) 47] 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* [(1994) 3 SCC 569 : 1994 SCC (Cri) 899 : JT (1994) 2 SC 423 : 1994 (1) Apex Decisions SC (Cri) 413] 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."

…

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* [(1994) 3 SCC 569 : 1994 SCC (Cri) 899: JT (1994) 2 SC 423 : 1994 (1) Apex Decisions SC (Cri) 413] 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."

THE PREVENTION OF TERRORISM ACT (POTA)

IN THE SUPREME COURT OF INDIA

Adambhai Sulemanbhai Ajmeri v. State of Gujarat

(2014) 7 SCC 716

A.K. Patnaik, V. Gopala Gowda, JJ.

This case concerned the Akshardham Temple attack in Gujarat. The Court laid down safeguards regarding grant of sanction under POTA. It was held that since a valid sanction requires application of the mind, it is important that all relevant documents required for granting sanction are presented before the sanctioning authority. Without a valid sanction the court cannot be approached to take cognizance of the offence. The court also examined the other mandatory provisions under the Act, like provisions to be followed while recording confessional statements. The court emphasized that the procedural safeguards under POTA are not a mechanical formality.

V. Gopala Gowda, J.: "130. It is pertinent to note here that while POTA makes a departure from CrPC in that it makes confessional statements made before a police officer admissible, the procedural safeguards therein are not a mechanical formality. On the other hand, it should be able to inspire confidence to show that the procedure has been scrupulously followed while recording confessional statements particularly because of the grave consequences which follow such statements, which might result in deprivation of life and personal liberty of the person, which is a fundamental right guaranteed by the Constitution that can be taken away only by following the procedure established by law. Therefore, it is incumbent upon the CJM to strictly and scrupulously follow all the statutory procedural safeguards provided for under Section 32 of POTA.

…

151. In the present case, the prosecution did not make any effort to substantiate the evidence of the accomplices with independent material evidence. Rather, the confessional statements of the accomplices have been used to corroborate the confessional statements of the accused persons, in the absence of any independent evidence.

152. But, apart from all these aspects on the statements of the accomplices, we fear that the story against the accused persons and its corroboration through the statements of accomplices is an act of concoction to make up a case against them. It was recorded in the statement of PW 126 that the information regarding PW 50 was given to him by D.G. Vanzara. However, D.G. Vanzara had not even been examined in this case and there is no information as to how he came to know about PW 50 after almost a year of the attack on Akshardham. This very important aspect of the lapse in investigation had been ignored by the courts below. The learned Senior Counsel for the accused persons have contended that there has been a delay of around a year from the time of the attack on Akshardham in recording the statements of the accomplices which shrouds the case of the prosecution. We have to accept the contention of the learned Senior Counsel for the accused persons in this regard as there is an inordinate delay in recording of the statements of the accomplices and this casts a grave suspicion on the reliability of the testimony of the accomplices.

…

157. The statement made by PW 51 during the cross-examination along with the legal principle laid down by this Court leads us to the conclusion that there was a serious attempt on the part of the investigating agency to fabricate a case against the accused persons and frame them with the help of the statements of the accomplices, since they had not been able to solve the case even after almost a year of the incidence.

158. Therefore, we hold that the evidence of the accomplices cannot be used to corroborate the confessional statements of the accused persons in the absence of independent evidence and the delay of more than one year in recording their statements causes us to disregard their evidence…

…

196. The story of the prosecution crumbles down at every juncture. Most importantly, the case laws relied upon above show that the statements of confession of the accused persons cannot be relied upon if they are retracted, unless corroborated by independent evidence. In this case, as already elucidated, the case of the prosecution rests on the confessional statements of the accused persons, the confessional statements of the accomplices and their evidence and the two Urdu letters purportedly found in the pockets of the trousers of the fidayeens and written by A-4, and apart from this, it is very clear that there is absolutely no independent evidence to implicate the accused persons for the crime. The evidence

of the accomplices, PW 50, PW 51 and PW 52 are also rejected for the reasons given in the answer to Point (*iii*). Therefore, there is no independent evidence on record which corroborates the confessions of the accused persons which were subsequently retracted.

…

210. Article 136 of the Constitution confers appellate jurisdiction on this Court, the scope and powers of which have been discussed by this Court in a catena of decisions. In *Arunachalam* v. *P.S.R. Sadhanantham* [(1979) 2 SCC 297 : 1979 SCC (Cri) 454] , Chinnappa Reddy, J. observed: (SCC p. 300, para 4)

> "4. … Article 136 of the Constitution of India invests the Supreme Court with a plenitude of plenary, appellate power over all courts and Tribunals in India. The power is plenary in the sense that there are no words in Article 136 itself qualifying that power. But, the very nature of the power has led the Court to set limits to itself within which to exercise such power. It is now the well-established practice of this Court to permit the invocation of the power under Article 136 only in very exceptional circumstances, as when a question of law of general public importance arises or a decision shocks the conscience of the Court. But, within the restrictions imposed by itself, this Court has the undoubted power to interfere even with findings of fact, making no distinction between judgments of acquittal and conviction, if the High Court, in arriving at those findings, has acted 'perversely or otherwise improperly'."

211. While examining as to whether this Court has the power to interfere with the concurrent findings of fact recorded by the courts below, it was held in *Indira Kaur* v. *Sheo Lal Kapoor* [(1988) 2 SCC 488] as under: (SCC p. 498, para 7)

> "7. … Article 136 of the Constitution of India does not forge any such fetters expressly. It does not oblige this Court to fold its hands and become a helpless

> spectator even when this Court perceives that a manifest injustice has been occasioned. If and when the court is satisfied that great injustice has been done it is not only the 'right' but also the 'duty' of this Court to reverse the error and the injustice and to upset the finding notwithstanding the fact that it has been affirmed thrice … It is not the number of times that a finding has been reiterated that matters. What really matters is whether the finding is manifestly an unreasonable, and unjust one in the context of evidence on record. It is no doubt true that this Court will unlock the door opening into the area of facts only sparingly and only when injustice is perceived to have been perpetuated. But in any view of the matter there is no jurisdictional lock which cannot be opened in the face of grave injustice."
>
> (emphasis supplied)

212. Further, this Court has explained the circumstances in which it can interfere with the findings of the fact recorded by the courts below. In *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat* [(1983) 3 SCC 217 : 1983 SCC (Cri) 728] , it was held by this Court that: (SCC p. 222, para 5)

> "5. … Such a concurrent finding of fact cannot be reopened in an appeal by special leave unless it is established: (1) that the finding is based on no evidence; or (2) that the finding is perverse, it being such as no reasonable person could have arrived at even if the evidence was taken at its face value; or (3) the finding is based and built on inadmissible evidence, which evidence, if excluded from vision, would negate the prosecution case or substantially discredit or impair it; or (4) some vital piece of evidence which would tilt the balance in favour of the convict has been overlooked, disregarded or wrongly discarded."

213. More recently, in *Ganga Kumar Srivastava* v. *State of Bihar* [(2005) 6 SCC 211 : 2005 SCC (Cri) 1424] it was stated while discussing previous cases on the subject that, the following principles could guide the courts in determining the scope of the criminal appellate jurisdiction exercised by

the Supreme Court, especially on the issue of reversing findings of fact by the lower courts: (SCC p. 217, para 10)

> "(i) The powers of this Court under Article 136 of the Constitution are very wide but in criminal appeals this Court does not interfere with the concurrent findings of the fact save in exceptional circumstances.
>
> (ii) It is open to this Court to interfere with the findings of fact given by the High Court if the High Court has acted perversely or otherwise improperly.
>
> (iii) It is open to this Court to invoke the power under Article 136 only in very exceptional circumstances as and when a question of law of general public importance arises or a decision shocks the conscience of the Court.
>
> (iv) When the evidence adduced by the prosecution fell short of the test of reliability and acceptability and as such it is highly unsafe to act upon it.
>
> (v) Where the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record."
>
> (emphasis in original)

214. From the aforementioned two cases, the legal principles laid down regarding the scope and ambit of exercise of this Court's power, it is clear that even though the powers under Article 136 must be exercised sparingly, yet, there is absolutely nothing in the article which prohibits this Court from reversing the concurrent findings of fact by the courts below, if it is of the opinion on the basis of the evidence on record, that affirming the findings of the courts below will result in a grave miscarriage of justice. Moreover, it has been held by this Court in *Mohd. Ajmal Amir Kasab* v. *State of Maharashtra* [(2012) 9 SCC 1 : (2012) 3 SCC (Cri) 481] that if the case is

of death sentence, this Court can exercise its power to examine material on record first hand and come to its own conclusion on facts and law, unbound by the findings of the trial court and the High Court.

215. Here, we intend to take note of the perversity in conducting this case at various stages, right from the investigation level to the granting of sanction by the State Government to prosecute the accused persons under POTA, the conviction and awarding of sentence to the accused persons by the Special Court (POTA) and confirmation of the same by the High Court. We, being the Apex Court cannot afford to sit with folded hands when such gross violation of fundamental rights and basic human rights of the citizens of this country were presented before us. The investigation process post Akshardham attack happened as under:

(*i*) The incidence of Akshardham happened in the intervening nights between 24-9-2002 and 25-9-2002. An FIR was registered by PW 126 on 25-9-2002.

(*ii*) According to the instruction of Superintendent of Police, the investigation of the complaint was handed over to Police Inspector Shri V.R. Tolia (PW 113).

(*iii*) The investigation was then handed over to the Anti-Terrorism Squad on 3-10-2002.

(*iv*) The investigation was thereafter handed over to the Crime Branch which was assigned to PW 126 on 28-8-2003 at 6.30 p.m.

(*v*) The statement of PW 50 was taken at 8 p.m. on the same night of 28-8-2003, after receiving verbal instruction from higher officer D.G. Vanzara in the morning.

(*vi*) A-1 to A-5 were arrested on 29-8-2003.

(*vii*) POTA was invoked on 30-8-2003.

(*viii*) IGP, Kashmir sends a fax message to IGP (Operations), ATS Gujarat State on 31-8-2003 regarding A-6 being in the custody of Kashmir Police and that he has stated that he was involved in the Akshardham attack.

(*ix*) A-6 was brought to Ahmedabad on 12-9-2003 and was arrested at 9.30 p.m.

(*x*) A-1 and A-3 confessed on 17-9-2003.

(*xi*) A-2 and A-4 confessed on 24-9-2003.

(*xii*) A-6 confessed on 5-10-2003.

(*xiii*) A-6 was brought to Ahmedabad on 12-9-2003 and was arrested at 9.30 p.m.

216. A careful observation of the abovesaid dates would show that the ATS was shooting in the dark for about a year without any result. No trace of the people associated with this heinous attack on Akshardham Temple could be found by the police. Then on the morning of 28-3-2003, the case is transferred to Crime Branch, Ahmedabad. This was followed by D.G. Vanzara giving instructions to the then ACP G.S. Singhal (PW 126) about one Ashfaq Bhavnagri (PW 50). PW 126 was thereafter made incharge of the case on the same evening at 6.30 p.m. and the statement of PW 50 was recorded at 8 p.m. i.e. within one-and-a-half hours. This shrouds our minds with suspicion as to why such a vital witness D.G. Vanzara, who discovered the link to the accused persons, was not examined by the Special Court (POTA). The courts below accepted the facts and evidence produced by the police without being suspicious about the extreme coincidences with which the chain of events unfolded itself immediately, that is, within 24 hours of the case being transferred to the Crime Branch, Ahmedabad.

217. We are reminded of the legendary lines of Vivian Bose, J. in *Kashmira Singh case* [AIR 1952 SC 159 : 1952 Cri LJ 839 : 1952 SCR 526] wherein he cautioned that: (AIR p. 160, para 2)

> "2. The murder was a particularly cruel and revolting one and for that reason it will be necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law." (emphasis supplied)

The courts below have not examined the evidence with "more than ordinary care".

…

218. Another error of the courts below is reflected in the fact that they have not given the same weightage to the defence witnesses as they have to the prosecution witnesses.

…

223. Therefore, according to us, this is a fit case for interference by this Court under Article 136 of the Constitution, as we are of the firm view that the concurrent findings of fact of the Special Court (POTA) and the High Court are not only erroneous in fact but also suffers from error in law.

224. On the basis of the issues we have already answered above based on the facts and evidence on record and on the basis of the legal principles laid down by this Court, we are convinced that the accused persons are innocent with respect to the charges levelled against them. We are of the view that the judgment and order of the Special Court (POTA) in POTA Case No. 16 of 2003 dated 1-7-2006 and the impugned judgment and order dated 1-6-2010 of the High Court of Gujarat at Ahmedabad in *State of Gujarat* v. *Adambhai Sulemanbhai Ajmeri* [*State of Gujarat* v. *Adambhai Sulemanbhai Ajmeri*, Criminal Confirmation Case No. 2 of 2006, decided on 1-6-2010 (Guj)] are liable to be set aside. Consequently, the sentences of death awarded to A-2, A-4 and A-6, life imprisonment awarded to A-3, 10 years of rigorous imprisonment awarded to A-5 are set aside. Since we are acquitting all the accused in appeal before us for the reasons mentioned in this judgment and also, since A-1 was convicted and sentenced on the basis of the same evidence which we have already rejected, we also acquit A-1 who is not in appeal before us, of the conviction and sentence of 5 years' rigorous imprisonment awarded to him by the courts below, exercising the power of this Court under Article 142 of the Constitution and hold him not guilty of the charges framed against him. We are aware that he has already served his sentence. However, we intend to absolve him of the stigma he is carrying of that of a convict, wrongly held guilty of offences of terror so that he is able to return to his family and society, free from any suspicion.

225. Before parting with the judgment, we intend to express our anguish about the incompetence with which the investigating agencies conducted the investigation of the case of such a grievous nature, involving the integrity and security of the nation. Instead of booking the real culprits responsible for taking so many precious lives, the police caught innocent people and got imposed the grievous charges against them which resulted in their conviction and subsequent sentencing."

THE MAHARASHTRA CONTROL OF ORGANISED CRIME ACT (MCOCA)

IN THE SUPREME COURT OF INDIA

State of Maharashtra v. Bharat Shanti Lal Shah

(2008) 13 SCC 5

K.G. Balakrishnan, C.J., R.V. Raveendran & Dr. M.K. Sharma , JJ.

The Supreme Court dealt with a challenge to the constitutional validity of MCOCA on the ground that the provisions with regard to bail are violative of articles 14 and 21 of the Constitution of India. The court struck down the parts of the provisions insofar as they denied a person the right to seek bail if he was being arrested for MCOCA while he was out on bail (after being arrested for violation of a law unconnected with MCOCA).

Dr. M.K. Sharma, J.:"62. …[W]e now proceed to decide the issue as to whether a person accused of an offence under Mcoca should be denied bail if on the date of the offence he is on bail for an offence under Mcoca or any other Act. Section 21(5) of Mcoca reads as under:

21. (5) Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the court that he was on bail in an offence under this Act, or under any other Act, on the date of the offence in question.

63.…[T]he object of MCOCA is to prevent the organised crime and, therefore, there could be reason to deny consideration of grant of bail if one has committed a similar offence once again after being released on bail but the same consideration cannot be extended to a person who commits an offence under some other Act, for commission of an offence under some other Act would not be in any case in consonance with the object of the Act which is enacted in order to prevent only organised crime.

64. We consider that a person who is on bail after being arrested for violation of law unconnected with MCOCA, should not be denied his right

to seek bail if he is arrested under MCOCA, for it cannot be said that he is a habitual offender. The provision of denying his right to seek bail, if he was arrested earlier and was on bail for commission of an offence under any other Act, suffers from the vice of unreasonable classification by placing in the same class, offences which may have nothing in common with those under Mcoca, for the purpose of denying consideration of bail. The aforesaid expression and restriction on the right of seeking bail is not even in consonance with the object sought to be achieved by the Act and, therefore, on the face of the provisions this is an excessive restriction.

65. The High Court found that the expression "or under any other Act" appearing in the section is arbitrary and discriminatory and accordingly struck down the said words from sub-section (5) of Section 21 as being violative of Articles 14 and 21 of the Constitution. We uphold the order of the High Court to the extent that the words "or under any other Act" should be struck down from sub-section (5) of Section 21.

IN THE SUPREME COURT OF INDIA

Jamiruddin Ansari v. Central Bureau of Investigation & Anr.

(2009) 6 SCC 316

Altamas Kabir & Cyriac Joseph, JJ.

The question before the Supreme Court was whether Sections 9 and 23 of the MCOCA are independent of each other. The Supreme Court answered in the negative and held that even in a private complaint about the commission of an offence of organized crime under the MCOCA, cognizance cannot be taken by a Special Judge without due compliance with section 23(1) of the MCOCA, which starts with a non-obstante clause.

Altamas Kabir, J.: "…63. We have carefully considered the submissions made on behalf of the respective parties and we are convinced that Section 9 of MCOCA cannot be read or invoked independent of Section 23. In our view, Section 9(1) contemplates filing of complaints both by the investigating authorities and also by private parties and the learned Special Judge is, therefore, entitled to take cognizance of offences under MCOCA even on a private complaint, but after due compliance with Section 23(2) thereof. In view of the stringent provisions of MCOCA, the legislature included certain safeguards for invoking the provisions thereof. The same is manifest from the provisions of Section 23 as a whole.

64. In order to understand and appreciate the provisions of Sections 9 and 23 and the interplay between them, sub-sections (1) and (4) of Section 9, which are relevant to the submissions made in these appeals, are reproduced hereinbelow:

> "9. Procedure and powers of Special Court.—(1) A Special Court may take cognizance of any offence without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence or upon a police report of such facts.
>
> (2)-(3)***

> (4) Subject to other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of the Court of Session and shall try such offence as if it were the Court of Session, so far as may be, in accordance with the procedure prescribed in the Code for the trial before the Court of Session."

The expression used in Section 9(1) indicates that the Special Court may take cognizance of any offence without the accused being committed to it for trial, either on receiving a complaint of facts or upon a police report of such facts, which clearly indicates that the Special Court is also empowered to take cognizance of an offence under MCOCA even on a private complaint. The said power vested in the learned Special Judge is, however, controlled by the provisions of Section 23(2) of the Act, which provides that no Special Court shall take cognizance of any offence under the Act without the previous sanction of a police officer not below the rank of Additional Director General of Police.

65. For the sake of reference, the provisions of Section 23 are extracted hereinbelow:

> "23. Cognizance of, and investigation into, an offence.—(1) Notwithstanding anything contained in the Code,—
>
> (a) no information about the commission of an offence of organised crime under this Act, shall be recorded by a police officer without the prior approval of the police officer not below the rank of the Deputy Inspector General of Police;
>
> (b) no investigation of an offence under the provisions of this Act shall be carried out by a police officer below the rank of the Deputy Superintendent of Police.
>
> (2) No Special Court shall take cognizance of any offence under this Act without the previous sanction of the police officer not below the rank of Additional Director General of Police."

The wording of sub-section (2) of Section 23 leaves no room for doubt that the learned Special Judge cannot take cognizance of any offence under MCOCA unless sanction has been previously given by the police

officer mentioned hereinabove. In such a situation, even as far as a private complaint is concerned, sanction has to be obtained from the police officer not below the rank of Additional Director General of Police, before the Special Judge can take cognizance of such complaint.

66. Accordingly, the provisions of Section 9(1) will have to be read in harmony with the provisions of Section 23(2) as far as private complaints are concerned, and we have no hesitation in negating the majority view of the Full Bench holding otherwise.

67. We are also inclined to hold that in view of the provisions of Section 25 of MCOCA, the provisions of the said Act would have an overriding effect over the provisions of the Criminal Procedure Code and the learned Special Judge would not, therefore, be entitled to invoke the provisions of Section 156(3) CrPC for ordering a special inquiry on a private complaint and taking cognizance thereupon, without traversing the route indicated in Section 23 of MCOCA. In other words, even on a private complaint about the commission of an offence of organised crime under Mcoca cognizance cannot be taken by the Special Judge without due compliance with sub-section (1) of Section 23, which starts with a non obstante clause.

68. As indicated hereinabove, the provisions of Section 23 are the safeguards provided against the invocation of the provisions of the Act which are extremely stringent and far removed from the provisions of the general criminal law. If, as submitted on behalf of some of the respondents, it is accepted that a private complaint under Section 9(1) is not subject to the rigours of Section 23, then the very purpose of introducing such safeguards lose their very raison d'être. At the same time, since the filing of a private complaint is also contemplated under Section 9(1) of MCOCA, for it to be entertained it has also to be subject to the rigours of Section 23. Accordingly, in view of the bar imposed under sub-section (2) of Section 23 of the Act, the learned Special Judge is precluded from taking cognizance on a private complaint upon a separate inquiry under Section 156(3) CrPC. The bar of Section 23(2) continues to remain in respect of complaints, either of a private nature or on a police report.

69. In order to give a harmonious construction to the provisions of Section 9(1) and Section 23 of MCOCA, upon receipt of such private complaint the learned Special Judge has to forward the same to the officer indicated in clause (*a*) of sub-section (1) of Section 23 to have an inquiry conducted into the complaint by a police officer indicated in clause (*b*) of sub-section (1) and only thereafter take cognizance of the offence complained of, if sanction is accorded to the Special Court to take cognizance of such offence under sub-section (2) of Section 23."

IN THE HIGH COURT OF BOMBAY

State of Maharashtra v. Jagan Gagansingh Nepali @ Jagya & Anr.

2011 SCC OnLine Bom 1049

Mohit Shah, C.J, B.R.Gavai & Roshan Dalvi, JJ.

A Division Bench of the Bombay High Court had disagreed with the ruling of two other Division Benches which had held that the term "other advantage" used in Section 2(1)(e) of MCOCA has to be read ejusdem generis with the words "for pecuniary benefits and undue economic." A Full Bench of the High Court was constituted to resolve the difference in opinion between the Division Benches.

B.R.Gavai, J.:"…2. The question, therefore, that we are called upon to answer is "as to whether the term "other advantage" has to be read as *ejusdem generis* with the words "gaining pecuniary benefits, or gaining undue economic advantage" or whether the said term "other advantage" is required to be given a wider meaning".

…

10. For appreciating the controversy, it would be necessary to refer to certain provisions of MCOCA, namely, section 2(d), 2(e), 2(f), section 3 and section 23 which read as under:

> "2. Definitions
>
> (1) In this Act, unless the context otherwise requires,-(a) - (c) ….. …..
>
> (d) "continuing unlawful activity" means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within

> the preceding period of ten years and that Court have taken cognizance of such offence;
>
> (e) "organised crime" means any continuing unlawful activity by an individual, singly or jointly, either as member of an organized crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency;
>
> (f) "organised crime syndicate" means a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime."

11. From the perusal of section 2(e), it can be seen that the following ingredients will be necessary to make out the case of an organised crime: (i) that there has to be a continuing unlawful activities; (ii) that such an activity will have to be by an individual, singly or jointly; (iii) that such an activity is either by a member of an organised crime syndicate or on behalf of such syndicate; (iv) that there has to be use of violence or threat of violence or intimidation or coercion or other unlawful means; (v) that such an activity has to be with an objective of gaining pecuniary benefits or gaining undue economic or other advantage for the person who undertakes such an activity or any other person or promoting insurgency. The ingredients of continuing unlawful activities would be: (i) that such an activity should be prohibited by law for the time being in force; (ii) that such an activity is a cognizable offence punishable with imprisonment of three years or more (iii) that such an activity is undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate; (iv) that in respect of such an activity more than one charge-sheet must have been filed before a competent Court; and (v) that the charge-sheets must have been filed within a preceding period of ten years; and (vi) that the Courts have taken cognizance of such offences.

12. In the present case we are only required to interpret the words of section 2(e), viz., "with objective of gaining pecuniary benefits, and undue economic or other advantage" and, therefore, it is not necessary for us to deal with other aspects of the matter. For that it will be relevant to refer to

the dictionary meaning of the words "economic"; "pecuniary"; and "other". As per Law Lexicon, "economic" means pertaining to wealth. "Pecuniary" means monetary; relating to money, consisting of money, belonging to, or having relation to money. "Other" means different from that which has been specified.

13. We will first deal with the contention as to whether the term "other advantage" is required to be construed as *ejusdem generis* with the terms "pecuniary benefits" or "economic advantage". The Constitution Bench of the Apex Court in the case of *Kochuni* v. *State of Madras & Kerala*, AIR 1960 SC 1080 was considering the word "otherwise". The Apex Court observed thus:

> "(50) ….. The word "otherwise" in the context, it is contended, must be construed by applying the rule of ejusdem generis. The rule is that when general words follow particular and specific words of the same nature, the general words must be confined to the things of the same kind as those specified. But it is clearly laid down by decided cases that the specific words must from a distinct genus or category. It is not an inviolable rule of law, but is only permissible inference in the absence of an indication to the contrary." (emphasis supplied)

It can, thus, be seen that the Apex Court has clearly held that the rule of *ejusdem generis* is not an inviolable rule of law but it is only permissible inference in the absence of an indication to the contrary.

14. … It follows, therefore, that interpretation ejusdem generis or noscitur a sociis need not always be made when words showing particular classes are followed by general words. Before the general words can be so interpreted there must be a genus constituted or a category disclosed with reference to which the general words can and are intended to be restricted.

…

19. …[F]rom [a] survey of the…judgments of the Apex Court, it can be gathered that for applying the principle of *ejusdem generis* the following five conditions will have to be fulfilled"

(i) the statute contains an enumeration of specific words;

(ii) the subjects of the enumeration constitute a class or category;

(iii) that class or category is not exhausted by the enumeration;

(iv) the general term follows the enumeration; and

(v) there is no indication of a different legislative intent.

20. The perusal of section 2(e) would reveal that after the words "gaining pecuniary benefits" there is a "comma" followed by the words "or gaining undue economic or other advantage". We have already reproduced hereinabove the dictionary meaning of "pecuniary" and "economic". To a pertinent query as to what the words "other advantage" could mean, if the principle of *ejusdem generis* was to be applied, Mr. Ponda, learned counsel stated that other advantage would mean and include financial, material, monetary profit, corruption, controlling market, parallel market and enrichment of participation. It can, thus, clearly be seen that all these would encompass within the term either "pecuniary" or "economic". It would, thus, be clear that the class or category of "pecuniary benefit" and "economic advantage" will stand exhausted. As such one of the essential conditions for applying the principle of *ejusdem generis*, would not be available. Since the preceding words do not constitute mere specification of the genus but constitute description of complete genus, the rule of *ejusdem generis* will have no application as held by the Apex Court in *Amar Chandra Chakraborty* v. *Collector of Excise, Tripura* and *Tribhuban Parkash* v. *Union of India* (cited supra). It is a settled principle of law that the rule has to be applied with care and caution. It is not inviolable rule of law but it has only permissible inference in the absence of any indication to the contrary. For the reasons to be discussed hereinafter we also find that even the legislative intent would not permit such a narrow construction. If the construction as put forth by the respondents has to be accepted, then the term "other advantage" would become otiose…[T]he Apex Court has held that no word or expression used in the statute can be construed to be redundant or superfluous. It has been also held that one should not concentrate too much on one word and pay too little attention to other words. It has been held that every provision and word must be looked at generally and in the context in which it is used.It has been held that the elementary principle of interpreting any word while considering a statute is to gather the intention of the legislation.

…

33. It is pertinent to note that in both Statement of Objects and Reasons and the Preface, though certain activities have been mentioned the same

are followed by the term “etc”. It is, thus, clear that the activities mentioned in the Statement of Objects and Reasons and the Preface are only illustrative in nature and not exhaustive. It is, thus, clear that the legislative intent is not only to curb only the activities mentioned in the Statement of Objects and Reasons or Preface but to curb various other activities of the organised crime syndicate so that unlawful elements spreading terrorism in the society can be controlled to a great extent, with an intention that the feeling of fear spread in the society is minimised.

34. It can, thus, clearly be seen that the purpose behind enacting the MCOCA was to curb the activities of the organised crime syndicates or gangs. The perusal of the Preamble and the Statement of Objects and Reasons and Preface, in our considered view, does not lead to any narrower meaning that MCOCA has been enacted only for the purpose of curbing activities which involve pecuniary gains or undue economic advantages. The mischief which is sought to be cured by enactment of MCOCA is to curb and control menace of organised crime. The law has been enacted with the hope that the elements spread by the organised crime in the Society can be controlled to a great extent and for minimizing the fear spread in the society. If a narrower meaning as sought to be placed is accepted, it will frustrate the object rather than curing the mischief for which the Act has been enacted.

35. For appreciating this issue, it would also be relevant to refer to subsection (4) of section 3 of MCOCA. It can be seen that the said provision also provides for punishment only by virtue of a person being a member of the organised crime syndicate. If the contention advanced by the respondents is to be accepted, subsection (4) of section 3 will be rendered redundant. We are also of the considered view that there could be various “unlawful continuing activities” by a member of “organised crime syndicate” or by any person on behalf of such a syndicate which can be for the advantages other than economic or pecuniary. We will consider some illustrations.

(i) A politician is murdered by a member of organised crime syndicate or gang on its behalf at the behest of rival political leader. In the facts of a given case, this was without any pecuniary or economic consideration, it was to gain an advantage in the nature of political patronage to the said organised crime syndicate by the political leader at whose behest the murder has taken place.

(ii) If a member of an organised crime syndicate or any person on its behalf murders or kills the leader of another syndicate or

rival gang in order to get supremacy in the area, there may be no direct economic or pecuniary advantage by that particular unlawful activity. However, in the long term by the very fact of having supremacy in the area, the organised crime syndicate would be in a position to get economic or pecuniary advantage.

(iii) A witness in the trial against the member of an organised crime syndicate may be killed. There may not be any pecuniary advantage in such an activity, however, advantage of assuring acquittal of member of the syndicate could be there.

(iv) A member of an organised crime syndicate murders another member of such syndicate. There may be no pecuniary or economic benefit by such an activity, however, there may be advantage to a person committing murder of getting a stronghold or supremacy in the 'organised crime syndicate' of which he is a member.

These could be some of the few illustrations which may come in the term "other advantage". There can be many more.

36. Such a interpretation is being opposed on the ground that if such an interpretation is permitted, the police authorities for every minor activity may invoke the provisions of the MCOCA. It is submitted that the provisions of the said Act are draconian. If such a wider meaning is given, it will lead to misuse of the said provision. It is further submitted that in view of the provisions of the MCOCA being draconian in nature, once the MCOCA is applied, it is difficult or impossible to get the bail and if the wider interpretation is placed to the term "other advantage" it will give a tool in the hands of the police machinery to misuse the said powers to invoke MCOCA for even petty offences.

…

38. It is difficult to accept the contention that if the wider meaning is given to the provision of section 2(e), provisions of MCOCA would be invoked even for petty offences. In case of *Sherbahadur Akram Khan* v. *State of Maharashtra* (cited supra), some of the offences resulted from the quarrel at public water tap. In the said matter, as in many of the cases, the accused had assaulted the injured with a fist blow. By no stretch of imagination, such an activity could be construed to be the one for which MCOCA could be invoked. If there are some altercations between two businessmen

within four corners of shop and, as a result of which one of them slaps the other, by no stretch of imagination it can be said to be an offence for which MCOCA is to be invoked. Similarly, a dispute between two brothers on some property issue and even assault and that too by a deadly weapon would not come in the ambit of MCOCA. The legislative intent is clear, that MCOCA is for curbing the organised crime. Unless there is *prima facie* material, firstly, to establish that there is an organised crime syndicate and, secondly, that organised crime has been committed by any member of the organised crime syndicate or any person on behalf of such syndicate, the provisions of MCOCA cannot be invoked. In the earlier paragraph we have discussed in detail as to what are the ingredients so as to constitute an offence of "organised crime". The prosecution will, therefore, have to firstly establish that there is an organised crime syndicate. It will have to satisfy that there exist the ingredients of "continuing unlawful activity". It will thereafter have to satisfy that the ingredients of the "organised crime" as spelt out by us hereinbefore exist, prior to invoking the provisions of MCOCA. We are, therefore, unable to accept the contention that if the wider meaning is given, the MCOCA can be invoked even for sundry offences. As held by the Apex Court in the case of *Ranjitsing Brahmajeetsing Sharma* (supra), merely because the person who cheats or commits a criminal breach of trust more than once, the same by itself may not be sufficient to attract the provisions of MCOCA. By the same analogy, if a person commits murder more than once, would not by itself be sufficient to attract the provisions of MCOCA. At the cost of repetition, we make it clear that unless all the ingredients to constitute the offence punishable under MCOCA are available, it will not be permissible to invoke the provisions of MCOCA.

39. Apart from that it can be seen that there is inbuilt safeguard in section 23 of the said Act, inasmuch as no information of the commission of the offence of the organised crime shall be recorded by the police officer without prior permission of the police officer not below the rank of Deputy Inspector General of Police. A further safeguard is provided by sub-section (2) of section 23 to the effect that no Special Court shall take cognizance of the offence under this Act without previous sanction of the police officer not below the rank of Additional Director General of Police. It is implicit that while granting permission under sub-section (1) and granting sanction under sub-section (2) of section 23 of MCOCA, the police officers, who are undisputedly high ranking, will be required to apply their mind to the facts of the case and come to a prima facie satisfaction as to whether the ingredients to constitute the offence punishable under MCOCA are made

out or not. Equally, the Special Courts, which are manned with senior judicial officials of the rank of Sessions Judge, while taking cognizance would be required to come to a prima facie satisfaction that the ingredients to constitute an offence punishable under MCOCA are made out. The Special Judge, if upon material placed by the police is satisfied that the ingredients to constitute offence punishable under MCOCA are not made out, would be required to transmit the case for trial of such offence to any Court having jurisdiction under the Code, in view of the provisions of section 11 of MCOCA.

40. In this respect, we will also refer to the observations of the Apex Court in the case of *Kartar Singh*, which are reproduced by the Constitution Bench of the Apex Court in the case of *Prakash Kumar alias Prakash Bhutto v. State of Gujarat (cited supra). The observation of the Apex Court reads as under;*

> "43. Having said so, we also notice the note of caution of this Court in Kartar Singh (supra) in paragraph 352 (SCC p. 707) as under:—
>
> "352. It is true that on many occasions, we have come across cases wherein the prosecution unjustifiably invokes the provisions of the TADA Act with an oblique motive of depriving the accused persons from getting bail and in some occasions when the Courts are inclined to grant bail in cases registered under ordinary criminal law, the investigating officers in order to circumvent the authority of the Courts invoke the provisions of the TADA Act. This kind of invocation of the provisions of TADA 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 on the qui vive, it cannot be said that the provisions of TADA Act are enforced effectively in consonance with the legislative intendment."
>
> (emphasis supplied)

44. In our view the above observation is eloquently sufficient to caution police officials as well as the Presiding Officers of the Designated Courts from misusing the Act and to enforce the Act effectively and in consonance with the legislative intendment which would mean after the application of mind. We reiterate the same."

41. We do hope that as already observed by the Constitution Bench of the Apex Court in the aforesaid two judgments, the above observation is eloquently sufficient to caution police officials as well as the Presiding Officers of the Designated Courts from misusing the Act and to enforce the Act effectively and in consonance with the legislative intendment.

42. For the reasons aforesaid, we answer the issue that the term "other advantage" cannot be read as *ejusdem generis* with the words "pecuniary benefits" and "undue economic"."

IN THE SUPREME COURT OF INDIA

State of Maharashtra v. Kamal Ahmed Mohammed Vakil Ansari

(2013) 12 SCC 17

P. Sathasivam & J.S. Khehar, JJ.

The Supreme Court in this case held that section 18 of the MCOCA, which permits confessional statements before the police to be admissible, is an exception to sections 25 and 26 of the Indian Evidence Act and therefore, must be construed narrowly and mandatorily have to be limited to the confessor and the co-accused. Further, the Court held that it could not be extended to other trials in which the person had made the confession.

Jagdish Singh Khehar, J.: "13. We shall now endeavour to delve into the first question, namely, whether the confessional statements recorded by the three accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, in Special Case No. 4 of 2009), before the witnesses at Serial Nos. 64 to 66, are admissible as confessions in the trial of Special Case No. 21 of 2006. There seems to be a serious dispute between the rival parties whether the deposition in respect of these confessional statements, can only be made by producing as witnesses, the persons who had made such admission/confession; or in the alternative, deposition thereof can also be made through the persons before whom such confessions were made.

14. Admissions and confessions are exceptions to the "hearsay" rule. The Evidence Act places them in the province of relevance, presumably on the ground that they being declarations against the interest of the person making them, they are in all probability true. The probative value of an admission or a confession does not depend upon its communication to another. Just like any other piece of evidence, admissions/confessions can be admitted in evidence only for drawing an inference of truth. (See *Law of Evidence*, by M. Monir, 15th Edn., Universal Law Publishing Co.) There is, therefore, no dispute whatsoever in our mind, that truth of an admission or a confession can not be evidenced through the person to whom such admission/confession was made. The position, however, may be different if admissibility is sought under Sections 6 to 16 as a "fact in issue" or as

a "relevant fact" (which is the second question which we are called upon to deal with). The second question in the present case, we may clarify, would arise only if we answer the first question in the negative. For only then will we have to determine whether these confessional statements are admissible in evidence otherwise than as admissions/confessions.

15. Therefore, to the extent that a confessional statement can be evidenced by the person before whom it is recorded, has been rightfully (*sic* erroneously) adjudicated by the High Court, by answering the same in the affirmative. The more important question however is, whether the same would be admissible through the witnesses at Serial Nos. 63 to 66 in Special Case No. 21 of 2006. Our aforesaid determination, commences from the following paragraph.

16. The scheme of the provisions pertaining to admissions/confessions under the Evidence Act (spelt out in Sections 17 to 31) makes admissions/confessions admissible (even though they are rebuttable) because the author of the statement acknowledges a fact to his own detriment. This is based on the simple logic (noticed above), that no individual would acknowledge his/her liability/culpability unless true. We shall determine the answer to the first question, by keeping in mind the basis on which, admissibility of admissions/confessions is founded. And also, whether confessions in this case (made to the witnesses at Serial Nos. 64 to 66) have been expressly rendered inadmissible, by the provisions of the Evidence Act, as is the case set up by the appellant.

17. An examination of the provisions of the Evidence Act would reveal that only such admissions/confessions are admissible as can be stated to have been made without any coercion, threat or promise.

…

17.5 There is, therefore, a common thread in the scheme of admissibility of admissions/confessions under the Evidence Act, namely, that the admission/confession is admissible only as against the person who had made such admission/confession. Naturally, it would be inappropriate to implicate a person on the basis of a statement made by another. Therefore, the next logical conclusion is that the person who has made the admission/confession (or at whose behest, or on whose behalf it is made) should be a party to the proceeding because that is the only way a confession can be used against him. Reference can be made to some provisions of the Evidence Act which fully support the above conclusions. Section 24 of the Evidence Act leads to such a conclusion. Under Section 24, a confession made "by an accused person", is rendered irrelevant

"against the accused person", in the circumstances referred to above. Likewise, Section 25 of the Evidence Act contemplates that a confession made to a police officer cannot be proved "as against a person accused of any offence". Leading to the inference that a confession is permissible/ admissible only as against the person who has made it, unless the same is rendered inadmissible under some express provision. Under Section 26 of the Evidence Act, a confession made by a person while in custody of the police, cannot "be proved as against such person" (unless it falls within the exception contemplated by the said Section itself).

17.7 The scheme of the provisions pertaining to admissions/confessions depicts a one way traffic. Such statements are admissible only as against the author thereof.

…

18. It is therefore clear that an admission/confession can be used only as against the person who has made the same. The admissibility of the confessions made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah need to be viewed in terms of the deliberations recorded above. The admissibility of confessions which have been made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, in Special Case No. 4 of 2009) who are not the accused in Special Case No. 21 of 2006, will lead to the clear conclusion that they are inadmissible as admissions/confessions under the provisions of the Evidence Act. Had those persons who had made these confessions been accused in Special Case No. 21 of 2006, certainly the witnesses at Serial Nos. 64 to 66 could have been produced to substantiate the same (subject to the same being otherwise permissible). Therefore, we have no doubt that the evidence of confessional statements recorded before the witnesses at Serial Nos. 64 to 66 would be impermissible within the scheme of admissions/confessions contained in the Evidence Act.

19. The issue in hand can also be examined from another perspective, though on the same reasoning. Ordinarily, as already noticed hereinabove, a confessional statement is admissible only as against an accused who has made it. There is only one exception to the aforesaid rule, wherein it is permissible to use a confessional statement, even against person(s) other than the one who had made it. The aforesaid exception has been provided for in Section 30 of the Evidence Act…As is evident from a perusal of Section 30…, a confessional statement can be used even against a co-accused. For such admissibility it is imperative that the person making the confession besides implicating himself, also implicates others who are

being jointly tried with him. In that situation alone, is such a confessional statement relevant even against the others implicated.

20. Insofar as the present controversy is concerned, the substantive provision of Section 30 of the Evidence Act has clearly no applicability because Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah have not implicated any of the accused-respondents herein. The importance of Section 30 of the Evidence Act, insofar as the present controversy is concerned, emerges from Illustration (*b*) thereunder, which substantiates to the hilt one of the conclusions already drawn by us above. Illustration (*b*) leaves no room for any doubt that unless the person who has made a confessional statement is an accused in a case, the confessional statement made by him is not relevant. None of the accused in Special Case No. 4 of 2009 is an accused in Special Case No. 21 of 2006. As such, in terms of Illustration (*b*) under Section 30 of the Evidence Act, we are of the view that the confessional statement made by the accused in Special Case No. 4 of 2009 cannot be proved as a confessional statement in Special Case No. 21 of 2006. This conclusion has been recorded by us on the admitted position that the accused in Special Case No. 4 of 2009 are different from the accused in Special Case No. 21 of 2006. And further because, Special Case No. 4 of 2009 is not being jointly tried with Special Case No. 21 of 2006. Therefore, even though Section 30 is not strictly relevant, insofar as the present controversy is concerned, yet the principle of admissibility, conclusively emerging from Illustration (*b*) under Section 30 of the Evidence Act persuades us to add the same to the underlying common thread that finds place in the provisions of the Evidence Act, pertaining to admissions/confessions. That, an admission/confession is admissible only as against the person who has made it.

…

23. In the present controversy, the authors of the confessional statements (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) are not amongst the accused in Special Case No. 21 of 2006. The confessional statements made by them would therefore be inadmissible (as admissions/confessions) in the present case (Special Case No. 21 of 2006), as the situation in the present case is exactly the same as has been sought to be explained through Illustration (*b*) under Section 30 of the Evidence Act.

…

25. The issue of admissibility of the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah before the witnesses at Serial Nos. 64 to 66, needs to be examined from

yet another perspective. The learned counsel for the respondents were successful in persuading the High Court that a confessional statement made by an accused in one case, could be used in another case as well. In this behalf, the respondents had placed reliance on the decision rendered by this Court in *State of Gujarat* v. *Mohd. Atik* [*State of Gujarat* v. *Mohd. Atik*, (1998) 4 SCC 351 : 1998 SCC (Cri) 936 : AIR 1998 SC 1686] .

…

27. We have given our thoughtful consideration to the conclusions drawn by the High Court on the basis of the decision in *State of Gujarat* v. *Mohd. Atik* [*State of Gujarat* v. *Mohd. Atik*, (1998) 4 SCC 351 : 1998 SCC (Cri) 936 : AIR 1998 SC 1686] . Before drawing any conclusion one way or the other, it would be relevant to notice that in accepting the admissibility of the confessional statement in one case as permissible in another case, reliance was placed by this Court on Section 15 of TADA. Section 15 of TADA is being extracted hereunder:

> "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."

> There is no room for any doubt that Section 15 of TADA expressly makes such confessional statement made by a person admissible not only against the person who has made it, but also as against others implicated therein, subject to the condition, that the person who has made the confession, and the others implicated (the co-accused—abettor or conspirator) are being "… tried in the same case together…"

28. Therefore, it is necessary for us first to specifically highlight that the admissibility of the aforesaid confessional statements in *Mohd. Atik case* [*State of Gujarat* v. *Mohd. Atik*, (1998) 4 SCC 351 : 1998 SCC (Cri) 936 : AIR 1998 SC 1686] was determined not with reference to the Evidence Act, but under Section 15 of TADA.

…

31. It is therefore apparent that the confessional statement made by an accused was held to be relevant in *State of Gujarat* v. *Mohd. Atik* [*State of Gujarat* v. *Mohd. Atik*, (1998) 4 SCC 351 : 1998 SCC (Cri) 936 : AIR 1998 SC 1686] under Section 15 of TADA, on the fulfilment of the condition that the same was recorded in consonance with the provisions of the said Act, as also, the satisfaction of the ingredients contained in the proviso under sub-section (1) of Section 15 of TADA, namely, the person who had made the confession and the others implicated were facing a joint trial. The judgment rendered by this Court in *State of Gujarat* v. *Mohd. Atik* [*State of Gujarat* v. *Mohd. Atik*, (1998) 4 SCC 351 : 1998 SCC (Cri) 936 : AIR 1998 SC 1686] has been incorrectly relied upon while applying the conclusions rendered in the same to the controversy in hand, as the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah do not implicate the respondent-accused in Special Case No. 21 of 2006, nor are the accused-respondents herein being jointly tried with the persons who had made the confessional statements. Reliance has not been placed by the respondent-accused on any provision under Mcoca to claim admissibility of the witnesses at Serial Nos. 63 to 66 as defence witnesses. Nor have the learned counsel for the respondent-accused invited our attention to any other special statute applicable hereto whereunder such a course of action, in the manner claimed by the respondents, would be admissible. We are therefore of the view that the High Court erred in relying on the judgment rendered by this Court in *State of Gujarat* v. *Mohd. Atik* [*State of Gujarat* v. *Mohd. Atik*, (1998) 4 SCC 351 : 1998 SCC (Cri) 936 : AIR 1998 SC 1686] while determining the controversy in hand.

…

70. It is also necessary to examine the issue in hand with reference to the provisions of Mcoca. The controversy pertaining to the relevance of the statement of witnesses at Serial Nos. 63 to 66, has to be understood with reference to Section 18 of Mcoca. We shall now record our determination on the scope and effect of Section 18 of Mcoca. Section 18 aforementioned is being extracted hereunder:

> "18.Certain confessions made to police officer 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 below the rank of the Superintendent of Police and recorded by such police officer either in writing or on any mechanical devices like cassettes, tapes or sound tracks from which sounds or images can be reproduced, shall be admissible in the trial of such person or 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.
>
> (2) The confession shall be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him.
>
> (3) 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 is satisfied that it is being made voluntarily. The police officer concerned shall, after recording such voluntary confession, certify in writing below the confession about his personal satisfaction of the voluntary character of such confession, putting the date and time of the same.

> (4) Every confession recorded under sub-section (1) shall be sent forthwith to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and such Magistrate shall forward the recorded confession so received to the Special Court which may take cognizance of the offence.
>
> (5) The person from whom a confession had been recorded under sub-section (1) shall also be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under sub-section (4) along with the original statement of confession, written or recorded on mechanical device without unreasonable delay.
>
> (6) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate shall 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 shall be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon."

71.Section 18 of MCOCA through a non obstante clause overrides the mandate contained in Sections 25 and 26 of the Evidence Act, by rendering a confession as admissible, even if it is made to a police officer (not below the rank of Deputy Commissioner of Police). Therefore, even though Sections 25 and 26 of the Evidence Act render inadmissible confessional statements made to a police officer, or while in police custody, Section 18 of MCOCA overrides the said provisions and bestows admissibility to such confessional statements, as would fall within the purview of Section 18 of MCOCA.

72. It is however relevant to mention that Section 18 of MCOCA makes such confessional statements admissible only for "the trial of such person, or co-accused, abettor or conspirator". Since Section 18 of Mcoca is an exception to the rule laid down in Sections 25 and 26 of the Evidence Act, the same will have to be interpreted strictly, and for the limited purpose contemplated thereunder. The admissibility of a confessional statement

would clearly be taken as overriding Sections 25 and 26 of the Evidence Act for purposes of admissibility, but must mandatorily be limited to the accused confessor himself, and to a co-accused (abettor or conspirator).

73. It is not the contention of the learned counsel for the respondent-accused that the persons who had made the confession (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) before the witnesses at Serial Nos. 64 to 66 are the accused themselves along with the co-accused (abettor or conspirator) in Special Case No. 21 of 2006. It is therefore apparent that the ingredients which render a confessional statement admissible under Section 18 of MCOCA are not satisfied in the facts of the present case. For that matter Section 18 of MCOCA has to be viewed in the same manner as we have recorded our analysis of Section 15 of TADA hereinabove. In the aforesaid view of the matter, it is imperative for us to conclude that Section 18 of MCOCA cannot constitute the basis of relevance of the confessional statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case No. 4 of 2009, to the case in hand. It is therefore not possible for us to accept the admissibility of the witnesses at Serial Nos. 63 to 66 insofar as Special Case No. 21 of 2006 is concerned.

…

75. In our deliberations in the preceding few paragraphs, we have brought out the scope of applicability of Section 18 of MCOCA. It needs to be reiterated that Section 18 of MCOCA is an exception to Sections 25 and 26 of the Evidence Act only in a trial against an accused (or against a co-accused — abettor or conspirator) who has made the confession. The said exemption has not been extended to other trials in which the person who had made the confession is not an accused. Since the vires of Section 18 of MCOCA is not subject-matter of challenge before us, it is imperative for us to interpret the effect of Section 18 of MCOCA as it is."

IN THE SUPREME COURT OF INDIA

Mahipal Singh v. Central Bureau of Investigation & Anr.

(2014) 11 SCC 282

Chandramauli Kr. Prasad & P.C. Ghose, JJ.

The question before the Supreme Court in this case, was whether the ingredients constituting the offence under section 3 of MCOCA have to be satisfied on the date on which MCOCA was invoked, or whether the same have to be satisfied on the date on which the crime is committed.

Chandramauli Kr. Prasad, J.: "12. Section 3 of MCOCA is the penal provision which provides for punishment for organised crime. "Organised crime" has been defined under Section 2(1)(*e*) of MCOCA and the same reads as follows:

> "2.Definitions.—(1) In this Act, unless the context otherwise requires—
>
> ***
>
> (e) 'organised crime' means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any person or promoting insurgency;"
>
> The definition aforesaid, inter alia, makes it clear that to come within the mischief of organised crime, continuing unlawful activity with the objective of gaining pecuniary benefits or gaining undue economic or other advantage for himself or any other person or promoting insurgency are essential.

> 13. "Continuing unlawful activity" has been defined under Section 2(1)(d) of MCOCA. It reads as follows:
>
> "2.Definitions.—(1) In this Act, unless the context otherwise requires—
>
> ***
>
> (d) 'continuing unlawful activity' means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent court within the preceding period of ten years and that court has taken cognizance of such offence;"

From a plain reading of the aforesaid provision, it is evident that to come within the mischief of continuing unlawful activity, it is required to be established that the accused is involved in activities prohibited by law which are cognizable offence punishable with imprisonment of three years or more and in respect thereof, more than one charge-sheets have been filed against such person before a competent court within the preceding period of ten years and that court has taken cognizance of such offence.

14. We have given our most anxious consideration to the rival submissions and in the light of what we have observed above, the submissions advanced by Mr Subramanium commend us. It is trite that to bring an accused within the mischief of the penal provision, ingredients of the offence have to be satisfied on the date the offence was committed. Article 20(1) of the Constitution of India permits conviction of a person for an offence for violation of law in force at the time of commission of the act charged as an offence. In the case in hand, examinations alleged to have been rigged had taken place in January 2010, June 2010, November 2010 and January 2011 and the date on which the first information reports were registered, more than one charge-sheets were not filed against the accused for the offence of specified nature within the preceding period of ten years and further, the court had not taken cognizance in such number of cases. As observed earlier, for punishment for the offence of organised crime under Section 3 of Mcoca, the accused is required to be involved

in continuing unlawful activity which inter alia provides that more than one charge-sheets have been filed before a competent court within the preceding period of ten years and the court had taken cognizance of such offence. Therefore, in the case in hand, on the date of commission of the offence, all the ingredients to bring the act within Section 3 of Mcoca have not been satisfied. We are conscious of the fact that there may be a case in which on the date of registration of the case, one may not be aware of the fact of charge-sheet and cognizance being taken in more than one case in respect of the offence of specified nature within the preceding period of ten years, but during the course of investigation, if it transpires that such charge-sheets and cognizance have been taken, Section 3 of Mcoca can be invoked. There may be a case in which the investigating agency does not know exactly the date on which the crime was committed; in our opinion, in such a case the date on which the offence comes to the notice of the investigating agency, the ingredients constituting the offence have to be satisfied. In our opinion, an act which is not an offence on the date of its commission or the date on which it came to be known, cannot be treated as an offence because of certain events taking place later on. We may hasten to add here that there may not be any impediment in complying with the procedural requirement later on in case the ingredients of the offence are satisfied, but satisfying the requirement later on to bring the act within the mischief of penal provision is not permissible. In other words, procedural requirement for prosecution of a person for an offence can later on be satisfied but ingredients constituting the offence must exist on the date the crime is committed or detected. Submission of charge-sheets in more than one case and taking cognizance in such number of cases are ingredients of the offence and have to be satisfied on the date the crime was committed or came to be known."

THE UNLAWFUL ACTIVITIES PREVENTION ACT

IN THE HIGH COURT OF KERALA

Ashruff v. State of Kerala

2010 SCC OnLine Ker 4917

V. Ramkumar, J.

The proviso to Section 43D(2)(b) of the UAPA permits the Court based on the report of the Public Prosecutor to extend the detention of the accused beyond the period of 90 days up to a period of 180 days. The question before the Court was whether the Magistrate could, upon satisfaction with the report of the Public Prosecutor, extend the detention.

V. Ramkumar, J.: "…JUDICIAL EVALUATION

7. On hearing both sides at length I am inclined to accept the contentions of the petitioners regarding the lack of authority of the Magistrate to deal with the case after the incorporation of the offences under the Unlawful Activities (Prevention) Act, 1967 (the "U.A. Act" for short). The following reasons persuade me to hold the said view:—

A. As per Section 43D(2)(b) of the U.A. Act, two more provisos have been added to Section 167(2) CrPC after the proviso thereto. Under the first proviso so added by Sec. 43D(2)(b) of the U.A. Act the "Court" is empowered to extend the period of detention of an accused person beyond 90 days and up to 180 days if the Court is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reason given for the detention of the accused person beyond 90 days. The first proviso added by Section 43D(2)(b) of the U.A. Act reads as follows:—

> 'Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with 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 ninety days, extend the said period up to one hundred and eighty days",

The expression "Court" in the above provision can only mean the Court as defined under Section 2(d) of the U.A. Act. Section 2(d) defines the expression "Court" as follows:—

> (d) "court" means a criminal court having jurisdiction, under the Code, to try offences under this Act and includes a Special Court constituted under section 11 or under section 21 of the National Investigation Agency Act, 2008".

Under the National Investigation Agency Act, 2008 (the "N.I.A. Act" for short) the Central Government is given the power to constitute a Special Court under Section 11 thereof and the State Government is given the power to constitute a Special Court under Section 22 thereof The mention of Sec. 21 of the N.I.A. Act in the definition of "Court" under Section 2(d) of the U.A. Act is an obvious mistake for Sec. 22 of the N.I.A. Act. Thus, going by the definition of the word "Court" in the U.A. Act it is that criminal court having jurisdiction under the CrPC to try offences under the Act which is to be understood as the "Court" and it includes a Special Court constituted under the N.I.A. Act either by the Central Government or by the State Government. Admittedly, the State Government has not constituted any Special Court in the State of Kerala in exercise of its powers under Sec. 22 of the N.I.A. Act. But, there is no dispute that the Central Government has constituted the Special Court, SPE/CBI-I, Kochi as the Special Court under Sec. 11 of the N.I.A. Act. The U.A. Act is a "scheduled offence" enumerated in the Schedule of the N.I.A. Act and falling under the definition of "scheduled offence" in Sec. 2(f) thereof. Sec. 13 of the N.I.A. Act would indicate that every scheduled offence investigated by the National Investigation Agency has to be tried by the Special Court constituted by the Central Government under Sec. 11 of the N.I.A. Act. In the case On hand even though the State Government claims to have submitted a report to the Central Government under Sec. 6 of the N.I.A. Act, as on today the investigation of the present case has not been taken over by the National Investigation Agency. The investigation of the case on hand is still conducted by the Dy.S.P. Muvattupuzha.

B. In view of Sec. 10 of the N.I.A. Act, the power of the State Government to investigate and prosecute any scheduled offence is subject to the

provisions of the N.I.A. Act. Section 43 of the U.A. Act specifies the officers competent to investigate the offences in question and by virtue of clause (c) thereof the present offences cannot be investigated by a police officer below the rank of a Dy.S.P. Hence with effect from 12-08-2010 when the offences under the U.A. Act were incorporated, the investigation of the present crime was taken over by the Dy.S.P. Muvattupuzha.

C. Section 22 of the N.I.A. Act reads as follows:—

> "22. Power of the State government to constitute Special courts. (1) The State Government may constitute one or more Special Courts for the trial of offences under any or all the enactments specified in the Schedule.
>
> (2) The provisions of this Chapter shall apply to the Special Courts constituted, by the State Government under sub-section (1) and shall have effect subject to the following modifications, namely,—
>
> (i) references to 'Central Government' in sections 11 and 15 shall be constituted as references to State Government
>
> (ii) reference to 'Agency in sub-section (1) of section 13 shall be construed as a reference to the "Investigation agency of the State Government".
>
> (3) The jurisdiction conferred by this Act on a Special Court shall, until a Special Court is constituted by the State Government under subsection (1) in the case of any offence punishable under this Act, notwithstanding anything contained in the code, be exercised by the Court of Session of the division in which such offence has been committed and it shall have all the powers and follow the procedure provided under this Chapter.
>
> (4) On and from the date when the Special Court is constituted by the State Government the trial of any offence investigated by the State Government

> under the provisions of this Act, which would have been required to be held before the Special Court, shall stand transferred to that Court on the date on which it is constituted".

Thus, under Sec. 22(3) of the N.I.A.-Act, until a Special Court is constituted by the State Government, the jurisdiction conferred by the N.I.A. Act on the Special Court is to be exercised by the Court of Session notwithstanding anything contained in the CrPC Such jurisdiction is to be exercised by the Sessions Court in the case of any offence punishable under the N.I.A. Act. The U.A. Act is a "scheduled offence" punishable under the N.I.A. Act and, therefore, till the Special Court is constituted by the State Government, it is the Sessions Court within the limits of which the offences were committed, which has to try the offences. The Court of Session has to follow the same procedure which is laid down for the Special Court under Chapter IV of the N.I.A. Act. Under Sec. 16(1) of the N.I.A. Act the Special Court is empowered to take cognizance of any offence either on a complaint or on a police report without a committal. Since the Sessions Court is also to follow the same procedure, that Court is also empowered to take cognizance of the offences without a committal. The above procedure of the Special Court is analogous to the procedure followed by the Special Court under the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the N.D.P.S. Act" for short). While Sec. 16(1) of the N.I.A. Act is similar to Section 36A(1)(d) of the N.D.P.S. Act empowering the Special Court to take cognizance of the offences without a committal, the N.D.P.S. Act does not contain a provision similar to Section 22(3) of the N.I.A. Act which says that the Sessions Court shall have all the powers of the Special Court and shall follow the same procedure' provided under Chapter IV of the N.I.A. Act. On the contrary, what Section 36 D of the N.D.P.S. Act provides is that until the Special Court is constituted under Section 36 thereof, the offences shall be tried by the Court of Session. The procedure to be followed by the Court of Session is not prescribed under the N.D.P.S. Act Hence the Sessions Court, under the N.D.P.S. Act will have to try the offences by recourse to the procedure under the Cr.P.C as per which the Sessions Court can take cognizance of the offence only on a committal as provided under Section 193 CrPC

D. When as per the scheme of the N.I.A. Act until the Special Court is constituted by the State Government, it is the Sessions Court which

is to try the scheduled offences and that too without a committal, the Sessions Court alone can extend the remand after the initial period of 30 days by virtue of See. 167 CrPC as modified by Sec. 43D(2) of the U.A. Act. Under Sec. 167(2) CrPC while the first remand of the accused for the initial period of 15 days can be authorised by any Magistrate (the nearest Magistrate) whether he has jurisdiction or not to try the offence, further action like remand extension, release of the accused from custody when it is considered that further detention is unnecessary, committal of the case to the Court of Session, trial etc. can be taken only by the Magistrate having jurisdiction to commit or try the offences. Thus, in the case of an offence punishable under the U.A. Act, while it is permissible to produce the accused for the purpose of first remand before the nearest Magistrate (whether he has jurisdiction or not to try the offence), the extension of remand can be ordered only by the Sessions Court which alone is competent to try the offences.

E. Sec. 15 of the N.I.A. Act provides for the appointment before the Special Court, of Public Prosecutors and Addl. Public Prosecutors who are deemed to be Public Prosecutors within the meaning of Sec. 2(u) CrPC That is the reason why the first proviso added by Section 43D(2)(b) of the U.A. Act refers to the report of a Public Prosecutor. If it was the Magistrate who was to extend the period of detention beyond 90 days, then the Legislature would have included the Assistant Public Prosecutor also for the purpose of submitting a report for the extension of the period of detention. As per Sec. 25 CrPC prosecution in the Courts of Magistrate is to be conducted by the Assistant Public Prosecutors. Reliance placed on Section 302 CrPC by the State Public Prosecutor is of no avail to him. The purpose of Sec. 302 CrPC is not to allow the Public Prosecutor to conduct the prosecution before the Magistrate Courts. The said provision only says that while the Advocate General, Government Advocate, Public Prosecutor or the Assistant Public Prosecutor do not require any permission of the Magistrate to conduct the prosecution, all other persons require the permission of the Magistrate to conduct the prosecution.

F. It is true that there are offences like those under Sections 10 to 13 of the U.A. Act which are punishable only with imprisonment for less than 5 years and going by Part II of the First Schedule to CrPC those offences are triable by Judicial Magistrates of the First Class. But then, in the light of the wording of Sec. 22(3) of the N.I.A. Act indicating

that the jurisdiction conferred on the Special Court shall be exercised by the Court of Session in the case of any offence under the Act, whatever be the punishment prescribed for the offences, all offences under the U.A. Act are to be tried by the Court of Session which alone can deal with the case from the stage of remand extension. Hence, after the incorporation of the offences under the U.A. Act, the power of remand extension in this case could have been exercised only by the Court of Session since the Muvattupuzhthe Magistrate was not a committal Court.

8. As for the alleged requirement of notice to the accused while the Court is considering the report of the Public Prosecutor under the first proviso added by Section 43D(2)(b) of the U.A. Act, a plain reading of the provision indicates that there is no such obligation under the said provision. The requirement of notice was read into a similar provision in the TADA by the two Judges' Bench decision of the Apex Court in *Hitendra Vishnu's case* (supra). But, as rightly contended by the learned Addl. Director General of Prosecution, the interpretation placed by the Apex Court in *Hitendra Vishnu's case* (supra) construing the similar provision in the TADA has been whittled down by the Constitution Bench in *Sanjay Dutt's Case* (supra) and it is now enough if the accused are produced before the Court at the time of consideration of the Public Prosecutor's report for extension of the period of detention and the accused are informed that the Court is considering the question of extension of the period of their detention.

9. Thus, the position which emerges from the above discussion is that after the first remand by the nearest Magistrate, it is the Court of Session which alone can extend the remand and pass orders under Sec. 43D(2)(b) of the U.A. Act extending the period of detention beyond 90 days and up to 180 days in individual cases after considering the report or reports of the Public Prosecutor. But I hasten to add that this resultant legal position is due to the combined effect of the U.A, Act and the N.I.A. Act. Had it not been for the coming into force of the N.I.A, Act with effect from 31.12.2008, the position in relation to the offences punishable under the U.A. Act would have probably been as canvassed by the learned Addl. Director General of Prosecution.

10. In the light of what has been discussed above and taking into account the proceedings before the Magistrate who passed the order dated 30-09-2010 extending the period of detention of the accused persons, the inescapable conclusion is that the said proceedings are vitiated due to the following reasons:—

i) The Magistrate had no jurisdiction to pass an order under the first proviso inserted by Sec. 43D(2)(b) of the U.A. Act. It is only the Sessions Court concerned which has jurisdiction to pass an order as above.

ii) The Assistant Public Prosecutor in-charge of the Court of the Judicial Magistrate of the First Class, Muvattupuzha had no locus standi to submit a report under the aforesaid proviso seeking extension of the period of detention. The Public Prosecutor alone is competent to file a report and that too before the Sessions Court having jurisdiction.

iii) The accused persons were not produced before the Magistrate on the date on which the order dated 30-09-2010 was passed. The non-production of the accused was due to the non-availability of police escort from the Central Prison, Viyyur in view of the Ayodhya verdict. (Vide the letter dated 21-10-2010 of the Magistrate received in B.A. 5134 of 2010). Hence, there was no occasion or possibility for the Magistrate to inform the accused about the consideration of the question of extending the period of their detention beyond 90 days.

iv) Separate reports giving the details insisted by the aforesaid proviso were not filed in respect of each and every accused. The only report filed, and that too, by the Assistant Public Prosecutor was an omnibus report which did not give the reasons in relation to each and every accused."

IN THE SUPREME COURT OF INDIA

Arup Bhuyan v. State of Assam

(2011) 3 SCC 377

Markandey Katju & Gyan Sudha Mishra, JJ.

The appellant in this case had been convicted under Section 3(5) of the TADA Act, 1987, which made the mere membership of an organization an offence. In this case, the Court dealt with the constitutionality of Section 3(5).

Markandey Katju, J.: "9.In *State of Kerala* v. *Raneef* [(2011) 1 SCC 784 : (2011) 1 SCC (Cri) 409], we have respectfully agreed with the US Supreme Court decision in *Elfbrandt* v. *Russell* [16 L Ed 2d 321 : 384 US 11 (1966)] which has rejected the doctrine of "guilt by association". Mere membership of a banned organisation will not incriminate a person unless he resorts to violence or incites people to violence or does an act intended to create disorder or disturbance of public peace by resort to violence (see also the Constitution Bench judgment of this Court in *Kedar Nath Singh* v. *State of Bihar* [AIR 1962 SC 955 : (1962) 2 Cri LJ 103] , AIR para 26)."

10. In *Brandenburg* v. *Ohio* [23 L Ed 2d 430 : 395 US 444 (1969)] the US Supreme Court went further and held that mere "advocacy or teaching the duty, necessity, or propriety" of violence as a means of accomplishing political or industrial reform, or publishing or circulating or displaying any book or paper containing such advocacy, or justifying the commission of violent acts with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism, or to voluntarily assemble with a group formed "to teach or advocate the doctrines of criminal syndicalism" is not per se illegal. It will become illegal only if it incites to imminent lawless action. The statute under challenge was hence held to be unconstitutional being violative of the First and Fourteenth Amendments to the US Constitution.

11. In *United States* v. *Robel* [19 L Ed 2d 508 : 389 US 258 (1967)] , the US Supreme Court held that a member of a communist organisation could not be regarded as doing an unlawful act by merely obtaining employment in a defence facility.

12. We respectfully agree with the above decisions, and are of the opinion that they apply to India too, as our fundamental rights are similar to the Bill of Rights in the US Constitution. In our opinion, Section 3(5) cannot be read literally otherwise it will violate Articles 19 and 21 of the Constitution. It has to be read in the light of our observations made above. Hence, mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence. Hence, the conviction of the appellant under Section 3(5) of TADA is also not sustainable."

IN THE SUPREME COURT OF INDIA

Indra Das v. State of Assam

(2011) 3 SCC 380

Markandey Katju & Gyan Sudha Mishra, JJ.

The appellant in this case had been convicted under Section 3(5) of the TADA Act, 1987, which made the mere membership of an organization an offence. The attention of the Court was also brought to a similar provision – Section 10 of the Unlawful Activities (Prevention) Act, 1967. The Court examined the constitutionality of these provisions in this case.

Markandey Katju, J.: "23. It has been submitted by the learned counsel for the Government before the TADThe Court that under many laws mere membership of an organisation is illegal e.g. Section 3(5) of the Terrorist and Disruptive Activities (Prevention), 1987; Section 10 of the Unlawful Activities (Prevention) Act, 1967, etc. In our opinion these statutory provisions cannot be read in isolation, but have to be read in consonance with the fundamental rights guaranteed by our Constitution.

24. The Constitution is the highest law of the land and no statute can violate it. If there is a statute which appears to violate it we can either declare it unconstitutional or we can read it down to make it constitutional. The first attempt of the court should be to try to sustain the validity of the statute by reading it down. This aspect has been discussed in great detail by this Court in *Govt. of A.P.* v. *P. Laxmi Devi* [(2008) 4 SCC 720] .

25. In this connection, we may refer to the Constitution Bench decision in *Kedar Nath Singh* v. *State of Bihar* [AIR 1962 SC 955 : (1962) 2 Cri LJ 103] where the Supreme Court was dealing with the challenge made to the constitutional validity of Section 124-A IPC (the law against sedition). In *Kedar Nath Singh case* [AIR 1962 SC 955 : (1962) 2 Cri LJ 103] this Court observed: (AIR p. 969, para 26)

> "26. … If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create

> disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make them unconstitutional in view of Article 19(1)(a) read with clause (2). It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence."
>
> (emphasis supplied)

26. Section 124-A which was enacted in 1870 was subsequently amended on several occasions. This Court observed in *Kedar Nath case* **[AIR 1962 SC 955 : (1962) 2 Cri LJ 103] that now that we have a Constitution having fundamental rights all statutory provisions including Section 124-A IPC have to be read in a manner so as to make them in conformity with the fundamental rights. Although according to the literal rule of interpretation we have to go by the plain and simple language of a provision while construing it, we may have to depart from the plain meaning if such plain meaning makes the provision unconstitutional.**

27. Similarly, we are of the opinion that the provisions in various statutes i.e. Section 3(5) of TADA or Section 10 of the Unlawful Activities (Prevention) Act which on their plain language make mere membership of a banned organisation criminal have to be read down and we have to depart from the literal rule of interpretation in such cases, otherwise these provisions will become unconstitutional as violative of Articles 19 and 21 of the Constitution. It is true that ordinarily we should follow the literal rule of interpretation while construing a statutory provision, but if the literal interpretation makes the provision unconstitutional we can depart from it so that the provision becomes constitutional."

IN THE BOMBAY HIGH COURT

State of Maharashtra v. Firoz @ Hamaja Abdul Hamid Sayyed

2015 SCC OnLine Bom 3132

P.V. Hardas & Shalini Phansalkar-Joshi, JJ.

The respondent challenged the concurrent applicability of MCOCA and UAPA, contending that the applicability of the provisions of the UAPA exclude the provisions of the MCOCA. However, the Bombay High Court held that an individual could be held liable for punishment under the provisions of the MCOCA regardless of the fact that he was also being tried for the offence punishable under the provisions of the UAPA.

P.V. Hardas, J.: "3. …The learned trial Judge has held/observed that, "Causing of bomb explosions would not convert a terrorist act or an act of insurgency into "promoting insurgency". The trial judge further recorded a finding that insurgency and promoting insurgency were two different aspects and the act alleged against the accused was an act of insurgency and, therefore, would not be an act promoting insurgency. The trial judge further recorded a finding that the act of terrorism or an act of terrorist as is defined under "The Unlawful Activities (Prevention) Act, 1967 (for short hereinafter referred to as "UAPA") would not be an offence under the M.C.O.C Act. The trial judge further recorded a finding that in cases of serial bomb blasts, it would not be a case of "organised crime" as it would not amount to committing any activity of promoting insurgency. The trial court came to the conclusion that once an act of insurgency had been committed, the said act cannot amount to promoting insurgency. The trial judge, therefore, with the above and other findings allowed the application filed by the accused and discharged all the accused from the provisions of the M.C.O.C Act.

4. Assailing the impugned order, Mr. Sunil Manohar, the learned Advocate General has urged before us that if two enactments have identical ingredients in respect of an offence, the accused could only be prosecuted under one enactment. However, if the ingredients of the offences under the two or more enactments are different, prosecution under both the Acts would be maintainable. The learned Advocate General further submitted before us that the ingredients of the offence under the UAPA and the M.C.O.C Act are distinct and separate, though there may be slight overlapping and, therefore, the bar under Section 26 of the General Clauses Act would

clearly not apply. The learned Advocate General amplified his submission by urging before us that the UAPA is directed against the terrorist act per se, while the M.C.O.C Act is directed against the crime syndicate which has a driving force of promoting insurgency. It is also urged before us by the learned Advocate General that the observation of the trial judge that a terrorist organisation would only promote acts of terrorism out of principle and for no other consideration is a fallacious observation.

5. Countering the submissions of the learned Advocate General, Mr. Pracha, learned counsel for the respondent has urged before us that perusal of the provisions of the UAPA as well as the perusal of the provisions of the M.C.O.C Act would indicate that the provisions of M.C.O.C Act would not apply to cases of terrorism or terrorist activity. It is also urged before us that in case there is a conflict between the Central Act and the State Act, the Central Act will obviously prevail. It is also urged before us that the (two) charge-sheets against the accused had not been filed before a competent court and on that count alone the provisions of the M.C.O.C Act would be inapplicable and the accused has been rightly discharged. Mr. Pracha, learned counsel for the respondent, has also urged before us that the Magistrate before whom the accused had been produced, had no jurisdiction to grant remand after the initial remand. The submission of Mr. Pracha, therefore, is that the provisions of the M.C.O.C Act would not apply.

6. Section 2(k) of the UAPA defines what is a "terrorist act". Section 2(k) reads thus:-

> "2(k) "terrorist act" has the meaning assigned to it in section 15, and the expressions "terrorism" and "terrorist" shall be construed accordingly."

Section 15 of the UAPA defines what is "Terrorist act" and Section 15 reads thus:

> "15. Terrorist act. - Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country, -
>
> (a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) or a

hazardous nature or by any other means of whatever nature to cause or likely to cause-

(i) death of, or injuries to, any person or persons; or

(ii) loss of, or damage to, or destruction of, property; or

(iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or

(iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or

(b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act.

Explanation.- For the purposes of this section, public functionary means the constitutional authorities and any other functionary notified in the Official Gazette by the Central Government as a public functionary."

7. Section 2(l) of the UAPA defines what is "terrorist gang" and Section 2(m) defines what is "terrorist organisation". Sections 2(l) and 2(m) read thus:-

"2(l) "terrorist gang" means any association, other than terrorist organisaton, whether systematic or otherwise, which is concerned with, or involved in, terrorist act.

2(m) "terrorist organisation" means an organisation

> listed in the Schedule or an organisation operating under the same name as an organisation so listed."
>
> Section 2(p) of the UAPA defines what is an "unlawful association" and Section 2(p) reads thus:
>
> "2(p) "unlawful association" means any association,-
>
> (i) which has for its object any unlawful activity, or which encourages or aids persons to undertake any unlawful activity, or of which the members undertake such activity; or
>
> (ii) which has for its object any activity which is punishable under section 153A or section 153B of the Indian Penal Code (45 of 1860), or which encourages or aids persons to undertake any such activity, or of which the members undertake any such activity:
>
> Provided that nothing contained in sub-clause (ii) shall apply to the State of Jammu and Kashmir;"

8. "Continue unlawful activity" [sic] is defined in Section 2(d) of the M.C.O.C Act, which reads thus:

> "2(d) "continuing unlawful activity" means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence."
>
> "Organised crime syndicate" is defined in Section 2(f) of the M.C.O.C Act, which reads thus:
>
> "2(f) "organised crime syndicate" means a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime.

As per the definition of "organised crime" in Section 2(e) of the M.C.O.C Act, an organised crime would mean any continuing unlawful activity either by an individual, singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate by use of violence or threat of violence or intimidation or coercion, or other unlawful means. The

aforesaid activity has to be with the objective of gaining pecuniary benefits or gaining undue economic or other advantage for himself or any other person or promoting insurgency.

The word "promoting insurgency" would be distinct from an insurgent act. Promoting insurgency would obviously mean all the steps which are taken for promotion of insurgency and it is immaterial whether an insurgent act has been committed pursuant to the promotion. Thus, the insurgent act may in a given case amount to culmination of the acts of promotion of insurgency. Thus, depending on the facts of the case an accused may be tried for promoting insurgency and insurgency itself. However, the acts leading to promotion of insurgency would be an independent and a distinct offence as against an act of insurgency which again is a separate and a distinct offence. Thus, any person, either singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate uses violence or threat of violence or intimidation or coercion or other unlawful means with the object of promoting insurgency, satisfying the other requirements of law, would be committing an offence under the M.C.O.C Act. The provisions of Section 15 of the UAPA, which defines a terrorist act, deal with the terrorist act as such i.e insurgency, but does not in any manner deal with any act promoting insurgency.

…

17. …[T]he provisions of the M.C.O.C Act and the UAPA are entirely different and both these Acts operate in spheres in respect of the offences specified therein. There may be some overlapping, but that by itself would be wholly insufficient to hold that prosecution under one Act would exclude the operation of the other Act. The M.C.O.C Act deals with the organised crime syndicate committing several illegal activities with the objective of promoting insurgency and other objectives, while the UAPA deals with punishing the act of insurgency per se. Since these two enactments operate in respect of different and distinct offences and a prosecution in respect of offences under both the enactments would certainly be maintainable. The finding of the trial court that the prosecution under the UAPA would exclude the operation of the provisions of the M.C.O.C Act is completely unsustainable. As pointed out by us above, any individual acting jointly or singly as a member of the organised crime syndicate or on behalf of the crime syndicate commits any of the illegal activity specified in the Act with the objective of promoting insurgency or for any other purpose, would be liable for punishment under the provisions of the M.C.O.C Act, regardless of the fact, whether the same accused is also being tried for the offence punishable under the provisions of the UAPA. It would be extremely hazardous to lay down a broad principle that the provisions UAPA exclude the provisions of the M.C.O.C Act."