IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO. 3924 OF 2023**

SUNITA DEVI ... APPELLANT(S)

VERSUS

THE STATE OF BIHAR & ANR. ... RESPONDENT(S)

**WITH**

**CRIMINAL APPEAL NOS. 3926-3927 OF 2023**

**CRIMINAL APPEAL NO. 3925 OF 2023**

- Concept of Fair Trial-- Code of Criminal Procedure, 1973—section 173, 207A, 251A, 207, 208, 209, 238, 227, 228, 230, 231, 233, 309, 465, 386, 235, 360, 354-- Witness Protection Scheme, 2018-- Rules for Video Conferencing for Courts, 2020--Rule 6, 8, 11---Probation of Offenders Act, 1958—section 3, 4, 6—separate appeals filed by informant and judicial officer against order of remittal passed by the Division Bench of the Patna High Court directing the Trial Court to conduct a de novo trial, while making certain observations against the Judicial officer, disapproving his approach in the conduct of the trial.

  *Held;*--At every stage of trial, including framing of charges, there was a constant denial of due opportunity and hearing to the accused--the accused was not able to consult his lawyer and was not even served with the copies, though his lawyer received the same before framing of the charges--receiving of documents by his lawyer would not be sufficient compliance, unless there was sufficient time given for accused to peruse them and thereafter have a consultation-- neither the provisions of the Witness Protection Scheme have been invoked nor the Rules for Video Conferencing for Courts were followed. The accused was merely shown the court’s proceedings and the writing was on the wall for him--it is only

appropriate that the accused has to be produced before the Court, rather than marking his appearance through video conferencing, the latter being an exception. While applying its mind, the Court has to rule out the possibility of any misuse--trial commenced and concluded in a single day—judicial officer was obviously acting in utmost haste--Every trial is a journey towards the truth and a Presiding Officer is expected to create a balanced atmosphere in the mind of the prosecution and the defence-- It would be humanly impossible to deliver the judgment within half an hour’s time running into 27 pages consisting of 59 paragraphs--The lawyer for the defence cannot fight against the court. It is the court which has to follow a balanced approach-- When the charges are very serious, Courts should be more circumspect in discharging their solemn duty--In an adversarial system of criminal law, which is being followed in India, when an accused is prosecuted on behalf of the State, the interest of a victim cannot be ignored-- right to fair hearing is a part of Article 21 of the Constitution of India. A trial should be a real one and, therefore, not a mere pretence. There shall never be an impression over the decision of a Court that it has predetermined and pre-judged a case even before starting a trial, or else, such a trial would become an empty formality--Court cannnot be lackadaisical in following the rules and procedures meant to ensure justice--Appeals dismissed with direction to The Government of India to file an affidavit on the feasibility of introducing a comprehensive sentencing policy.

2024 INSC 448

**REPORTABLE**

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**CRIMINAL APPEAL NOS. 3926-3927 OF 2023**

**CRIMINAL APPEAL NO. 3925 OF 2023**

**J U D G M E N T**

**M. M. Sundresh, J.**

1. Criminal Appeal No.3924 of 2023 has been filed by the informant, against the order of remittal passed by the Division Bench of the Patna High Court directing the Trial Court to conduct a *de novo* trial, while making certain observations against the Special Judge, disapproving his approach in the conduct of the trial. Criminal Appeal Nos.3926-3927 of 2023 have been filed by the learned Special Judge who conducted the trial and thereafter

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delivered the judgment. Criminal Appeal No.3925 of 2023 has been filed by the very same learned Judge, aggrieved over the remarks once again made by the High Court in an order of remittal, requesting the Hon'ble Chief Justice of the Patna High Court to consider whether the Judicial Officer should be assigned the function of holding sessions trial which have far reaching consequences, while sending him for fresh training to the State Judicial Academy.

2. Heard Learned Senior Counsel Mr. Vikas Singh for the appellant and Learned Senior Counsel Mr. C. U. Singh for the respondents. We have perused the documents filed along with the written submissions made by the parties.

3. Before going into the submissions on merit, we shall first deal with the provisions governing the legal position in conducting a trial.

**VIDEO CONFERENCING**

**Rule 6 of the Rule for Video Conferencing for Courts, 2020**

> **"6.** ***Application for Appearance, Evidence and Submission by Video Conferencing:***
> 6.1 Any party to the proceeding or witness, save and except where proceedings are initiated at the instance of the Court, may move a request for video conferencing. A party or witness seeking a video conferencing proceeding shall do so by making a request in the form prescribed in Schedule II.
> 6.2 Any proposal to move a request to for video conferencing should first be discussed with the other party or parties to the proceeding, except where it is not possible or inappropriate, for example in cases such as urgent applications.

6.3 On receipt of such a request and upon hearing all concerned persons, the Court will pass an appropriate order after ascertaining that the application is not filed with an intention to impede a fair trial or to delay the proceedings.
6.4 While allowing a request for video conferencing, the Court may also fix the schedule for convening the video conferencing.
6.5 In case the video conferencing event is convened for making oral submissions, the order may require the Advocate or party in person to submit written arguments and precedents, if any, in advance on the official email ID of the concerned Court.
6.6 Costs, if directed to be paid, shall be deposited within the prescribed time, commencing from the date on which the order convening proceedings through video conferencing is received."

## Rule 8 of the Rule for Video Conferencing for Courts, 2020

**"8.** ***Examination of persons*****.—**

8.3 Where the person being examined, or the accused to be tried, is in custody, the statement or, as the case may be, the testimony may be recorded through video conferencing. The Court shall provide adequate opportunity to the under-trial prisoner to consult in privacy with their counsel before, during and after the video conferencing."

## Rule 11 of the Rule for Video Conferencing for Courts, 2020

**"11.** ***Judicial remand, framing of charge, examination of accused and Proceedings under Section 164 of the CrPC.—***
11.1 The Court may, at its discretion, authorize detention of an accused, frame charges in a criminal trial under the CrPC by video conferencing. However, ordinarily judicial remand in the first instance or police remand shall not be granted through video conferencing save and except in exceptional circumstances for reasons to be recorded in writing.
11.2 The Court may, in exceptional circumstances, for reasons to be recorded in writing, examine a witness or an accused under Section 164 of the CrPC or record the statement of the accused under Section 313 CrPC through video conferencing, while observing all due precautions to ensure that the witness or the accused as the case maybe is free of any form of coercion, threat or undue influence. The Court shall ensure compliance with Section 26 of the Evidence Act."

4. The High Court of Patna, in exercise of the powers conferred under Articles 225 and 227 of the Constitution of India, 1950, framed rules and

procedures relating to the use of video conferencing for Courts. This was done with the concurrence of the State Government. "*Rules for Video Conferencing for Courts, 2020*" delineate the general principles governing video conferencing. Rule 6 provides for an application seeking video conferencing. When such an application is made, it has to be put to the other party followed by an appropriate order by the court indicating its satisfaction for granting approval. As per Rule 8, when the testimony of a person being examined is to be recorded through video conferencing, the court shall provide an adequate opportunity to the undertrial prisoner to consult in privacy with his counsel at different stages – before, during and after. Under Rule 11, an act of securing the presence of an accused through video conferencing at the time of judicial remand for the first time or police remand, is not a matter of course and, therefore, it is to be exercised only in exceptional circumstances for the reasons to be recorded in writing. Similar is the case *qua* recording of the statement of an accused under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "**CrPC, 1973**"), in which case, it is obligatory on the part of the Court to make sure that the accused is free from any form of coercion, threat or undue influence.

5. On a conjoint reading of the aforesaid rules, it is only appropriate that the accused has to be produced before the Court, rather than marking his

appearance through video conferencing, the latter being an exception. While applying its mind, the Court has to rule out the possibility of any misuse.

**WITNESS PROTECTION SCHEME, 2018**

6. Witness Protection Scheme, 2018 has been introduced in the interest of the administration of justice, while enforcing a criminal law. It is meant to take care of a situation where the witnesses are made to depose before the Court by completely abandoning the case of the prosecution, either by fear or favour. The scheme provides for a competent authority which is the Standing Committee headed by a District and Sessions Judge with the head of the Police in the District as a Member and the head of the Prosecution as its Member Secretary. A witness is at liberty to seek protection before the competent authority. The head of the police is expected to place before the competent authority a "*Threat Analysis Report*". The Scheme lays down in detail, the action proposed to be taken, once such an application is filed.

**FAIR TRIAL**

7. A fair trial would include due compliance of the procedure with adequate opportunities for all the stakeholders. Such procedural safeguards and compliance are to be kept in mind by the Court, as any deviation might

either impact the prosecution or the defence in a given case. In an adversarial system of criminal law, which is being followed in India, when an accused is prosecuted on behalf of the State, the interest of a victim cannot be ignored. An offence is presumed to be against societal values and, therefore, any crime would constitute a deviant act by the accused.

8. Every trial is a march towards the truth. It is the primary duty of the Court to search for the truth using the procedural law as its tool. Such a procedural law may have a substantive part extending certain inalienable rights to both, the accused and the victim. By non-compliance of the procedural law, justice cannot be allowed to derail. Anyone, who complains of an unfair trial, is duty bound to satisfy the Court that he stands prejudiced by it. This does not mean that a Court can be lackadaisical in following the rules and procedures meant to ensure justice.

9. A fair trial is the heart and soul of criminal jurisprudence. The principle of democracy lies in a fair trial. It is not only a statutory right, but also a human right, which would be violated when the safeguards provided under the Statute are not followed. The absence of a fair trial would seriously impair and violate the fundamental rights guaranteed under Articles 14 and 21 of the Constitution of India, 1950. What is important to be seen is the existence of a failure of justice, which is obviously one of fact. A mere

violation *per se* would not vitiate the trial, especially when the degree of substantivity exhibited in a statute is minimal.

10. The right to fair hearing is a part of Article 21 of the Constitution of India, 1950. A trial should be a real one and, therefore, not a mere pretence. There shall never be an impression over the decision of a Court that it has pre-determined and pre-judged a case even before starting a trial, or else, such a trial would become an empty formality.

**Precedents**

**J. Jayalalithaa v. State of Karnataka, (2014) 2 SCC 401**

> "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."

(emphasis supplied)

## Rattiram v. State of M.P., (2012) 4 SCC 516

**"39.** The question posed by us fundamentally relates to the non-compliance with such interdict. **The crux of the matter is whether it is such a substantial interdict which impinges upon the fate of the trial beyond any redemption or, for that matter it is such an omission or it is such an act that defeats the basic conception of fair trial. Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism.**

**40. In *Kalyani Baskar* v. *M.S. Sampoornam* [(2007) 2 SCC 258 : (2007) 1 SCC (Cri) 577] it has been laid down that "fair trial" includes fair and proper opportunities allowed by law to the accused to prove innocence and, therefore, adducing evidence in support of the defence is a valuable right and denial of that right means denial of fair trial. It is essential that the rules of procedure designed to ensure justice should be scrupulously followed and the courts should be zealous in seeing that there is no breach of them.**

41. In this regard, we may fruitfully reproduce the observations from *Manu Sharma* v. *State (NCT of Delhi)* [(2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385] wherein it has been so stated : (SCC pp. 79-80, para 197)

> "*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."

(emphasis supplied)

**42.** It would not be an exaggeration if it is stated that a "fair trial" is the heart of criminal jurisprudence and, in a way, an important facet of a democratic polity that is governed by rule of law. Denial of "fair trial" is crucifixion of human rights. It is ingrained in the concept of due process of law. **While emphasising the principle of "fair trial" and the practice of the same in the course of trial, it is obligatory on the part of the courts to see whether in an individual case or category of cases, because of non-compliance with a certain provision, reversion of judgment of conviction is inevitable or it is dependent on arriving at an indubitable conclusion that substantial injustice has in fact occurred."**

(emphasis supplied)

## Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158

**"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 a 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.

**xxx xxx xxx**

**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.**

**xxx xxx xxx**

**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."**

(emphasis supplied)

## PRESUMPTION OF INNOCENCE AND SPEEDY TRIAL

11. Unless a statute indicates otherwise, a criminal trial would commence with the presumption of innocence. This principle is of utmost importance as the Court embarks upon a trial in its quest for the truth. Though an accused

is charged with an offence, it is the Court which has to satisfy its conscience, upon the prosecution proving the charges levelled beyond reasonable doubt. For the aforesaid purpose, an accused will have to be given a decent setting to prove his innocence. Compliance with the procedural safeguard is meant for the aforesaid purpose. However, such procedural safeguards would not only ensure a fair trial, but also help the prosecution in confirming that it did its part fairly.

12. The concept of fair trial is not a vague idea, but a decisive one. While a speedy trial is in the best interest of everyone, including the society, the pace can only be set through the procedural mechanism, and it cannot be done at the mere dictate of the Court in ignorance of the procedural law. At the same time, care has to be taken with the aid of the law, to prevent the miscarriage of justice, when the delay is caused on purpose. Thus, a speedy trial, being a facet of fair trial, cannot be permitted to destroy the latter by its recklessness. Any anxiety on the part of the Court, either to expedite the trial in contravention of law, or delay it unnecessarily, would seriously impede fair trial. In such a case, either the prosecution or the defence would bear the consequences.

**Precedents**

**Mohd. Hussain v. State (Govt. of NCT of Delhi), (2012) 9 SCC 408**

**"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."**

(emphasis supplied)

## State of Haryana v. Ram Mehar, (2016) 8 SCC 762

"24. The decisions of this Court when analysed appositely clearly convey that the concept of the fair trial is not in the realm of abstraction. It is not a vague idea. It is a concrete phenomenon. It is not rigid and there cannot be any straitjacket formula for applying the same. On occasions it has the necessary flexibility. Therefore, it cannot be attributed or clothed with any kind of rigidity or flexibility in its application. It is because fair trial in its ambit requires fairness to the accused, the victim and the collective at large. Neither the accused nor the prosecution nor the victim which is a part of the society can claim absolute predominance over the other. Once absolute predominance is recognised, it will have the effect potentiality to bring in an anarchical disorder in the conducting of trial defying established legal norm. There should be passion for doing justice but it must be commanded by reasons and not propelled by any kind of vague instigation. It would be dependent on the fact situation; established norms and recognised principles and eventual appreciation of the factual scenario in entirety. There may be cases which may command

compartmentalisation but it cannot be stated to be an inflexible rule. Each and every irregularity cannot be imported to the arena of fair trial. There may be situations where injustice to the victim may play a pivotal role. The centripodal purpose is to see that injustice is avoided when the trial is conducted. Simultaneously the concept of fair trial cannot be allowed to such an extent so that the systemic order of conducting a trial in accordance with CrPC or other enactments get mortgaged to the whims and fancies of the defence or the prosecution. The command of the Code cannot be thrown to winds. In such situation, as has been laid down in many an authority, the courts have significantly an eminent role. A plea of fairness cannot be utilised to build castles in Spain or permitted to perceive a bright moon in a sunny afternoon. It cannot be acquiesced to create an organic disorder in the system. It cannot be acceded to manure a fertile mind to usher in the nemesis of the concept of trial as such."

**Talab Haji Hussain v. Madhukar Purshottam Mondkar, 1958 SCR 1226 (at page 1232)**

"Now it is obvious that the primary object of criminal procedure is to ensure a fair trial of accused persons. Every criminal trial begins with the presumption of innocence in favour of the accused; and provisions of the Code are so framed that a criminal trial should begin with and be throughout governed by this essential presumption; but a fair trial has naturally two objects in view; it must be fair to the accused and must also be fair to the prosecution. The test of fairness in a criminal trial must be judged from this dual point of view. It is therefore of the utmost importance that, in a criminal trial, witnesses should be able to give evidence without any inducement or threat either from the prosecution or the defence. A criminal trial must never be so conducted by the prosecution as would lead to the conviction of an innocent person; similarly the progress of a criminal trial must not be obstructed by the accused so as to lead to the acquittal of a really guilty offender. The acquittal of the innocent and the conviction of the guilty are the objects of a criminal trial and so there can be no possible doubt that, if any conduct on the part of an accused person is likely to obstruct a fair trial, there is occasion for the exercise of the inherent power of the High Courts to secure the ends of justice. …"

## THE CODE OF CRIMINAL PROCEDURE, 1973 (CrPC, 1973)

13. The CrPC, 1973, though a Code dealing with procedural law, is embellished with numerous substantive elements in it.

The substantive elements give effect to Articles 14, 20, 21 and 22 of the Constitution of India, 1950. Any Court that deals with a criminal case, starting at the magisterial level, is duty-bound to give effect to the CrPC, 1973 which would only mean the protection of rights conferred under the Constitution of India, 1950. To put it differently, the CrPC, 1973 is a handbook introduced to maintain and uphold fair play in a criminal case, starting with the investigation and ending with the acquittal or a conviction leading to a sentence.

## SUPPLY OF DOCUMENTS

### Section 173 of the Code of Criminal Procedure, 1898

> **"173. Report of police officer.—**
>
> **xxx xxx xxx**
>
> (4) After forwarding a report under this section, the officer-in-charge of the police station shall, before the commencement of, the inquiry or trial, furnish or cause to be furnished to the accused, free of cost, a copy of the report forwarded under sub-section (1) and of the first information report recorded under Section 154 and of all other documents or relevant extracts thereof, on which the prosecution proposes to rely, including the statements and confessions, if any recorded under Section 164 and the statements recorded under sub-section (3) of Section 161 of all the persons whom the prosecution proposes to examine as its witnesses."

### Section 207A of the Code of Criminal Procedure, 1898

> **"207A. Procedure to be adopted in proceedings instituted on police report.**
>
> **xxx xxx xxx**
>
> (3) At the commencement of the inquiry, the Magistrate shall, when the accused appears or is brought before him, satisfy himself that the documents referred to in Section 173 have been furnished to the accused

and if he finds that the accused has not been furnished with such documents or any of them, he shall cause the same to be so furnished."

## Section 251A of the Code of Criminal Procedure, 1898

**"251A. Procedure to be adopted in cases instituted on police report**.

(1) When, in any case instituted on a police report, the accused appears or is brought before a Magistrate at the commencement of the trial, such Magistrate shall satisfy himself that the documents referred to in Section 173 have been furnished to the accused, and if he finds that the accused has not been furnished with such documents or any of them, he shall cause them to be so furnished."

## Section 207 of the CrPC, 1973

**"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."

## Section 208 of the CrPC, 1973

**"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, of 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."

## Section 209 of the CrPC, 1973

**"209. Commitment of case to Court of Session when offence is triable exclusively by it**.-

When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall—

(*a*) commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(*b*) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(*c*) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(*d*) notify the Public Prosecutor of the commitment of the case to the Court of Session."

**Section 238 of the CrPC, 1973**

> **"238. Compliance with Section 207**.
>
> When, in any warrant-case instituted on a police report, the accused appears or is brought before a Magistrate at the commencement of the trial, the Magistrate shall satisfy himself that he has complied with the provisions of Section 207."

14. To understand these provisions, one has to go back to the Code of Criminal Procedure, 1898 (hereinafter referred to as the "**CrPC, 1898**"). Section 173 of the CrPC, 1898 fixes the responsibility on the officer in charge of police station to serve a copy of the report of the Police Officer and of the First Information Report, along with the requisite documents, on the accused. As per Section 207A of the CrPC, 1898 a Magistrate shall, after the commencement of the inquiry, satisfy himself that there was due compliance of Section 173 of the CrPC 1898 by furnishing all the requisite documents on the accused. Thus, the Magistrate was expected to find out due compliance on the part of the investigating agency and, if not done, must direct it to do so. A similar procedure was adopted under Section 251A of the CrPC, 1898.

15. Section 207 of the CrPC, 1973 has dispensed with the role of the investigating agency in serving the requisite copies on the accused, replacing it with that of the Magistrate. Additionally, the Magistratre is directed to make sure that due compliance is made at the earliest. Section 208 of the CrPC, 1973 reiterates the aforesaid position in cases instituted

otherwise than on a police report and triable by the Court of Sessions. It is only thereafter, that the commitment of the case to a Court of Sessions, regarding an offence exclusively triable by it, shall take place.

16. Section 238 of the CrPC, 1973 mandates that while dealing with a warrant case instituted on a police report, the Magistrate shall satisfy himself that he has complied with the provisions of Section 207 of the CrPC, 1973. In all these cases, due compliance is to be done when the accused is produced or appears before the Magistrate. Therefore, Section 238 of the CrPC, 1973 reiterates the bounden duty of a Magistrate and, if not done, to be complied with at the time of commencement of the trial. Such a reiteration would only reinforce a renewed emphasis on due compliance being a facet of fair play. An accused shall be put to notice on the incriminating materials leading to the charges framed against him. As stated, the obligation so imposed is not only on the supply of the relevant documents, but such compliance should be at the appropriate stage so that it does not brook any delay. The idea is to enable an accused to face the trial by thoroughly understanding the case stated against him. However, a mere non-supply of a part of the documents would not lead to the trial being vitiated, unless an accused substantiates before the Court that it has caused prejudice to him. Obviously, it is ultimately for the Court to come to an appropriate conclusion by an adequate assessment of facts placed before it.

## Precedents

### Naresh Kumar Yadav v. Ravindra Kumar, (2008) 1 SCC 632

> **"13. The documents in terms of Sections 207 and 208 are supplied to make the accused aware of the materials which are sought to be utilised against him. The object is to enable the accused to defend himself properly. The idea behind the supply of copies is to put him on notice of what he has to meet at the trial. The effect of non-supply of copies has been considered by this Court in *Noor Khan* v. *State of Rajasthan* [AIR 1964 SC 286] and *Shakila Abdul Gafar Khan* v. *Vasant Raghunath Dhoble* [(2003) 7 SCC 749 : 2003 SCC (Cri) 1918]. It was held that non-supply is not necessarily prejudicial to the accused.** The court has to give a definite finding about the prejudice or otherwise. Even the supervision notes cannot be utilised by the prosecution as a piece of material or evidence against the accused. If any reference is made before any court to the supervision notes, as has been noted above they are not to be taken note of by the court concerned. As many instances have come to light when the parties, as in the present case, make reference to the supervision notes, the inevitable conclusion is that they have unauthorised access to the official records."
>
> **(emphasis supplied)**

### P. Gopalkrishnan v. State of Kerala, (2020) 9 SCC 161

> **"21. Be that as it may, furnishing of documents to the accused under Section 207 of the 1973 Code is a facet of right of the accused to a fair trial enshrined in Article 21 of the Constitution…**
>
> 22. Similarly, in *V.K. Sasikala* v. *State* [(2012) 9 SCC 771 : (2013) 1 SCC (Cri) 1010] , this Court held as under : (SCC p. 788, para 21)
>
> > "*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 [*V.K. Sasikala* v. *State*, 2012 SCC OnLine Kar 9209] . *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 [*V.K. Sasikala* v. *State*, 2012 SCC OnLine Kar 9209] 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."
>
> (emphasis supplied)
>
> xxx xxx xxx
>
> 38. It is crystal clear that all documents including "electronic record" produced for the inspection of the court along with the police report and which prosecution proposes to use against the accused must be furnished to the accused as per the mandate of Section 207 of the 1973 Code. The concomitant is that the contents of the memory card/pen-drive must be furnished to the accused, which can be done in the form of cloned copy of the memory card/pen-drive. **It is cardinal that a person tried for such a serious offence should be furnished with all the material and evidence in advance, on which the prosecution proposes to rely against him during the trial. Any other view would not only impinge upon the statutory mandate contained in the 1973 Code, but also the right of an accused to a fair trial enshrined in Article 21 of the Constitution of India."**
>
> (emphasis supplied)

17. We make it clear that the right of an accused would arise, in getting the documents relied upon by the prosecution, after taking cognizance and before framing of the charges. Therefore, between taking cognizance and framing of charges, an accused should have sufficient window to go through the documents supplied to him as he is entitled to be heard at a later stage.

## DISCHARGE

### Section 227 of the CrPC, 1973

> **"227. Discharge.-**
>
> If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

18. Before the stage of framing of charges, the Judge is expected to discharge an accused, if he is of the considered view that there is no sufficient ground to proceed against the accused. This being a judicial exercise, his discretion must be supported by adequate reasons. In discharge of his powers, he has to consider the records and documents submitted by the prosecution vis-à-vis the arguments adduced by both sides. The words "*after hearing the submissions of the accused*" would imply an effective and meaningful hearing. It is not a mere procedural compliance. A Judge has to satisfy himself that the accused had reasonable time to ponder over and prepare his arguments before seeking a discharge. At this stage, an accused gets a substantive right as there is a window of opportunity for him to get discharged, instead of facing a prolonged trial. Such an opportunity can only be exercised by not only supplying the documents needed, but also giving adequate and sufficient time to the defence to place its case. Granting time for the aforesaid purpose is the sole discretion of the Court.

19. The duty of the Court is to see as to whether the materials produced by the prosecution are reasonably related to the offence attributed against the accused. What is to be seen is the existence of a prima facie case. The case is at a pre-framing stage and therefore, it cannot be a full-fledged pre-trial. Adequacy and sufficiency are the relevant factors to be seen. The test is one of the degree of probability.

20. Section 227 of the CrPC, 1973, in fact, is a provision which gives effect to Article 22 of the Constitution of India, 1950. The right of an accused to be heard is inalienable. For exercising this right, there has to be due consultation. Such a right can never be termed as a procedural one. It would be a ground to challenge the proceeding at that stage, but the same would not vitiate the trial. Suffice it is to reiterate that it is the duty of the court to ensure that the accused is given sufficient opportunities to consult his lawyer.

**Precedents**

**Anokhilal v. State of M.P., (2019) 20 SCC 196**

> **"22. The provisions concerned viz. Sections 227 and 228 of the Code contemplate framing of charge upon consideration of the record of the case and the documents submitted therewith, and after "hearing the submissions of the accused and the prosecution in that behalf". If the hearing for the purposes of these provisions is to be meaningful, and not just a routine affair, the right under the said provisions stood denied to the appellant.**

**23. In our considered view, the trial court on its own, ought to have adjourned the matter for some time so that the Amicus Curiae could have had the advantage of sufficient time to prepare the matter. The approach adopted by the trial court, in our view, may have expedited the conduct of trial, but did not further the cause of justice. Not only were the charges framed the same day as stated above, but the trial itself was concluded within a fortnight thereafter. In the process, the assistance that the appellant was entitled to in the form of legal aid, could not be real and meaningful.**

**xxx xxx xxx**

26. Expeditious disposal is undoubtedly required in criminal matters and that would naturally be part of guarantee of fair trial. However, the attempts to expedite the process should not be at the expense of the basic elements of fairness and the opportunity to the accused, on which postulates, the entire criminal administration of justice is founded. In the pursuit for expeditious disposal, the cause of justice must never be allowed to suffer or be sacrificed. What is paramount is the cause of justice and keeping the basic ingredients which secure that as a core idea and ideal, the process may be expedited, but fast tracking of process must never ever result in burying the cause of justice.

**xxx xxx xxx**

**31. Before we part, we must lay down certain norms so that the infirmities that we have noticed in the present matter are not repeated:**

**xxx xxx xxx**

**31.3. Whenever any learned counsel is appointed as Amicus Curiae, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard-and-fast rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.**

**31.4. Any learned counsel, who is appointed as Amicus Curiae on behalf of the accused must normally be granted to have meetings and discussion with the accused concerned. Such interactions may prove to be helpful as was noticed in *Imtiyaz***

***Ramzan Khan* [*Imtiyaz Ramzan Khan* v. *State of Maharashtra*, (2018) 9 SCC 160 : (2018) 3 SCC (Cri) 721] ."**

(emphasis supplied)

## Kewal Krishan v. Suraj Bhan, 1980 (Supp) SCC 499

**"11.** The proposition that in cases instituted on complaint in regard to an offence exclusively triable by the Court of Session, the standard for ascertaining whether or not the evidence collected in the preliminary inquiry discloses sufficient grounds for proceeding against the accused is lower than the one to be adopted at the stage of framing charges in a warrant case triable by the Magistrate, is now evident from the scheme of the new Code of 1973. Section 209 of the Code of 1973 dispenses with the inquiry preliminary to commitment in cases triable exclusively by a Court of Session, irrespective of whether such a case is instituted on a criminal complaint or a police report. Section 209 says: "When in a case instituted on a police report or otherwise the accused appears or is brought before the magistrate and it appears to the magistrate that the offence is triable exclusively by the Court of Session, he shall commit the case to the Court of Session." If the Committing Magistrate thinks that it is not necessary to commit the accused who may be on bail to custody, he may not cancel the bail. This has been made clear by the words "subject to the provisions of this Code relating to bail" occurring in clause (*b*) of Section 209. Therefore, if the accused is already on bail, his bail should not be arbitrarily cancelled. **Section 227 of the Code of 1973 has made another beneficent provision to save the accused from prolonged harassment which is a necessary concomitant of a protracted trial. This section provides that if upon considering the record of the case, the documents submitted with it and the submissions of the accused and the prosecution, the judge is not convinced that there is sufficient ground for proceeding against the accused, he has to discharge the accused under this section and record his reasons for so doing."**

(emphasis supplied)

## Hardeep Singh v. State Of Punjab, (2014) 3 SCC 92

**"100.** However, there is a series of cases wherein this Court **while dealing with the provisions of Sections 227, 228, 239, 240, 241, 242 and 245 CrPC, has consistently held that the court at the stage of**

**framing of the charge has to apply its mind to the question whether or not there is any ground for presuming the commission of an offence by the accused. The court has to see as to whether the material brought on record reasonably connect the accused with the offence. Nothing more is required to be enquired into. While dealing with the aforesaid provisions, the test of prima facie case is to be applied. The court has to find out whether the materials offered by the prosecution to be adduced as evidence are sufficient for the court to proceed against the accused further.** (Vide *State of Karnataka* v. *L. Muniswamy* [(1977) 2 SCC 699 : 1977 SCC (Cri) 404 : AIR 1977 SC 1489] , *All India Bank Officers' Confederation* v. *Union of India* [(1989) 4 SCC 90 : 1989 SCC (L&S) 627 : AIR 1989 SC 2045] , *Stree Atyachar Virodhi Parishad* v. *Dilip Nathumal Chordia* [(1989) 1 SCC 715 : 1989 SCC (Cri) 285] , *State of M.P.* v. *Krishna Chandra Saksena* [(1996) 11 SCC 439 : 1997 SCC (Cri) 35] and *State of M.P.* v. *Mohanlal Soni* [(2000) 6 SCC 338 : 2000 SCC (Cri) 1110 : AIR 2000 SC 2583] .)

101. In *Dilawar Balu Kurane* v. *State of Maharashtra* [(2002) 2 SCC 135 : 2002 SCC (Cri) 310] , this Court while dealing with the provisions of Sections 227 and 228 CrPC, placed a very heavy reliance on the earlier judgment of this Court in *Union of India* v. *Prafulla Kumar Samal* [(1979) 3 SCC 4 : 1979 SCC (Cri) 609 : AIR 1979 SC 366] and held that while considering the question of framing the charges, the court may weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out and whether the materials placed before the court disclose *grave suspicion* against the accused which has not been properly explained. In such an eventuality, the court is justified in framing the charges and proceeding with the trial. The court has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but the court should not make a roving enquiry into the pros and cons of the matter and weigh evidence as if it is conducting a trial."

(emphasis supplied)

## Sajjan Kumar v. CBI, (2010) 9 SCC 368

**"*Exercise of jurisdiction under Sections 227 and 228 CrPC***

**21.** On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge:

(*i*) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(*ii*) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly

explained, the court will be fully justified in framing a charge and proceeding with the trial.

(*iii*) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(*iv*) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(*v*) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(*vi*) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(*vii*) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.

xxx xxx xxx

**24.** At the stage of framing of charge under Section 228 CrPC or while considering the discharge petition filed under Section 227, it is not for the Magistrate or the Judge concerned to analyse all the materials including pros and cons, reliability or acceptability, etc. It is at the trial, the Judge concerned has to appreciate their evidentiary value, credibility or otherwise of the statement, veracity of various documents and is free to take a decision one way or the other."

## Mohd. Ajmal Amir Kasab v. State of Maharashtra, (2012) 9 SCC 1

"465. All this development clearly indicates the direction in which the law relating to access to lawyers/legal aid has developed and continues to develop. It is now rather late in the day to contend that Article 22(1) is merely an enabling provision and that the right to be defended by a legal

practitioner comes into force only on the commencement of trial as provided under Section 304 CrPC.

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471. The resounding words of the Court in *Khatri (2)* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228] are equally, if not more, relevant today than when they were first pronounced. In *Khatri (2)* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228] the Court also alluded to the reasons for the urgent need of the accused to access a lawyer, these being the indigence and illiteracy of the vast majority of Indians accused of crimes.

472. As noted in *Khatri (2)* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228] as far back as in 1981, a person arrested needs a lawyer at the stage of his first production before the Magistrate, to resist remand to police or jail custody and to apply for bail. He would need a lawyer when the charge-sheet is submitted and the Magistrate applies his mind to the charge-sheet with a view to determine the future course of proceedings. He would need a lawyer at the stage of framing of charges against him and he would, of course, need a lawyer to defend him in trial.

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

**475.** It needs to be clarified here that the right to consult and be defended by a legal practitioner is not to be construed as sanctioning or permitting the presence of a lawyer during police interrogation. **According to our system of law, the role of a lawyer is mainly focused on court proceedings. The accused would need a lawyer to resist remand to police or judicial custody and for granting of bail; to clearly explain to him the legal consequences in case he intended to make a confessional statement in terms of Section 164 CrPC; to represent him when the court examines the charge-sheet submitted by the**

**police and decides upon the future course of proceedings and at the stage of the framing of charges; and beyond that, of course, for the trial. It is thus to be seen that the right to access to a lawyer in this country is not based on the *Miranda* [(1966) 16 L Ed 2d 694 : 384 US 436] principles, as protection against self-incrimination, for which there are more than adequate safeguards in Indian laws. The right to access to a lawyer is for very Indian reasons; it flows from the provisions of the Constitution and the statutes, and is only intended to ensure that those provisions are faithfully adhered to in practice.**

xxx xxx xxx

**477. Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the constitutional duty of the court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused (see *Suk Das* v. *UT of Arunachal Pradesh* [(1986) 2 SCC 401 : 1986 SCC (Cri) 166] ).**

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

(emphasis supplied)

## Section 228 of the CrPC, 1973

**"228. Framing of charge.-**

(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which--

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, [or any other Judicial Magistrate of

> the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate] shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;
> (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.
>
> (2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

21. Under sub-section (2) of Section 228 of the CrPC, 1973, the Judge, while framing any charge, is ordained to read and explain it to the accused. Thereafter, the accused shall be asked as to whether he pleads guilty of the offence charged or claims to be tried. As a matter of routine, video conferencing must be avoided, unless there are compelling reasons to do so. This is an occasion where the Judge avoids the lawyer and keeps in touch with the accused directly. He records the response of the accused. Under those circumstances, unless a situation so warrants otherwise, the presence of the accused shall be ensured.

## EXAMINATION OF WITNESSES

## Section 230 of the CrPC, 1973

> **"230. Date for prosecution evidence .-**
>
> If the accused refuses to plead, or does not plead, or claims to be tried or is not convicted under section 229, the Judge shall fix a date for the

> examination of witnesses, and may, on the application of the prosecution, issue any process for compelling the attendance of any witness or the production of any document or other thing."

**Section 231 of the CrPC, 1973**

> **"231. Evidence for prosecution.-**
>
> (1) On the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution.
>
> (2) The Judge may, in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination."

22. These two provisions are to be read in consonance with each other. At this stage, the Court is concerned only with the prosecution's evidence. To ensure fair play, as a normal practice, the Court has to fix a date for the examination of the witnesses. The idea is to complete the examination-in-chief and cross examination, both at the same time. While fixing the date, the Court is expected to take into consideration the relative convenience of the parties, though the discretion lies with it. Sub-section (1) of Section 231 of the CrPC, 1973 fixes a responsibility on the Court, the prosecution and the defence to go ahead with the examination of witnesses on the date so fixed. Therefore, even for this reason, the Court shall ascertain and then decide a convenient date for both sides, while being conscious about any attempt to drag the trial. Completion of such examination is a matter of rule as any deferment can at best be an exception, to the discretion of the Court. Obviously, the use of such a discretion, being judicial in nature, has

to be on a case-to-case basis. Suffice it is to state that a balance has to be struck between the competing interests.

**State of Kerala v. Rasheed, (2019) 13 SCC 297**

> **"22. <u>There cannot be a straitjacket formula providing for the grounds on which judicial discretion under Section 231(2) CrPC can be exercised. The exercise of discretion has to take place on a case-to-case basis. The guiding principle for a Judge under Section 231(2) CrPC is to ascertain whether prejudice would be caused to the party seeking deferral, if the application is dismissed</u>.**
>
> **23. <u>While deciding an application under Section 231(2) CrPC, a balance must be struck between the rights of the accused, and the prerogative of the prosecution to lead evidence. The following factors must be kept in consideration</u>:**
>
> (*i*) possibility of undue influence on witness(es);
> (*ii*) possibility of threats to witness(es);
> (*iii*) possibility that non-deferral would enable subsequent witnesses giving evidence on similar facts to tailor their testimony to circumvent the defence strategy;
> (*iv*) possibility of loss of memory of the witness(es) whose examination-in-chief has been completed;
> (*v*) occurrence of delay in the trial, and the non-availability of witnesses, if deferral is allowed, in view of Section 309(1) CrPC [ "**309. *Power to postpone or adjourn proceedings***.—(1) In every inquiry or trial the proceedings 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:"See also *Vinod Kumar* v. *State of Punjab*, (2015) 3 SCC 220 : (2015) 2 SCC (Cri) 226 : (2015) 1 SCC (L&S) 712; and *S.J. Chaudhary* v. *State (UT of Delhi)*, (1984) 1 SCC 722 : 1984 SCC (Cri) 163.] .
>
> These factors are illustrative for guiding the exercise of discretion by a Judge under Section 231(2) CrPC.
>
> **24. <u>The following practice guidelines should be followed by trial courts in the conduct of a criminal trial, as far as possible</u>:**
> **24.1.** A detailed case-calendar must be prepared at the commencement of the trial after framing of charges.

**24.2.** The case-calendar must specify the dates on which the examination-in-chief and cross-examination (if required) of witnesses is to be conducted.
**24.3.** The case-calendar must keep in view the proposed order of production of witnesses by parties, expected time required for examination of witnesses, availability of witnesses at the relevant time, and convenience of both the prosecution as well as the defence, as far as possible.
**24.4.** Testimony of witnesses deposing on the same subject-matter must be proximately scheduled.
**24.5.** The request for deferral under Section 231(2) CrPC must be preferably made before the preparation of the case-calendar.
**24.6.** The grant for request of deferral must be premised on sufficient reasons justifying the deferral of cross-examination of each witness, or set of witnesses.
**24.7.** While granting a request for deferral of cross-examination of any witness, the trial courts must specify a proximate date for the cross-examination of that witness, after the examination-in-chief of such witness(es) as has been prayed for.
**24.8.** The case-calendar, prepared in accordance with the above guidelines, must be followed strictly, unless departure from the same becomes absolutely necessary.
**24.9.** In cases where trial courts have granted a request for deferral, necessary steps must be taken to safeguard witnesses from being subjected to undue influence, harassment or intimidation."

(emphasis supplied)

## Section 233 of the CrPC, 1973

**"233. Entering upon defence.-**

(1) Where the accused is not acquitted under section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."

23. At this stage, the accused will be called upon to enter on his defence and adduce any evidence. If the accused applies for the issue of process to compel the attendance of any witnesses or production of document, the Judge shall issue such process. It is only when he comes to the conclusion, that an application filed for the aforesaid purpose on behalf of the defence is vexatious or filed to delay the proceedings or for defeating the ends of justice, it has to be refused. We have no hesitation in holding that when an application is moved invoking Section 233 of the CrPC, 1973 the Judge is duty bound to issue process, unless he is satisfied on the existence of the three elements as aforesaid. Any denial would be an affront to the concept of a fair trial.

**Section 309 of the CrPC, 1973**

> **"309. Power to postpone or adjourn proceedings**.— (1) In every inquiry or trial the proceedings 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:
>
> Provided that when the inquiry or trial relates to an offence under Section 376, Section 376A, Section 376AB, Section 376B, Section 376C, Section 376D, Section 376DA or Section 376DB of the Indian Penal Code (45 of 1860), the inquiry or trial shall be completed within a period of two months from the date of filing of the charge sheet.
>
> (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 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."

24. This section places emphasis on the continuation of the trial as any obstruction and delay would hamper the process of justice. In a criminal trial, continuity is of utmost importance, as it not only helps the court to concentrate, but ensures quality justice. However, the courts are not powerless in granting adjournments if the circumstances so warrant. Therefore, despite a bar under the second and fourth proviso to Section 309, an adjournment can be granted, provided the party who seeks so,

satisfies the court. After all, a speedy trial enures to the benefit of the accused.

**State of UP v. Shambu Nath Singh (2001) 4 SCC 667**

> **"11. The first sub-section mandates on the trial courts that the proceedings shall be held expeditiously but the words "as expeditiously as possible" have provided some play at the joints and it is through such play that delay often creeps in the trials. Even so, the next limb of the sub-section sounded for a more vigorous stance to be adopted by the court at a further advanced stage of the trial. That stage is when examination of the witnesses begins. The legislature which diluted the vigour of the mandate contained in the initial limb of the sub-section by using the words "as expeditiously as possible" has chosen to make the requirement for the next stage (when examination of the witnesses has started) to be quite stern. Once the case reaches that stage the statutory command is that such examination "shall be continued from day to day until all the witnesses in attendance have been examined". The solitary exception to the said stringent rule is, if the court finds that adjournment "beyond the following day to be necessary" the same can be granted for which a condition is imposed on the court that reasons for the same should be recorded.** Even this dilution has been taken away when witnesses are in attendance before the court. In such situation the court is not given any power to adjourn the case except in the extreme contingency for which the second proviso to sub-section (2) has imposed another condition,
>
> "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*".
>
> (emphasis supplied)
>
> **12.** Thus, the legal position is that once examination of witnesses started, the court has to continue the trial from day to day until all witnesses in attendance have been examined (except those whom the party has given up). **The court has to record reasons for deviating from the said course. Even that is forbidden when witnesses are present in court, as the requirement then is that the court has to examine them. Only if there are "special reasons", which reasons should find a place in the order for adjournment, that alone can confer jurisdiction on the court to adjourn the case without examination of witnesses who are present in court."**
>
> (emphasis supplied)

**Section 465 of the CrPC, 1973**

> **"465. Finding or sentence when reversible by reason of error, omission or irregularity.—**
>
> (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation of revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.
>
> (2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

25. This provision is meant to uphold the decision of the trial court, even in a case where there is an apparent irregularity in procedure. If the evidence available has been duly taken note of by the Court, then such a decision cannot be reversed on account of a mere technical error. This is based on the principle that a procedural law is the handmaid of justice. However, the ultimate issue is as to whether such an error or omission has constituted a failure of justice, which is one of fact, to be decided on the touchstone of prejudice.

26. If the Appellate Court is of the view that there is a continued non-compliance of the substantial provisions of the CrPC, 1973 then the rigour of Section 465 of the CrPC, 1973 would not apply and, in that case, an order of remand would be justified.

## State of M.P. v. Bhooraji, (2001) 7 SCC 679

**"15.** A reading of the section makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the legislature as possible occurrences in criminal courts. Yet the legislature disfavoured axing down the proceedings or to direct repetition of the whole proceedings afresh. Hence, the legislature imposed a prohibition that **unless such error, omission or irregularity has occasioned "a failure of justice" the superior court shall not quash the proceedings merely on the ground of such error, omission or irregularity.**

**16. What is meant by "a failure of justice" occasioned on account of such error, omission or irregularity? This Court has observed in *Shamnsaheb M. Multtani* v. *State of Karnataka* [(2001) 2 SCC 577: 2001 SCC (Cri) 358] thus: (SCC p. 585, para 23)**

**"*23.* We often hear about 'failure of justice' and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression 'failure of justice' would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in *Town Investments Ltd.* v. *Deptt. of the Environment* [(1977) 1 All ER 813: 1978 AC 359: (1977) 2 WLR 450 (HL)]). The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage."**

(emphasis supplied)

## Darbara Singh v. State of Punjab, (2012) 10 SCC 476

**21.** "***Failure of justice" is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be "failure of justice"; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be overemphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under the Indian criminal jurisprudence. "Prejudice" is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that***

***the same has defeated the rights available to him under criminal jurisprudence, then the accused can seek benefit under the orders of the court***. (Vide *Rafiq Ahmed* v. *State of U.P.* [(2011) 8 SCC 300: (2011) 3 SCC (Cri) 498: AIR 2011 SC 3114] , SCC p. 320, para 36; *Rattiram* v. *State of M.P.* [(2012) 4 SCC 516 : (2012) 2 SCC (Cri) 481] and *Bhimanna* v. *State of Karnataka* [(2012) 9 SCC 650] .)"

(emphasis supplied)

## Kottayya v. Emperor, AIR (34) 1947 Privy Council 67

"[7] Even on this basis, Mr. Pritt for the accused has argued that a breach of a direct and important provision of the Code of Criminal Procedure cannot be cured, but must lead to the quashing of the conviction. The Crown, on the other hand, contends that the failure to produce the note-book in question amounted merely to an irregularity in the proceedings which can be cured under the provisions of S. 537 Criminal P.C. if the court is satisfied that such irregularity has not in fact occasioned any failure of justice. There are, no doubt, authorities in India which lend some support to Mr. Pritt's contention, and reference may be made to 49 ALL. 475 [('27) 49 All. 475 : 14 A.I.R. 1927 All. 350 : 100 I.C. 371, Tirkha v Nanak], in which the court expressed the view that S. 537, Criminal P.C., applied only to errors of procedure arising out of mere inadvertence, and not to cases of disregard of, or disobedience to, mandatory provisions of the Code, and to 45 Mad. 820 [('22) 45 Mad. 820 : 9 A.I.R. 1922 Mad. 512 : 71 I.C. 252, In re Madura Muthu Vannian.], in which the view was expressed that any failure to examine the accused under S. 342, Criminal P.C., was fatal to the validity of the trial and could not be cured under S. 537. In their Lordships' opinion this argument is based on too narrow a view of the operation of S. 537. **When a trial is conducted in a manner different from that prescribed by the Code as in 28 I.A. 257 [('01) 28 I.A. 257 : 25 Mad. 61 : 8 Sar. 160 (P.C.), Subrahmania Aiyar v. Emperor], the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under S. 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind.** This view finds support in the decision of their Lordships' Board in 5 Rang. 53 [('26) 5 Rang. 53 : 14 A.I.R. 1927 P.C. 44 :54 I.A. 96 : 100 I.C. 227 (P.C.), Abdul Rahman v. Emperor], where failure to comply with Ss. 360, Criminal P.C., was held to be cured by Ss. 535 and 537. The present case falls under S. 537, and their Lordships hold the trial valid notwithstanding the breach of S. 162."

(emphasis supplied)

## RE-TRIAL

## Section 386 of the CrPC, 1973

"**386. Powers of the Appellate Court**.—After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction—

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same—

(c) in an appeal for enhancement of sentence—

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or, the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has

> committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."

27. An Appellate Court has got ample power to direct re-trial. However, such a power is to be exercised in exceptional cases. The irregularities found must be so material that a re-trial is the only option. In other words, the failure to follow the mandate of law must cause a serious prejudice vitiating the entire trial, which cannot be cured otherwise, except by way of a re-trial. Once such a re-trial is ordered, the effect is that all the proceedings recorded by the court would get obliterated leading to a fresh trial, which is inclusive of the examination of witnesses.

**Nasib Singh v. State of Punjab, (2022) 2 SCC 89**

> "33. The principles that emerge from the decisions of this Court on retrial can be formulated as under:
>
> 33.1. The appellate court may direct a retrial only in "exceptional" circumstances to avert a miscarriage of justice.
>
> 33.2. Mere lapses in the investigation are not sufficient to warrant a direction for retrial. Only if the lapses are so grave so as to prejudice the rights of the parties, can a retrial be directed.
>
> 33.3. A determination of whether a "shoddy" investigation/trial has prejudiced the party, must be based on the facts of each case pursuant to a thorough reading of the evidence.
>
> 33.4. It is not sufficient if the accused/prosecution makes a facial argument that there has been a miscarriage of justice warranting a retrial. It is incumbent on the appellate court directing a retrial to provide a reasoned order on the nature of the miscarriage of justice caused with reference to the evidence and investigatory process.

33.5. If a matter is directed for retrial, the evidence and record of the previous trial is completely wiped out.
33.6. The following are some instances, not intended to be exhaustive, of when the Court could order a retrial on the ground of miscarriage of justice:

(*a*) The trial court has proceeded with the trial in the absence of jurisdiction;

(*b*) The trial has been vitiated by an illegality or irregularity based on a misconception of the nature of the proceedings; and

(*c*) The prosecutor has been disabled or prevented from adducing evidence as regards the nature of the charge, resulting in the trial being rendered a farce, sham or charade."

## SENTENCING

***"If the criminal law as a whole is the Cinderella of jurisprudence, then the law of sentencing is Cinderella's illegitimate baby"***

***Nigel Walker.***
***British criminologist***
***Sentencing in a Rational Society 1 (1969)***

## Section 235 of the CrPC, 1973

**"235. Judgment of acquittal or conviction.—**

(1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the questions of sentence, and then pass sentence on him according to law."

## Section 360 of the CrPC, 1973

**"360. Order to release on probation of good conduct or after admonition**.-

(1) When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour:

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class forwarding the accused to or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub-section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub-section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of 1860) punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law:

Provided that the High Court or Court of Session shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(6) The provisions of Sections 121, 124 and 373 shall, so far as may be apply in the case of sureties offered in pursuance of the provisions of this section.

(7) The Court, before directing the release of an offender under sub-section (1) shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and such Court may after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders."

## Section 3 of the Probation of Offenders Act, 1958

**"3. Power of court to release certain offenders after admonition.—**

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

probation of good conduct under section 4, release him after due admonition.

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

## Section 4 of the Probation of Offenders Act, 1958

**"4. Power of court to release certain offenders on probation of good conduct.—**

(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a

repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.**"**

**Section 6 of the Probation of Offenders Act 1958**

**"6. Restrictions on imprisonment of offenders under twenty-one years of age.—**

(1) When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under section 3 or section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.

(2) For the purpose of satisfying itself whether it would not be desirable to deal under section 3 or section 4 with an offender referred to in sub-section (1), the court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender."

28. Before passing the sentence on a convict, after rendering conviction, the Judge shall consider the feasibility of proceeding in accordance with the provisions of Section 360 of the CrPC, 1973 which speaks of releasing a convict on probation of good conduct or after admonition. Being a beneficial provision dealing with a reformative aspect, it is the bounden duty of the Judge to consider the application of this provision before proceeding to hear the accused on sentence. While doing so, the Judge has

to hear the accused and the prosecution. Similarly, the Court has to apply the salient provisions contained under Sections 3, 4 and 6 of the Probation of Offenders Act, 1958 (hereinafter referred to as "**Act, 1958**"). If an offence is considered as an act against the society, the resultant action cannot be retributive alone, as equal importance is required, if not more, to be given to the reformative part. The ultimate goal is to bring the accused back on the rails, to once again be a part of society. Any attempt to ignore either Section 360 of the CrPC, 1973 or the provisions as mandated in the Act, 1958 would make their purpose redundant. It looks as if these laudable provisions have been lost sight of while rendering a sentence. The ultimate objective is to prevent the commission of such offences in future. It can never be done by a retributive measure alone, as a change of heart at the behest of the accused is the best way to prevent an act of crime. Therefore, we have absolute clarity in our mind, that a trial court is duty bound to comply with the mandate of Section 360 of the CrPC, 1973 read with Sections 3, 4 and 6 of the Act, 1958 before embarking into the question of sentence. In this connection, we may note that sub-section (10) of Section 360 of the CrPC, 1973 makes a conscious effort to remind the Judge of the rigour of the beneficial provisions contained in the Act, 1958.

29. Hearing the accused on sentence is a valuable right conferred on the accused. The real importance lies only with the sentence, as against the

conviction. Unfortunately, we do not have a clear policy or legislation when it comes to sentencing. Over the years, it has become judge-centric and there are admitted disparities in awarding a sentence.

30. In a country like ours, sentencing accused persons pursuant to a conviction, on a uniform pattern, would also be prejudicial. When it comes to sentencing, there are various factors such as age, sex, education, home life, social background, emotional and mental conditions, caste, religion and community that constitute aggravating and mitigating circumstances.

31. There is a distinction between knowledge and character. Knowledge is acquired, while character is formed. The formation of a person's character depends upon various factors. More often than not, a convict does not have control over the formation of his character. This leads to certain groups of people inheriting crime. In this connection, we can draw an analogy from nature itself. Before falling on the ground, rainwater remains the same. It is the soil which changes the character of the water. Rainwater partakes in the character of the soil, over which it does not have any control. The issues are extremely complex.

32. A decision of a Judge in sentencing, would vary from person to person. This will also vary from stage to stage. It is controlled by the mind. The environment and the upbringing of a Judge would become the ultimate arbiter in deciding the sentence. A Judge from an affluent background

might have a different mindset as against a Judge from a humble one. A female Judge might look at it differently, when compared to her male counterpart. An Appellate Court might tinker with the sentence due to its experience, and the external factors like institutional constraints might come into play. Certainly, there is a crying need for a clear sentencing policy, which should never be judge-centric as the society has to know the basis of a sentence.

33. Sentencing shall not be a mere lottery. It shall also not be an outcome of a knee-jerk reaction. This is a very important part of the Fundamental Rights conferred under Articles 14 and 21 of the Constitution of India, 1950. Any unwarranted disparity would be against the very concept of a fair trial and, therefore, against justice.

34. Various elements such as deterrence, incapacitation and reformation should form part of sentencing. There is a compelling need for a studied scrutiny of sentencing, to address in particular the reformative aspect, while maintaining equality between different groups. Perhaps, much study is also required on the occurence of repeat offences, which could be attributable to certain groups. The nexus between particular types of offences and the offenders forming their own groups has to be taken note of and addressed.

35. The concept of intuitive sentencing is against the rule of law. A Judge can never have unrestrictive and unbridled discretion, based upon his conscience formed through his understanding of the society, without there being any guidelines in awarding a sentence. The need for adequate guidelines for exercising sentencing discretion, avoiding unwanted disparity, is of utmost importance.

36. Courts do take into consideration the mitigating and aggravating circumstances. As we have dealt with illustratively, no research has been undertaken for constituting what are aggravating and mitigating circumstances. While it would be appropriate to follow '*beyond reasonable doubt*' standard in adjudicating aggravating circumstances, the '*balance of probability*' standard is required while construing mitigating circumstances. Courts may also be guided by the conduct of the convict during pre-trial stage, either under incarceration or otherwise. A report may well be called for from the designated authority. The ultimate idea is to eliminate discretion on the part of the Court, which obviously leads to disparity.

37. As we discuss the issue we have flagged, we understand that the issue is an extremely complex one and it is the duty of the States and the Union of India to deal with the situation by duly considering the three different modes discussed above. There has to be a conscious discussion and debate

over this issue which might require constituting an appropriate Commission on Sentencing consisting of various experts and stakeholders. We illustratively suggest "the members from the legal fraternity, psychologists, sociologists, criminologists, executives and legislators". Societal experience would come handy in coming to a correct conclusion. What we have at present is an imposition of a sentence by way of a legislation. There are obvious errors and lacunae, which have been pointed out in the preceding discussion. It may also be imperative for a court to have an assessment to be made by an independent authority on the conduct and behaviour of the accused for the purpose of deciding the sentence. The guidelines which have been proposed by this Court may also be considered. This would include the creation of a competent authority tasked to give a report and its composition.

**Manoj v. State of M.P., (2023) 2 SCC 353**

> "230. The strength of "precedent" and "consistency" is perhaps, therefore, *lowest* when it comes to matters of sentencing, as long as it is within the confines of legality and resulting in "principled sentencing". In other words, the judicial incongruence when it relates to sentencing, would in fact be a positive indicator, rather than a negative one, *provided it is still within the well-defined contours of "principled" sentencing*. For sentencing in capital offences, discretion to arrive at individualised sentences is encouraged, but must be constrained by the "rarest of rare" principle, wherein the court considers aggravating circumstances of the crime, and mitigating circumstances of the criminal (a "liberal and expansive" construction of the latter), which in turn must inform their consideration of whether the option of life imprisonment is unquestionably foreclosed owing to an impossibility [ Held to be "probability" and not "impossibility" in *Rajendra Pralhadrao Wasnik* v.

*State of Maharashtra*, (2019) 12 SCC 460 : (2019) 4 SCC (Cri) 420] to reform.

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233. Therefore, "individualised, principled sentencing" — based on *both* the crime and criminal, with consideration of whether reform or rehabilitation is achievable (held to be "*probable*" in *Rajendra Pralhadrao Wasnik* [*Rajendra Pralhadrao Wasnik* v. *State of Maharashtra*, (2019) 12 SCC 460 : (2019) 4 SCC (Cri) 420] ), and consequently whether the option of life imprisonment is unquestionably foreclosed — should be the only factor of "commonality" that must be discernible from decisions relating to capital offences. With the creation of a new sentencing threshold in *Swamy Shraddananda (2)* [*Swamy Shraddananda (2)* v. *State of Karnataka*, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] , and later affirmed by a Constitution Bench in *Union of India* v. *V. Sriharan* [*Union of India* v. *V. Sriharan*, (2016) 7 SCC 1 : (2016) 2 SCC (Cri) 695] , of life imprisonment without *statutory* remission (i.e. Articles 72 and 161 of the Constitution are still applicable), yet another option exists, before imposition of death sentence. However, serious concern has been raised against this concept, as it was upheld by a narrow majority, and is left to be considered at an appropriate time.

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***Practical guidelines to collect mitigating circumstances***

248. There is urgent need to ensure that mitigating circumstances are considered at the trial stage, to avoid slipping into a retributive response to the brutality of the crime, as is noticeably the situation in a majority of cases reaching the appellate stage.

249. To do this, the trial court must elicit information from the accused and the State, both. The State, must—for an offence carrying capital punishment—at the appropriate stage, produce material which is preferably collected beforehand, before the Sessions Court disclosing psychiatric and psychological evaluation of the accused. This will help establish proximity (in terms of timeline), to the accused person's frame of mind (or mental illness, if any) at the time of committing the crime and offer guidance on mitigating factors (1), (5), (6) and (7) spelled out in *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] . Even for the other factors of (3) and (4)—an onus placed squarely on the State—conducting this form of psychiatric and psychological evaluation close on the heels of commission of the offence, will provide a baseline for the appellate courts to use for comparison i.e. to evaluate the progress of the accused towards reformation, achieved during the incarceration period.

250. Next, the State, must in a *time-bound manner*, collect *additional* information pertaining to the accused. An illustrative, but not exhaustive list is as follows:

(*a*) Age

(*b*) Early family background (siblings, protection of parents, any history of violence or neglect)

(*c*) Present family background (surviving family members, whether married, has children, etc.)

(*d*) Type and level of education

(*e*) Socio-economic background (including conditions of poverty or deprivation, if any)

(*f*) Criminal antecedents (details of offence and whether convicted, sentence served, if any)

(*g*) Income and the kind of employment (whether none, or temporary or permanent, etc.);

(*h*) Other factors such as history of unstable social behaviour, or mental or psychological ailment(s), alienation of the individual (with reasons, if any), etc.

This information should mandatorily be available to the trial court, at the sentencing stage. The accused too, should be given the same opportunity to produce evidence in rebuttal, towards establishing all mitigating circumstances.

251. Lastly, information regarding the accused's jail conduct and behaviour, work done (if any), activities the accused has involved themselves in, and other related details should be called for in the form of a report from the relevant jail authorities (i.e. Probation and Welfare Officer, Superintendent of Jail, etc.). If the appeal is heard after a long hiatus from the trial court's conviction, or High Court's confirmation, as the case may be — *a fresh report* (rather than the one used by the previous court) from the jail authorities is recommended, for a more exact and complete understanding of the contemporaneous progress made by the accused, in the time elapsed. The jail authorities must also include a fresh psychiatric and psychological report which will *further* evidence the reformative progress, and reveal post-conviction mental illness, if any.

252. It is pertinent to point out that this Court in *Anil* v. *State of Maharashtra* [*Anil* v. *State of Maharashtra*, (2014) 4 SCC 69 : (2014) 2 SCC (Cri) 266] has in fact directed criminal courts to call for additional material : (SCC p. 86, para 33)

> "*33*. … Many a times, while determining the sentence, the courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. The facts, which the courts deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials. *We, therefore, direct that the criminal courts, while dealing with the offences like Section 302IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case*."
>
> (emphasis supplied)
>
> We hereby fully endorse and direct that this should be implemented uniformly, as further elaborated above, for conviction of offences that carry the possibility of death sentence."

38. Our thought process has been ignited from a book titled "*Discretion, Discrimination and the Rule of Law, Reforming Sentencing in India*", authored by Mr. Mrinal Satish, published by the Cambridge University Press, (2017). The learned author has drawn extensively from the sentencing policy in Israel. Upon a thorough reading of the book, it presents an excellent insight into sentencing policy. The Israeli model takes into consideration numerous factors compiled in the form of guidelines to the Judge, in sentencing an accused.

39. We have also benefitted by looking into the policy adopted in other countries, such as in Canada, New Zealand and UK.

## CANADA

## Criminal Code (Canada)

## Purpose and Principles of Sentencing

## Section 718 of the Criminal Code (Canada)

> **"Purpose**
>
> **718** The **fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:**
>
> **(a)** to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> **(b)** to deter the offender and other persons from committing offences;
>
> **(c)** to separate offenders from society, where necessary;
>
> **(d)** to assist in rehabilitating offenders;
>
> **(e)** to provide reparations for harm done to victims or to the community; and
>
> **(f)** to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community."
>
> (emphasis supplied)

## Section 718.1 of the Criminal Code (Canada)

> **"Fundamental principle**
>
> **718.1** A sentence **must be proportionate to the gravity of the offence** and the **degree of responsibility of the offender."**
>
> (emphasis supplied)

## Section 718.2 of the Criminal Code (Canada)

> **"Other sentencing principles**
>
> **718.2** A court that imposes a sentence **shall also take into consideration the following principles:**

**(a)** a sentence should be increased or reduced to account **for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,**

**(i)** evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,

**(ii)** evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family,

**(ii.1)** evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

**(iii)** evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

**(iii.1)** evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

**(iii.2)** evidence that the offence was committed against a person who, in the performance of their duties and functions, was providing health services, including personal care services,

**(iv)** evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,

**(v)** evidence that the offence was a terrorism offence,

**(vi)** evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the *Corrections and Conditional Release Act*, and

**(vii)** evidence that the commission of the offence had the effect of impeding another person from obtaining health services, including personal care services,

**shall be deemed to be aggravating circumstances;**

**(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;**

**(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;**

**(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and**

**(e)** all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."

(emphasis supplied)

## Procedure and Evidence

## Section 720 of the Criminal Code (Canada)

**"Sentencing proceedings**

**720 (1)** **A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed.**

**Court-supervised programs**

**(2)** The court may, with the consent of the Attorney General and the offender and after considering the interests of justice and of any victim of the offence, delay sentencing to enable the offender to attend a treatment program approved by the province under the supervision of the court, such as an addiction treatment program or a domestic violence counselling program."

(emphasis supplied)

## Section 721 of the Criminal Code (Canada)

**"Report by probation officer**

**721 (1)** **Subject to regulations made under subsection (2), where an accused, other than an organization, pleads guilty to or is found guilty of an offence, a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing a sentence or in determining whether the accused should be discharged under section 730."**

(emphasis supplied)

## NEW ZEALAND

## Sentencing Act 2002, New Zealand

## Section 3 of the Sentencing Act, 2002

"Part 1 **Sentencing purposes and principles, and provisions of general application**

*Preliminary provisions*
**3 Purposes**

The purposes of this Act are—
**(a)** to set out the purposes for which offenders may be sentenced or otherwise dealt with; and
**(b) to promote those purposes, and aid in the public's understanding of sentencing practices, by providing principles and guidelines to be applied by courts in sentencing or otherwise dealing with offenders; and**
**(c)** to provide a sufficient range of sentences and other means of dealing with offenders; and
**(d)** to provide for the interests of victims of crime."

(emphasis supplied)

## Section 7 of the Sentencing Act, 2002

***"Purposes and principles of sentencing***
**7 Purposes of sentencing or otherwise dealing with offenders**
(1) The purposes for which a court may sentence or otherwise deal with an offender are—
**(a)** to hold the offender accountable for harm done to the victim and the community by the offending; or
**(b)** to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
**(c)** to provide for the interests of the victim of the offence; or
**(d)** to provide reparation for harm done by the offending; or
**(e)** to denounce the conduct in which the offender was involved; or
**(f)** to deter the offender or other persons from committing the same or a similar offence; or
**(g)** to protect the community from the offender; or
**(h)** to assist in the offender's rehabilitation and reintegration; or
**(i) a combination of 2 or more of the purposes in paragraphs (a) to (h).**
(2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to."

(emphasis supplied)

## Section 8 of the Sentencing Act, 2002

**"8 Principles of sentencing or otherwise dealing with offenders**

In sentencing or otherwise dealing with an offender the court—

**(a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and**

**(b)** must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and

**(c)** must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

**(d)** must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

**(e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and**

**(f) must take into account any information provided to the court concerning the effect of the offending on the victim; and**

**(g)** must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A; and

**(h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and**

**(i) must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and**

**(j) must take into account any outcomes of restorative justice processes that have occurred**, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10)."

(emphasis supplied)

## Section 9 of the Sentencing Act, 2002

**"9 Aggravating and mitigating factors**

(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

xxx xxx xxx

(2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:

xxx xxx xxx

(3) Despite subsection (2)(e), the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).

xxx xxx xxx

(4) Nothing in subsection (1) or subsection (2)—
(a) prevents the court from taking into account any other aggravating or mitigating factor that the court thinks fit; or
(b) implies that a factor referred to in those subsections must be given greater weight than any other factor that the court might take into account."

## Section 9A of the Sentencing Act, 2002

**"9A Cases involving violence against, or neglect of, child under 14 years**

(1) **This section applies if the court is sentencing or otherwise dealing with an offender in a case involving violence against, or neglect of, a child under the age of 14 years.**

(2) **The court must take into account the following aggravating factors to the extent that they are applicable in the case:**

(a) the defencelessness of the victim:

(b) in relation to any harm resulting from the offence, any serious or long-term physical or psychological effect on the victim:

(c) the magnitude of the breach of any relationship of trust between the victim and the offender:

(d) threats by the offender to prevent the victim reporting the offending:

(e) deliberate concealment of the offending from authorities.

**(3) The factors in subsection (2) are in addition to any factors the court might take into account under section 9.**

(4) Nothing in this section implies that a factor referred to in subsection (2) must be given greater weight than any other factor that the court might take into account."

(emphasis supplied)

## Section 24 of the Sentencing Act, 2002

**"24 Proof of facts**

(1) **In determining a sentence or other disposition of the case, a court—**

**(a) may accept as proved any fact that was disclosed by evidence at the trial and any facts agreed on by the prosecutor and the offender; and**

**(b)** must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt.

(2) **If a fact that is relevant to the determination of a sentence or other disposition of the case is asserted by one party and disputed by the other,—**

**(a) the court must indicate to the parties the weight that it would be likely to attach to the disputed fact if it were found to exist, and its significance to the sentence or other disposition of the case:**

**(b) if a party wishes the court to rely on that fact, the parties may adduce evidence as to its existence unless the court is satisfied that sufficient evidence was adduced at the trial:**

**(c) the prosecutor must prove beyond a reasonable doubt the existence of any disputed aggravating fact, and must negate beyond a reasonable doubt any disputed mitigating fact raised by the defence (other than a mitigating fact referred to in paragraph (d)) that is not wholly implausible or manifestly false**:

**(d) the offender must prove on the balance of probabilities the existence of any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in the offence:**

**(e)** either party may cross-examine any witness called by the other party.

(3) **For the purposes of this section,—**

**aggravating fact means any fact that—**

**(a) the prosecutor asserts as a fact that justifies a greater penalty or other outcome than might otherwise be appropriate for the offence; and**

**(b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case**

**mitigating fact means any fact that—**

**(a) the offender asserts as a fact that justifies a lesser penalty or other outcome than might otherwise be appropriate for the offence; and**

**(b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case."**

(emphasis supplied)

## Section 25 of the Sentencing Act, 2002

**"25 Power of adjournment for inquiries as to suitable punishment**

(1) **A court may adjourn the proceedings in respect of any offence after the offender has been found guilty or has pleaded guilty and before the offender has been sentenced or otherwise dealt with for any 1 or more of the following purposes:**

**(a) to enable inquiries to be made or to determine the most suitable method of dealing with the case:**

**(b) to enable a restorative justice process to occur, or to be completed:**

**(c)** to enable a restorative justice agreement to be fulfilled:

**(d)** to enable a rehabilitation programme or **course of action to be undertaken**:

**(da)** to determine whether to impose an instrument forfeiture order and, if so, the terms of that order:

**(e)** to enable the court to take account of the offender's response to any process, agreement, programme, or course of action referred to in paragraph (b), (c), or (d).

(2) **If proceedings are adjourned under this section** or under section 10(4) or 24A, a Judge or Justice or Community Magistrate having jurisdiction to deal with offences of the same kind (whether or not the same Judge or Justice or Community Magistrate before whom the case was heard) **may, after inquiry into the circumstances of the case, sentence or otherwise deal with the offender for the offence to which the adjournment relates."**

(emphasis supplied)

## Section 26 of the Sentencing Act, 2002

**"26 Pre-sentence reports**

**(1) Except as provided in** section 26A**, if an offender who is charged with an offence punishable by imprisonment is found guilty or pleads guilty, the court may direct a probation officer to prepare a report for the court in accordance with subsection (2).**

(2) A pre-sentence report may include—

**(a)** information regarding the personal, family, whanau, community, and cultural background, and social circumstances of the offender:

**(b)** information regarding the factors contributing to the offence, and the rehabilitative needs of the offender:

**(c)** information regarding any offer, agreement, response, or measure of a kind referred to in section 10(1) or the outcome of any other restorative justice processes that have occurred in relation to the case:

**(d) recommendations on the appropriate sentence or other disposition of the case, taking into account the risk of further offending by the offender:**

**(e) in the case of a proposed sentence of supervision, intensive supervision, or home detention, recommendations on the appropriate conditions of that sentence:**

**(f) in the case of a proposed sentence of supervision, intensive supervision, or home detention involving 1 or more programmes,—**

**(i)** a report on the programme or programmes, including a general description of the conditions that the offender will have to abide by; and

**(ii)** confirmation that the report has been made available to the offender:

**(g)** in the case of a proposed sentence of supervision, intensive supervision, or home detention involving a special condition requiring the offender to take prescription medication, confirmation that the offender—

**(i)** has been fully advised by a person who is qualified to prescribe that medication about the nature and likely or intended effect of the medication and any known risks; and

**(ii)** consents to taking the prescription medication:

**(h)** in the case of a proposed sentence of community work,—

**(i)** information regarding the availability of community work of a kind referred to in section 63 in the area in which the offender will reside; and

**(ii)** recommendations on whether the court should authorise, under section 66A, hours of work to be spent undertaking training in basic work and living skills:

**(i)** in the case of a proposed sentence of intensive supervision or possible release conditions for a proposed sentence of imprisonment for 24 months or less, the opinion of the chief executive of the Department of Corrections as to whether—

**(i)** a condition that prohibits the offender from entering or remaining in specified places or areas at specified times or at all times (a **whereabouts condition** in this paragraph) would facilitate or promote the objective of reducing the risk of the offender reoffending while subject to the sentence or release conditions; and

**(ii)** a whereabouts condition would facilitate or promote the objective of rehabilitating and reintegrating the offender; and

**(iii)** a further condition requiring the offender to submit to electronic monitoring of his or her compliance with a whereabouts condition is warranted, having regard to the likelihood of non-compliance with the whereabouts condition.

(3) The court must not direct the preparation of a report under subsection (1) on any aspects of the personal characteristics or personal history of an offender if a report covering those aspects is readily available to the court and there is no reason to believe that there has been any change of significance to the court since the report was prepared.

(4) **On directing the preparation of a report under subsection (1), the court may indicate to the probation officer the type of sentence or other mode of disposition that the court is considering, and may also give any other guidance to the probation officer that will assist the officer to prepare the report.**

**(5) If a court has directed the preparation of a report under subsection (1), the probation officer charged with the preparation of the report may seek the further directions of the court on—**

**(a)** any particular item of information sought by the court; or

**(b) any alternative sentence or other mode of disposition that may be considered by the court if it appears that the sentence or other mode of disposition under consideration is inappropriate.”**

(emphasis supplied)

## Section 31 of the Sentencing Act, 2002

**"31 General requirement to give reasons**
(1) **A court must give reasons in open court—**
**(a) for the imposition of a sentence or for any other means of dealing with the offender; and**
**(b) for the making of an order under** Part 2**.**
**(2) The reasons may be given under this section with whatever level of particularity is appropriate to the particular case.**
(3) Nothing in this section limits any other provision of this or any other enactment that requires a court to give reasons.
(4) **The fact that a court, in giving reasons in a particular case, does not mention a particular principle in** section 8 **or a particular factor in** section 9 **or a consideration under** section 10 **or** section 11 **is not in itself grounds for an appeal against a sentence imposed or an order made in that case."**

(emphais supplied)

## UNITED KINGDOM

## Coroners and Justice Act, 2009 (UK)

### PART 4

### SENTENCING

### CHAPTER 1

*Sentencing Council For England and Wales*

## Section 118 of the Coroner and Justice Act, 2009

"118 Sentencing Council for England and Wales

(1) There is to be a Sentencing Council for England and Wales.

(2) Schedule 15 makes provision about the Council."

Schedule 15

THE SENTENCING COUNCIL FOR ENGLAND AND WALES

*Constitution of the Council*

**Schedule 15, Para 1 of the Coroner and Justice Act, 2009**

"1 The Council is to consist of—

(a) 8 members appointed by the Lord Chief Justice with the agreement of the Lord Chancellor ("judicial members");

(b) 6 members appointed by the Lord Chancellor with the agreement of the Lord Chief Justice ("non-judicial members")."

*Appointment of a person to chair the Council etc*

**Schedule 15, Para 2 of the Coroner and Justice Act, 2009**

"2 The Lord Chief Justice must, with the agreement of the Lord Chancellor, appoint—

(a) a judicial member to chair the Council ("the chairing member"), and

(b) another judicial member to chair the Council in the absence of the chairing member."

*Appointment of judicial members*

**Schedule 15, Para 3 of the Coroner and Justice Act, 2009**

"3(1) A person is eligible for appointment as a judicial member if the person is—

(a) a judge of the Court of Appeal,

(b) a puisne judge of the High Court,

(c) a Circuit judge,

(d) a District Judge (Magistrates' Courts), or

(e) a lay justice.

(2) The judicial members must include at least one Circuit judge, one District Judge (Magistrates' Courts) and one lay justice.

(3) When appointing judicial members, the Lord Chief Justice must have regard to the desirability of the judicial members including at least one person who appears to the Lord Chief Justice to have responsibilities relating to the training of judicial office-holders who exercise criminal jurisdiction in England and Wales.

(4) "Judicial office-holder" has the meaning given by section 109(4) of the Constitutional Reform Act 2005 (c. 4)."

*Appointment of non-judicial members*

## Schedule 15, Para 4 of the Coroner and Justice Act, 2009

"4(1) A person is eligible for appointment as a non-judicial member if the person appears to the Lord Chancellor to have experience in one or more of the following areas—

(a) criminal defence;

(b) criminal prosecution;

(c) policing;

(d) sentencing policy and the administration of justice;

(e) the promotion of the welfare of victims of crime;

(f) academic study or research relating to criminal law or criminology;

(g) the use of statistics;

(h) the rehabilitation of offenders.

(2) The persons eligible for appointment as a non-judicial member by virtue of experience of criminal prosecution include the Director of Public Prosecutions."

## Section 120 of the Coroner and Justice Act, 2009

*Guidelines*

"**120 Sentencing guidelines**

(1) In this Chapter "sentencing guidelines" means guidelines relating to the sentencing of offenders.

(2) A sentencing guideline may be general in nature or limited to a particular offence, particular category of offence or particular category of offender.

(3) The Council must prepare—

(a) sentencing guidelines about the discharge of a court's duty under section 73 of the Sentencing Code (reduction in sentences for guilty pleas), and

(b) sentencing guidelines about the application of any rule of law as to the totality of sentences.

(4) The Council may prepare sentencing guidelines about any other matter.

(5) Where the Council has prepared guidelines under subsection (3) or (4), it must publish them as draft guidelines.

(6) The Council must consult the following persons about the draft guidelines—

(a) the Lord Chancellor;

(b) such persons as the Lord Chancellor may direct;

(c) the Justice Select Committee of the House of Commons (or, if there ceases to be a committee of that name, such committee of the House of Commons as the Lord Chancellor directs);

(d) such other persons as the Council considers appropriate.

(7) In the case of guidelines within subsection (3), the Council must, after making any amendments of the guidelines which it considers appropriate, issue them as definitive guidelines.

(8) In any other case, the Council may, after making such amendments, issue them as definitive guidelines.

(9) The Council may, from time to time, review the sentencing guidelines issued under this section, and may revise them.

(10) Subsections (5), (6) and (8) apply to a revision of the guidelines as they apply to their preparation (and subsection (8) applies even if the guidelines being revised are within subsection (3)).

(11) When exercising functions under this section, the Council must have regard to the following matters—

(a) the sentences imposed by courts in England and Wales for offences;

(b) the need to promote consistency in sentencing;

(c) the impact of sentencing decisions on victims of offences;

(d) the need to promote public confidence in the criminal justice system;

(e) the cost of different sentences and their relative effectiveness in preventing re-offending;

(f) the results of the monitoring carried out under section 128."

## Section 121 of the Coroner and Justice Act, 2009

"**121 Sentencing ranges**

(1) When exercising functions under section 120, the Council is to have regard to the desirability of sentencing guidelines which relate to a particular offence being structured in the way described in subsections (2) to (9).

(2) The guidelines should, if reasonably practicable given the nature of the offence, describe, by reference to one or more of the factors mentioned in subsection (3), different categories of case involving the commission of the offence which illustrate in general terms the varying degrees of seriousness with which the offence may be committed.

(3) Those factors are—

(a) the offender's culpability in committing the offence;

(b) the harm caused, or intended to be caused or which might foreseeably have been caused, by the offence;

(c) such other factors as the Council considers to be particularly relevant to the seriousness of the offence in question.

(4) The guidelines should—

(a) specify the range of sentences ("the offence range") which, in the opinion of the Council, it may be appropriate for a court to impose on an offender convicted of that offence, and

(b) if the guidelines describe different categories of case in accordance with subsection (2), specify for each category the range of sentences ("the category range") within the offence range which, in the opinion of the Council, it may be appropriate for a court to impose on an offender in a case which falls within the category.

(5) The guidelines should also—

(a) specify the sentencing starting point in the offence range, or

(b) if the guidelines describe different categories of case in accordance with subsection (2), specify the sentencing starting point in the offence range for each of those categories.

(6) The guidelines should—

(a) (to the extent not already taken into account by categories of case described in accordance with subsection (2)) list any aggravating or mitigating factors which, by virtue of any enactment or other rule of law, the court is required to take into account when considering the seriousness of the offence and any other aggravating or mitigating factors which the Council considers are relevant to such a consideration,

(b) list any other mitigating factors which the Council considers are relevant in mitigation of sentence for the offence, and

(c) include criteria, and provide guidance, for determining the weight to be given to previous convictions of the offender and such of the other factors within paragraph (a) or (b) as the Council considers to be of particular significance in relation to the offence or the offender.

(7) For the purposes of subsection (6)(b) the following are to be disregarded—

(a) the requirements of section 73 of the Sentencing Code (reduction in sentences for guilty pleas);

(b) sections 74, 387 and 388 of the Sentencing Code (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered to be given) by the offender to the prosecutor or investigator of an offence;

(c) any rule of law as to the totality of sentences.

(8) The provision made in accordance with subsection (6)(c) should be framed in such manner as the Council considers most appropriate for the purpose of assisting the court, when sentencing an offender for the offence, to determine the appropriate sentence within the offence range.

(9) The provision made in accordance with subsections (2) to (8) may be different for different circumstances or cases involving the offence.

(10) The sentencing starting point in the offence range—

(a) for a category of case described in the guidelines in accordance with subsection (2), is the sentence within that range which the Council considers to be the appropriate starting point for cases within that category—

(i) before taking account of the factors mentioned in subsection (6), and

(ii) assuming the offender has pleaded not guilty, and

(b) where the guidelines do not describe categories of case in accordance with subsection (2), is the sentence within that range which the Council considers to be the appropriate starting point for the offence—

(i) before taking account of the factors mentioned in subsection (6), and

(ii) assuming the offender has pleaded not guilty."

## Section 128 of the Coroner and Justice Act, 2009

"128 Monitoring

(1) The Council must—

(a) monitor the operation and effect of its sentencing guidelines, and

(b) consider what conclusions can be drawn from the information obtained by virtue of paragraph (a).

(2) The Council must, in particular, discharge its duty under subsection (1)(a) with a view to drawing conclusions about—

(a) the frequency with which, and extent to which, courts depart from sentencing guidelines;

(b) the factors which influence the sentences imposed by courts;

(c) the effect of the guidelines on the promotion of consistency in sentencing;

(d) the effect of the guidelines on the promotion of public confidence in the criminal justice system.

(3) When reporting on the exercise of its functions under this section in its annual report for a financial year, the Council must include—

(a) a summary of the information obtained under subsection (1)(a), and

(b) a report of any conclusions drawn by the Council under subsection (1)(b)."

## Sentencing Act 2020 (UK)

## Section 3 of the Sentencing Act, 2020

**"DEFERMENT OF SENTENCE**

**3 Deferment order**

(1) In this Code **"deferment order" means an order deferring passing sentence on an offender in respect of one or more offences until the date specified in the order, to enable a court, in dealing with the offender, to have regard to—**

**(a) the offender's conduct after conviction (including, where appropriate, the offender's making reparation for the offence), or**

**(b) any change in the offender's circumstances.**

(2) A deferment order may impose requirements ("deferment requirements") as to the offender's conduct during the period of deferment.

**(3) Deferment requirements may include—**

**(a) requirements as to the residence of the offender during all or part of the period of deferment;**

**(b) restorative justice requirements."**

(emphais supplied)

## Section 5 of the Sentencing Act, 2020

**"5 Making a deferment order**

**(1) A court may make a deferment order in respect of an offence only if—**

(a) the offender consents,

(b) the offender undertakes to comply with any deferment requirements the court proposes to impose,

(c) if those requirements include a restorative justice requirement, section 7(2) (consent of participants in restorative justice activity) is satisfied, and

(d) the court is satisfied, having regard to the nature of the offence and the character and circumstances of the offender, that it would be in the interests of justice to make the order.

**(2) The date specified under section 3(1) in the order may not be more than 6 months after the date on which the order is made.**

(3) A court which makes a deferment order must forthwith give a copy of the order—

(a) to the offender,

(b) if it imposes deferment requirements that include a restorative justice requirement, to every person who would be a participant in the activity concerned (see section 7(1)),

(c) where an officer of a provider of probation services has been appointed to act as a supervisor, to that provider, and

(d) where a person has been appointed under section 8(1)(b) to act as a supervisor, to that person.

(4) A court which makes a deferment order may not on the same occasion remand the offender, notwithstanding any enactment."

(emphais supplied)

## Section 6 of the Sentencing Act, 2020

**"6 Effect of deferment order**

**(1) Where a deferment order has been made in respect of an offence, the court which deals with the offender for the offence may have regard to—**

**(a) the offender's conduct after conviction, or**

**(b) any change in the offender's circumstances."**

(emphais supplied)

## Section 30 of the Sentencing Act, 2020

**"Pre-sentence reports**

**30 Pre-sentence report requirements**

**(1) This section applies where, by virtue of any provision of this Code, the pre-sentence report requirements apply to a court in relation to forming an opinion.**
**(2) If the offender is aged 18 or over, the court must obtain and consider a pre-sentence report before forming the opinion unless, in the circumstances of the case, it considers that it is unnecessary to obtain a pre-sentence report.**
(3) If the offender is aged under 18, the court must obtain and consider a pre-sentence report before forming the opinion unless—
(a) there exists a previous pre-sentence report obtained in respect of the offender, and
(b) the court considers—
(i) in the circumstances of the case, and
(ii) having had regard to the information contained in that report or, if there is more than one, the most recent report, that it is unnecessary to obtain a pre-sentence report.
**(4) Where a court does not obtain and consider a pre-sentence report before forming an opinion in relation to which the pre-sentence report requirements apply, no custodial sentence or community sentence is invalidated by the fact that it did not do so."**

(emphais supplied)

## Section 31 of the Sentencing Act, 2020

**"31 Meaning of "pre-sentence report" etc**

**"Pre-sentence report"**

(1) In this Code "pre-sentence report" means a report which—

(a) is made or submitted by an appropriate officer with a view to assisting the court in determining the most suitable method of dealing with an offender, and

(b) contains information as to such matters, presented in such manner, as may be prescribed by rules made by the Secretary of State."

40. We find that an exhaustive and detailed exercise has been done by New Zealand. What we have discussed has already been substantially taken into

consideration by the aforementioned countries. As it is an important aspect which has escaped the attention of the Government of India, we recommend the Department of Justice, Ministry of Law and Justice, Government of India, to consider introducing a comprehensive policy, possibly by way of getting an appropriate report from a duly constituted Sentencing Commission consisting of experts in different fields for the purpose of having a distinct sentencing policy. We request the Union of India to respond to our suggestion by way of an affidavit within a period of six months from today.

41. In this connection, we would like to place on record the 47th Report of the Law Commission of India, Report by the Committee on Reforms of Criminal Justice, Chaired by Dr. Justice V.S. Malimath, (2003), Report by the Committee on Draft National Policy on Criminal Justice, Chaired by Dr. N.R. Madhava Menon and decisions rendered by this Court to indicate an emerging need for a distinct sentencing policy

**47th Report of the Law Commission of India**

CHAPTER 7
DESIRABILITY OF AMENDMENTS – SUBSTANTIVE POINTS COMMON TO ALL THE ACTS CONSIDERED

"7.44. A proper sentence is a composite of many factors, including the nature of the offence, the circumstances- extenuating or aggravating- of the offence, the prior criminal record, if any, of the offender, the age of the offender, the professional and social record of the offender, the

background of the offender with reference to education. home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospect for the rehabilitation of the offender, the possibility of a return of the offender to normal life in the community, the possibility of treatment or of training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the present community need, if any, for such a deterrent in respect to the particular type of offence involved."

**Report by the Committee on Reforms of Criminal Justice System, Chaired by Dr. Justice V.S. Malimath, Vol. I March (2003)**

"14.4 NEED FOR SENTENCING GUIDELINES

14.4.1 The Indian Penal Code prescribed offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum may be prescribed. **The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge who exercises the discretion. In some countries guidance regarding sentencing option and sentencing guideline laws are given in the penal code. There is need for such law in our country to minimise uncertainty to the matter of awarding sentence.** There are several factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body.

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14.4.5 **Sometimes the courts are unduly harsh while at other times they are liberal. We have already adverted to aspects which Supreme Court said are relevant in deciding as to what are the rarest of the rare cases for imposing death sentence. However, even in such matters uniformity is lacking. In certain rape cases acquittals gave rise to public protests. Therefore in order to bring about certain regulation and predictability in the matter of sentencing, the Committee recommends a statutory committee to lay guidelines on sentencing under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the Prosecution, legal profession, Police, social scientist and women representative."**

(emphasis supplied)

## Report of the Committee on Draft National Policy on Criminal Justice, Chaired by Prof. (Dr.) N.R. Madhava Menon, July, 2007

"5.5 PUNISHMENTS AND SENTENCING

5.5.1 Given the limited options in the choice of punishments now available in the statutes and the inadequate deterrence in the sentence often imposed, there has to be some serious rethinking on the philosophy, justification and impact of sentencing in criminal justice administration. The quantums of fines were prescribed more than a century ago. Imprisonment in practice is reduced to a much shorter period through a variety of practices even when it is for life. **Equality in sentencing is not pursued vigorously and there is no serious attempt yet to standardize the sentencing norms and procedures. The objects of punishment are not served in many cases as a result of such incoherent sentencing practices.**

5.5.2 What are the policy choices in the matter of punishments and determination of its quantum to achieve the goals of criminal justice? Can community service be made an effective punishment and how is it to be organized? How to make probation a dominant part of disposition in criminal cases? How to achieve equality and fairness in sentencing? These and many related questions are not even raised in India seriously with the result the system seems to be functioning as an end in itself.

**There has to be a radical change in the law and practice of sentencing if punishment should serve the cause of criminal justice. A set of sentencing guidelines may be statutorily evolved to make the system consistent and purposeful. Fixing mandatory minimum sentences may not be a worthwhile solution. More importantly, the policy should be to increase the choices in punishment and make the other functionaries of the system (like probation service and correctional administration) to have a voice in the sentencing process and administration.**

**In short, sentences and sentencing require urgent attention of policy planners if criminal justice is to retain its credibility in the public mind.**

5.5.3 A national policy on sentencing shall seek to address the following issues:

(i) The need for criminal law to offer more alternatives in the matter of punishments instead of limiting the option merely to fines and imprisonment.

(ii) In respect of the quantum of punishments, the need for constant review to ensure that it meets the ends of justice and disparity is reduced in similar situations.

(iii) A policy to avoid short-term imprisonments and to prevent overcrowding of jails and other custodial institutions, to be rigorously pursued at all levels.

(iv) The need for specific sentencing guidelines to be evolved in respect of each punishment.

(v) Also the need for an institutional machinery involving correctional experts for fixing proper punishment."

(emphasis supplied)

## Precedents

## Dhananjoy Chatterjee v. State of W.B., (1994) 2 SCC 220

**"14.** In recent years, the rising crime rate — particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. **Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.**

**15.** In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

(emphasis supplied)

## Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767

**"48.** That is not the end of the matter. **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.**

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**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."**

(emphasis supplied)

## Soman v. State of Kerala, (2013) 11 SCC 382

"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. In *State of Punjab* v. *Prem Sagar* [(2008) 7 SCC 550 : (2008) 3 SCC (Cri) 183] this Court acknowledged as much and observed as under: (SCC p. 552, para 2)

> "*2*. In our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts except making observations with regard to the purport and object for which punishment is imposed upon an offender, have not issued any guidelines. Other developed countries have done so. At some quarters, serious concerns have been expressed in this behalf. Some committees as for example Madhava Menon Committee and Malimath Committee have advocated introduction of sentencing guidelines."

## Section 354 of the CrPC, 1973

**"354. Language and contents of judgment**.—

(1) Except as otherwise expressly provided by this Code, every judgment referred to in section 353,—

(a) shall be written in the language of the Court;

(b) shall contain the point or points for determination, the decision thereon and the reasons for the decision;

(c) shall specify the offence (if any) of which, and the section of the Indian Penal Code (45 of 1860) or other law under which, the accused is convicted and the punishment to which he is sentenced;

(d) if it be a judgment of acquittal, shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(2) When the conviction is under the Indian Penal Code (45 of 1860) and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.

(3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of

> years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.
>
> (4) When the conviction is for an offence punishable with imprisonment for a term of one year or more, but the Court imposes a sentence of imprisonment for a term of less than three months, it shall record its reasons for awarding such sentence, unless the sentence is one of imprisonment till the rising of the Court or unless the case was tried summarily under the provisions of this Code.
>
> (5) When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.
>
> (6) Every order under section 117 or sub-section (2) of section 138 and every final order made under section 125, section 145 or section 147 shall contain the point or points for determination, the decision thereon and the reasons for the decision."

42. Section 354 of the CrPC, 1973 though merely deals with the language and contents of judgment, also sheds light on the fact that a judgment contains two distinct parts, wherein the first part deals with the conviction and the second deals with the sentence. Sub-section (1)(c) of the aforesaid provision has to be understood to mean that a Judge is expected to consider the aggravating and mitigating circumstances. In such view of the matter, sub-section (3) of the aforesaid provision is more clarificatory, keeping in mind the nature of the offence committed. As a convict is heard on sentence, it follows that any decision on sentence has to indicate the reasons for exercise of judicial discretion by the Judge.

**ON FACTS**

**Criminal Appeal No. 3924 of 2023 and Criminal Appeal Nos. 3926-3927 of 2023.**

43. An FIR was registered in Crime No. 137 of 2021 for the occurrence that took place on 01.12.2021. The said complaint was filed by the mother of the victim on 02.12.2021. Accordingly, the case was registered under Section 376AB of the Indian Penal Code, 1860 (hereinafter referred to as the "**IPC, 1860**") and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the "**POCSO Act, 2012**") read with Section 3(2)(v) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "**SC/ST Act, 1989**"). The case of the prosecution in nutshell is that the accused took advantage of a minor girl child and committed the offence of rape.

44. The accused was arrested on 12.12.2021. He was produced before the concerned Judicial Magistrate on 13.12.2021 and remanded to judicial custody till 24.12.2021. The remand was further extended by the orders dated 24.12.2021 and 05.01.2022 through video conferencing. On 12.01.2022, the charge-sheet was filed for the offences aforestated. The accused was once again produced through video conferencing on 15.01.2022. There was no advocate representing the accused, and the case was put up on 24.01.2022 for his production.

45. On 20.01.2022, without the FSL report, the charge-sheet filed was taken on record. Accordingly, the cognizance was taken. The prosecutor was directed to ensure the presence of the accused through video conferencing. The accused feigned his inability to engage a lawyer as he was behind the bars. The case was adjourned to 22.01.2022 for framing of charges and for the supply of documents.

46. On that day i.e. 22.01.2022, the counsel appearing for the accused was provided with the documents, without being given any time and without ensuring that these documents were in fact shown to the accused, followed by due consultation with his lawyer, directly arguments were heard on framing of charges. Thereafter, the charges were framed and explained to the accused through the virtual mode. On the very same date, an order was passed for summoning the prosecution witnesses. Strangely enough, an application was filed by the Investigating Officer to record the evidence of four witnesses in a single day, as a confidential information obtained, indicated that there was pressure from the family members of the accused. No notice was served either on the accused or his counsel, and the order was apparently passed, without taking into consideration the Witness Protection Scheme, 2018. In disregard of the provisions of the Rules for Video Conferencing for Courts, 2020, the statements of the witnesses were recorded.

47. After two days i.e. 24.01.2022, the remaining witnesses, including the Investigating Officer, were examined. There was no material to show that the accused was present at that point of time. The plea made by the counsel for the defence for deferment by one week was rejected, *sans* any substantial reason. For the purpose of questioning under Section 313 of the CrPC, 1973 alone, the accused was brought through video conferencing. In a hurried manner, the questioning was done. The repeated plea of adjournment by one week made by the counsel for the defence was once again rejected, while ultimately facilitating a day's adjournment.

48. On the next day i.e. 25.01.2022, an application was filed by the defence praying for time for production of witnesses. The matter was passed over, with a direction to produce the witnesses on that day itself. Arguments were heard, during which time, the prosecution made submissions for 10 minutes, whereas the defence argued for 3 hours. It was accordingly concluded at 6.30 p.m. The judgment was delivered at about 7.00 pm, running into about 27 pages consisting of 59 paragraphs. It is not known as to how the copies of the witnesses statements were made ready and kept for perusal. Admittedly, even the counsel for the defence did not have those copies.

49. Two days thereafter i.e. 27.01.2022, the case was posted for sentencing. Upon hearing the accused, death sentence was imposed by the trial court.

The High Court, by the impugned judgment, called for the records and went through them thoroughly, finding that there is non-compliance of Sections 207, 226, 227 and 230 of the CrPC, 1973, set aside the conviction and sentence awarded by the trial Court, and ordered for a *de novo* trial. Incidentally, the approach adopted by the Trial Court was found fault with.

50. Assailing the impugned judgment on merit, the informant has filed Criminal Appeal No. 3924 of 2023. Aggrieved over the observations made by the High Court, the learned Trial Judge has filed Criminal Appeal Nos. 3926-3927 of 2023.

**Criminal Appeal No. 3925 of 2023**

51. Criminal Appeal No. 3925 of 2023 has been filed by the very same learned Judge who rendered a similar conviction and sentenced the accused to life imprisonment for remainder of natural life, without any remission, against the observations made by a Coordinate Bench of the High Court, which took note of the earlier judgment rendered by the Coordinate Bench. It has been brought to our notice that the disciplinary proceedings initiated were dropped on the administrative side. However, an application in I.A. No. 29814 of 2023 has been filed by the learned Judge *inter alia* alleging that certain administrative work has been taken away from him, apparently on

the basis of the impugned judgments, and therefore, he should either be restored with the said power or transferred to some other place.

52. Insofar as the Criminal Appeal No. 3925 of 2023 is concerned, there is no appeal filed on behalf of the victim. Therefore, the only question for consideration is as to whether the observation made against the appellant, is justified or not, especially when he has not been heard. On facts, even in this case, the trial had commenced and concluded in a single day.

**SUBMISSIONS ON BEHALF OF THE APPELLANT**

**Criminal Appeal No. 3924 of 2023 and Criminal Appeal Nos. 3926-3927 of 2023.**

53. Mr. Vikas Singh, learned senior counsel appearing for both the informant and the learned Trial Judge, submitted that the procedure established by law has been followed. The appellant has kept in mind the rigour of Section 309 of the CrPC, 1973 read with the provisions contained under the POCSO Act, 2012. Even assuming that there is a procedural flaw, in view of the mandate contained under Section 465 of the CrPC, 1973 there is no need for remittal. During the course of trial, the counsel for the respondent-accused has not raised any serious objection.

**Criminal Appeal No. 3925 of 2023**

It is further submitted that the appellant has discharged his judicial function and, therefore, any action without hearing him is contrary to law. Though the charges have been dropped, the observations made would be detrimental to his future career progression. The accused had antecedents and, therefore, the Trial Court rightly exercised due caution. It is a case where no witness was produced on behalf of the defence. To buttress his submission, learned senior counsel appearing for the appellant has relied upon the following decisions,

- Munna Pandey v. State of Bihar, AIR 2023 SUPREME COURT 5709.
- Akil v. State (NCT of Delhi), (2013) 7 SCC 125.
- Sakshi v. Union of India, (2004) 5 SCC 518.
- State of Maharashtra v. Mahesh Kariman Tirki, (2022) 10 SCC 207.
- Pradeep S. Wodeyar v. State of Karnataka, (2021) 19 SCC 62.

**SUBMISSIONS ON BEHALF OF THE RESPONDENT**

54. *Per contra*, Mr. C. U. Singh, learned senior counsel appearing for the High Court and the accused submitted that admittedly there are serious procedural violations. Prejudice was sufficiently demonstrated before the court. It would be impossible for a Judge to deliver the judgment within such a short span of time. No opportunity was given at every stage of the

trial to the accused. It is a clear case of "*justice hurried is justice buried*". There is no question of giving an opportunity to the appellant, the judicial officer, as no action is pending against him. In any case, the accused is still under incarceration.

**DISCUSSION**

55. On perusal, we find that the High Court, while passing both the impugned judgments, has not only called for the records and rendered findings of fact, but has also considered them in detail. At every stage, the accused was denied due opportunity to defend himself. The appellant judicial officer was obviously acting in utmost haste. Every trial is a journey towards the truth and a Presiding Officer is expected to create a balanced atmosphere in the mind of the prosecution and the defence. It seems to us that the decision was rendered in utmost haste. It would be humanly impossible to deliver the judgment within half an hour's time running into 27 pages consisting of 59 paragraphs in the first case and similarly in the other. The lawyer for the defence cannot fight against the court. It is the court which has to follow a balanced approach. At every stage, including framing of charges, there was a constant denial of due opportunity and hearing. The accused was not able to consult his lawyer. He was not even served with the copies, though his lawyer received the same before framing of the

charges. Receiving of documents by his lawyer would not be sufficient compliance, unless there was sufficient time given for him to peruse them and thereafter have a consultation. Admittedly, neither the provisions of the Witness Protection Scheme, 2018 have been invoked nor the Rules for Video Conferencing for Courts, 2020 were followed. The accused was merely shown the court's proceedings and the writing was on the wall for him. We are not willing to say anything on the merits of the case. On facts, even in Criminal Appeal No. 3925 of 2023, the trial had commenced and concluded in a single day. Additionally, no lawyer could be engaged by the accused and, therefore, as per the recommendations of the prosecutor, another one was engaged. Otherwise, the facts are more or less similar in both the cases and, therefore, we are not inclined to go into it in detail. When the charges are very serious, Courts should be more circumspect in discharging their solemn duty.

56. We do not think that the decisions relied upon by the learned senior counsel for the appellant have any bearing on the present case. The appellant judicial officer is fortunate that no action was taken against him. We do not wish to say anything more on this, except by stating that in the absence of any proposed action, there is no question of hearing the appellant. Thus, we are not inclined to interfere on the merits of the case

with respect to non-compliance of the mandatory provisions, as the accused is still under incarceration.

57. On the application filed seeking intervention over the action taken on the administrative side, it is for the appellant to approach the High Court. It is an administrative action taken and, therefore, the same does not require any interference on the judicial side by us, especially in light of the discussion made above. Suffice it is to state that liberty is given to the appellant to approach the High Court on the administrative side.

58. For the foregoing reasons, the appeals stand dismissed with the following directions :

(1.) The trial court shall keep in mind the mandate of POCSO Act, 2012 while recording the evidence of the victim.

(2.) The trial court shall conduct and complete the trial expeditiously in view of Section 35 of the POCSO Act, 2012.

(3.) The Government of India represented by the Secretary for the Ministry of Law and Justice shall file an affidavit on the feasibility of introducing a comprehensive sentencing policy and a report thereon, within a period of six months from today, as indicated above.

(4.) The Registry shall forward a copy of this judgment to the Department of Justice, Ministry of Law and Justice, Government of India.

59. Consequently, IA No. 29814/2023 stands dismissed.

60. Pending application(s), are allowed.

**..……..J.**
**(M. M. SUNDRESH )**

**……..J.**
**(S. V. N. BHATTI)**

NEW DELHI;
MAY 17, 2024